

# Expatriating Taxpayers and Unfiled Form 8854: Administration Proposes Disparate Treatment Based on Financial Status

By Hale E. Sheppard\*

## I. Introduction

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Certain U.S. individuals who cease their relationship with the United States must pay an expatriation tax, which is also known as the exit tax. One major problem, at least from the perspective of the Internal Revenue Service (“IRS”), is that some taxpayers intentionally fail to file Form 8854 (*Initial and Annual Expatriation Statement*) to notify the IRS of their departure, keep a low profile for a few years until the general assessment period expires, and thereby avoid paying the exit tax. Other taxpayers, particularly so-called accidental Americans, do not maintain U.S. tax compliance and do not properly expatriate for less nefarious reasons. The current Presidential Administration has recently suggested changes for both categories of taxpayers. This article analyzes the main concepts of the exit tax, an existing IRS relief program for certain individuals who incorrectly expatriated in prior years, and pending proposals that could harm some taxpayers and benefit others.

## II. Worldwide Duties

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U.S. persons, including U.S. citizens and U.S. residents, ordinarily are subject to federal income tax on *all* income derived, regardless of where it originates.<sup>1</sup> In other words, U.S. individuals face a system of worldwide taxation, obligating them to declare to the IRS on Form 1040 (*U.S. Individual Income Tax Return*) all income, whether it was earned, obtained, received, or accrued in the United States or a foreign country. Moreover, U.S. individuals with foreign assets, income, or activities generally must file a long list of international information returns with the IRS, and penalties for non-compliance can be severe.<sup>2</sup> Lastly,



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certain U.S. individuals who renounce their status must notify the IRS of their departure by filing Form 8854 and pay the exit tax, if required.<sup>3</sup>

### III. Expatriation Taxes

In 1966, Congress enacted the expatriation tax rules to discourage U.S. citizens from moving abroad and surrendering their citizenship to avoid paying U.S. taxes.<sup>4</sup> Code Sec. 877 originally imposed taxes on individuals who surrendered their U.S. citizenship with a tax-avoidance purpose. Later that same year, Congress expanded Code Sec. 877 to cover long-term residents (“LTRs”) who terminated their U.S. residency, too.<sup>5</sup> Congress again revised Code Sec. 877 in 2004 based on various recommendations from the Joint Committee on Taxation.<sup>6</sup> Finally, in 2008, Congress made its final changes thus far by replacing Code Sec. 877 with a new provision, Code Sec. 877A.<sup>7</sup> The IRS has not issued regulations concerning Code Sec. 877A, but it provided guidance in Notice 2009-85.<sup>8</sup> More information about the current rules is set forth below.

#### A. General Concept

Code Sec. 877A generally imposes a mark-to-market tax regime on certain taxpayers, including U.S. citizens and LTRs, who decide to abandon the United States. In essence, they must pretend to sell all their property at fair market value the day before their “expatriation date” and pay the corresponding U.S. income taxes on any gains.<sup>9</sup>

#### B. Long-Term Residents

Determining whether an individual is a U.S. citizen is relatively straightforward, but confirming status as a U.S. resident can be tricky. Broadly speaking, an individual can become a U.S. resident for tax purposes in one of the four ways: (i) he can obtain a Green Card from the relevant U.S. immigration agency, thereby transforming into a lawful permanent resident; (ii) he can maintain a “substantial presence” in the United States; (iii) he can make a first-year election to be treated as a U.S. resident; or (iv) he can elect to file joint Form 1040 with a spouse who is already a U.S. person.

An LTR is an individual, other than a U.S. citizen, who is a Green Card holder in at least eight of the past 15 years ending with the year in which his Green Card status ends.<sup>10</sup>

#### C. Expatriation Date for U.S. Citizens

Expatriation by a U.S. citizen occurs when (i) the individual renounces his U.S. nationality at a diplomatic or consular office,<sup>11</sup> (ii) the individual furnishes to the Department of State a signed statement of voluntary relinquishment of U.S. nationality,<sup>12</sup> (iii) the Department of State issues the individual a certificate of loss of U.S. nationality,<sup>13</sup> or (iv) a U.S. court cancels an individual’s certificate of naturalization.<sup>14</sup> The “expatriation date” is the earliest day on which any of these four events takes place.<sup>15</sup>

#### D. Expatriation Dates for LTRs

The standards are slightly different for LTRs. The “expatriation date” in their case is the date on which they cease to be lawful permanent residents for tax purposes.<sup>16</sup> Loss of LTR status occurs when (i) a Green Card is revoked/rescinded, (ii) a Green Card is abandoned, and then an administrative or judicial ruling confirms such abandonment, or (iii) an individual officially takes the position with the IRS that he is a resident of a foreign country under the tie-breaker rules of the relevant treaty by filing Form 1040-NR (*U.S. Nonresident Alien Income Tax Return*), Form 8833 (*Treaty-Based Return Position Disclosure*), and Form 8854, if necessary.<sup>17</sup>

#### E. Covered Expatriates

The term “expatriate” means either a U.S. citizen who relinquishes his citizenship or an LTR who ceases to be a lawful permanent resident.<sup>18</sup> The exit tax applies only to “covered expatriates.”<sup>19</sup> Thus, in order for the exit tax to apply, the taxpayer must be not only an expatriate but also a covered expatriate.

For purposes of Code Sec. 877A, a covered expatriate means one who has an average annual U.S. income tax liability for the past five years over a particular amount (“Tax Liability Test”), *or* who has a net worth exceeding a certain threshold (“Net Worth Test”), *or* who cannot certify to the IRS that he maintained full U.S. tax compliance during the past five years (“Certification Test”).<sup>20</sup> Stated another way, an individual failing *any one* of the preceding three tests normally is considered a covered expatriate.

#### F. Form 8854 Filing Duty

U.S. individuals who relinquish their U.S. status normally must file a Form 8854 either as soon as possible

after expatriation or by the due date for their first Form 1040-NR.<sup>21</sup>

The need to file Form 8854 is explained in various sources. For instance, the Internal Revenue Code states that any individual to whom Code Sec. 877A applies for any taxable year must provide a statement (*i.e.*, Form 8854) for such year, which includes the basic information described in the statute, plus “such other information as the [IRS] may prescribe.”<sup>22</sup>

The IRS has not issued regulations yet, so taxpayers look to Notice 2009-85.<sup>23</sup> It explains that a covered expatriate is an expatriate who fails the Tax Liability Test, the Net Worth Test, or the Certification Test. Notice 2009-85 expands on the third aspect, as follows:

A taxpayer is a covered expatriate if he “fails to certify, under penalties of perjury, compliance with all U.S. federal tax obligations for the five taxable years preceding the taxable year that includes the expatriation date, including, but not limited to, obligations to file income tax, employment tax, gift tax, and information returns, if applicable, and obligations to pay all relevant tax liabilities, interest, and penalties (the “certification test”). This certification must be made on Form 8854 and must be filed by the due date of the taxpayer’s federal income tax return for the taxable year that includes the day before the expatriation date.”<sup>24</sup>

Notice 2009-85 contains additional language confirming the need for taxpayers to file Form 8854 to demonstrate U.S. tax compliance during the relevant period.

All U.S. citizens who relinquish their U.S. citizenship ... must file Form 8854 in order to certify, under penalties of perjury, that they have been in compliance with all federal tax laws during the five years preceding the year of expatriation. Individuals who fail to make such certification will be treated as covered expatriates... whether or not they also meet the tax liability test or the net worth test.<sup>25</sup>

Like Notice 2009-85, Form 8854 itself clarifies that filing is mandatory for U.S. individuals desiring to leave the United States behind. Form 8854 poses the following question: “Do you certify under penalties of perjury that you have complied with all of your tax obligations for the five preceding tax years (*see* instructions)?”<sup>26</sup> Taxpayers uncertain about the question can turn to the corresponding instructions from the IRS, which state the following:

Check the ‘Yes’ box if you have complied with your tax obligations for the 5 tax years ending before the date on which you expatriated, including, but not limited to, your obligations to file income tax, employment tax, gift tax, and information returns, if applicable, and your obligations to pay all relevant tax liabilities, interest, and penalties. You will be subject to tax under Section 877A if you have not complied with these obligations, regardless of whether your average annual income tax liability or net worth exceeds the applicable threshold amounts.<sup>27</sup>

## G. Exemptions

There are exceptions to classification as a covered expatriate. Specifically, an individual shall *not* be treated as a covered expatriate, and thus shall *not* be subject to exit tax, in the following two circumstances. First, an individual is not a covered expatriate where he became both a U.S. citizen and a citizen of a foreign country at birth and, as of the expatriation date, he continues to be a citizen of, and is taxed as a resident of, the foreign country, and he has not been a U.S. resident under the “substantial presence” test for more than 10 years during the 15-year period before his expatriation date.<sup>28</sup> Second, an individual also will not be deemed a covered expatriate where he relinquishes his U.S. citizenship before he is 18½ years old and he has not been a U.S. resident for more than 10 years before his expatriation date.<sup>29</sup> Congress created these two exceptions to relieve from the exit tax individuals whose principal purpose for expatriating was *not* tax avoidance and who were *not* previously aware of their status as U.S. citizens.<sup>30</sup> These types of taxpayers are often known as “accidental Americans.”

## IV. Exiting IRS Relief Program

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The IRS announced an initiative in late 2019, called the Relief Procedures for Certain Former Citizens (“RPCFC”). Its goal was to allow certain taxpayers to avoid classification as covered expatriates and exposure to the exit tax.<sup>31</sup>

### A. General Information

Setting the stage, the IRS indicated that it recognized that “[s]ome U.S. citizens, born in the United States to foreign parents, or born outside the United States to U.S. citizen parents, may be unaware of their status as U.S.

citizens or the consequences of such status.”<sup>32</sup> It later explained that, in order to comply with existing law and possibly avoid exit taxes, citizens who renounce or otherwise relinquish their U.S. citizenship must comply with U.S. tax obligations for the year of expatriation, as well as the previous five years.<sup>33</sup> The IRS then pointed out that, in order to meet the Certification Test and thus avoid being classified as a covered expatriate, taxpayers must file a Form 8854 with their Form 1040 for the year of expatriation and certify full U.S. compliance for the past five years.<sup>34</sup>

The IRS designed the RPCFC to benefit a narrow group of taxpayers who (i) were U.S. citizens, (ii) have already expatriated, (iii) had either no U.S. income tax liability or minimal liability in the years preceding expatriation, (iv) were effectively “off the grid” in terms of U.S. tax compliance in that they never filed Form 1040 or international information returns, (v) would not have been subjected to the exit tax as a result of the Tax Liability Test or Net Worth Test, (v) but who were liable for the exit tax solely because they failed the Certification Test (*i.e.*, they did not have full U.S. tax compliance in the five years preceding expatriation) and did not pay such tax.<sup>35</sup>

The IRS clarified that the RPCFC is only available to taxpayers whose failure to file Form 1040, international information returns, and Report of Foreign Bank and Financial Accounts (FBARs), as well as their failure to pay all relevant taxes, was due to “non-willful conduct.”<sup>36</sup>

## B. Benefits of Participation

The RPCFC is an alternative means for satisfying the Certification Test by certain U.S. citizens who expatriated after March 18, 2010. If the individuals submit the mandatory documents and meet the eligibility requirements for the RPCFC, then they will not be considered covered expatriates under Section 877A and thus will not be subject to the exit tax, will not be required to pay back income taxes, and will not be penalized for unfiled international information returns.<sup>37</sup>

## C. Initial Guidance Issued by the IRS

The IRS has grown accustomed to issuing guidance about voluntary disclosure programs through Frequently Asked Questions (“FAQs”), published solely on its website. The case is no different with the RPCFC. Certain information gleaned from the FAQs is described below.

- The IRS has not yet determined a termination date for the RPCFC.<sup>38</sup>

- Taxpayers must “strictly meet” all the following eligibility criteria: (i) they relinquished their U.S. citizenship after March 18, 2010; (ii) they have no filing history with the IRS as a U.S. citizen; (iii) they did not fail the Tax Liability Test during the five years before expatriating; (iv) they had a net worth of less than \$2 million, both at the time of expatriating and at the time of making a submission under the RPCFC, without taking into account any exceptions; (v) they have an aggregate tax liability of \$25,000 or less for the five years before expatriating and the year of expatriating, calculated after applying all deductions, exclusions, exemptions, and credits, omitting any potential exit tax, and omitting any penalties and interest; (vi) they complete and file all necessary U.S. tax returns and information returns for the relevant six years; and (vii) they did not willfully violate any U.S. duties.<sup>39</sup>
- The fact that taxpayers previously filed a Form 1040-NR (*U.S. Nonresident Alien Income Tax Return*) with a good faith belief that they were not U.S. citizens does not mean that they have a “filing history” with the IRS and does not disqualify them from the RPCFC.<sup>40</sup>
- Taxpayers do not take into account any U.S. taxes previously paid *via* automatic withholding when determining whether they satisfy the \$25,000 total tax liability eligibility criteria.<sup>41</sup>
- The RPCFC is only open to individuals, not estates, trusts, corporations, partnerships, or other entities.<sup>42</sup>
- Taxpayers must submit the following documents under the RPCFC: (i) Certification of Loss of Nationality or court order canceling the Certificate of Naturalization; (ii) copy of a valid passport or birth certificate and government-issued identification; (iii) for the year of expatriation, a dual-status return, including Form 1040NR with all required information returns, Form 8854, Form 1040, and all required information returns; and (iv) for the five years before expatriation, Form 1040 enclosing all required information returns, with “Relief for Certain Former Citizens” stamped in red ink at the top.<sup>43</sup>
- Taxpayers are not required to enclose a check with their RPCFC submissions because they often have no U.S. tax liability, and the IRS waives all income tax liabilities and potential penalties.<sup>44</sup>
- Taxpayers send their RPCFC submissions to a special IRS office in Austin, Texas.<sup>45</sup>
- Taxpayers cannot seek pre-clearance or a placeholder to participate in the RPCFC.<sup>46</sup>

- Submissions under the RPCFC are not automatically audited by the IRS, but they might be audited through normal channels or they might be subject to “verification procedures” to ensure their accuracy and completeness.<sup>47</sup>
- Filing FBARs is not an eligibility criteria for the RPCFC, but, if taxpayers file FBARs with their RPCFC submission, then the IRS will not assert FBAR penalties.<sup>48</sup>
- The IRS will review the RPCFC submissions to ensure that they meet the eligibility criteria and then send taxpayers a letter confirming that their submissions are complete.<sup>49</sup>

## D. Examples Provided by the IRS

The IRS provided nine examples of how the RPCFC functions. The two examples most relevant to this article are set forth below, with certain modifications to enhance readability.<sup>50</sup>

**Example 1.** John was born in the United States while his foreign parents were attending university for post-graduate studies. Shortly after John was born, the family returned to Country E. John is a citizen of Country E and lives and works in Country E. John renounced his citizenship on October 1, 2019 and received a Certificate of Loss of Nationality. John has never filed a Form 1040 and never applied for or received a Social Security Number. He wants to use the RPCFC to come into compliance with his U.S. tax obligations. He must report his worldwide income on Form 1040 for 2019 and the preceding five tax years (and may claim all available deductions and credits, including foreign tax credits, to the extent permitted) to determine the total tax. In each year, John had various sources of income, including small amounts of income from foreign mutual funds that are passive foreign investment companies. John submits the following tax returns: (i) 2019 Form 1040NR (with Form 1040 attached as an information return reporting worldwide income through the expatriation date), with a total tax of \$1,000, and (ii) Form 1040 for 2014 through 2018, each of which shows a total tax of \$4,800. John uses his best efforts in computing his total tax for each year. John computed the income from his foreign mutual funds and reported them as ordinary income on his Form 1040. He should have also used Form 8621 (Information Return by a Shareholder of a Passive Foreign Investment Company or Qualified Electing

Fund) to make additional computations, but he failed to do so. The total tax due for the relevant six years was \$25,000. John is eligible for the RPCFC.

**Example 2.** Jane was born in the United States. Her parents, citizens of a foreign country, were in the United States on a temporary work assignment with a multinational company when she was born. While on that temporary work assignment, Jane’s parents purchased a house in the United States. Jane and her family returned to their country shortly after she was born. Although they left the United States, Jane’s parents kept the house in the United States and rented it to tenants. Jane lives and works outside the United States. When her parents died, Jane inherited the rental house (with a fair market value of \$300,000). Jane wants to renounce her U.S. citizenship and use the RPCFC to come into compliance. Jane has never filed a Form 1040 and never applied for or received a Social Security Number. Jane must report her worldwide income, including any income from the U.S. rental home. Jane renounces her citizenship on December 31, 2019. Then, Jane submits the tax returns required under the RPCFC for 2014 through 2019 (including a Form 8854). Assuming the aggregate total tax amount is less than \$25,000 and Jane’s net worth is below \$2 million, Jane may use the RPCFC.

## V. Proposed Changes

The current Presidential Administration has some ideas when it comes to how to treat expatriating taxpayers in the future. It announced these in a publication called General Explanations of the Administration’s Fiscal Year 2023 Revenue Proposals (“Green Book”).<sup>51</sup> The Administration divided its suggestions into two parts, one for “high net-wealth taxpayers” and the other for “lower-income individuals.”

### A. Comments Directed at Rich Taxpayers

With respect to the wealthy, the Green Book starts by emphasizing time constraints facing the IRS. It explains the general rule that the IRS has three years from the time a taxpayer files a tax return to identify it as problematic, conduct an audit, offer all required administrative procedures, and issue a final notice proposing adjustments.<sup>52</sup> The Green Book recognizes that there are various exceptions to the normal three-year rule. One

exception, found in Code Sec. 6501(c)(8), applies to situations where a taxpayer fails to file information returns about foreign income, entities, assets, activities, *etc.*<sup>53</sup>

*Uncertainties abound, but what is clear is that taxpayers who might be affected by the Green Book, as well as their tax and legal advisors, should be following these developments and planning accordingly.*

This tax provision establishes when a taxpayer does not file one of the specified information returns that the assessment period, both for asserting penalties related to the information return and “with respect to *any* tax return, event, or period to which such information relates,” will remain open for three years *after* the date on which the taxpayer eventually files the information return.<sup>54</sup> In other words, Code Sec. 6501(c)(8) provides that, if a taxpayer does not file particular international information returns, then the assessment period never starts to run against the IRS. The legislative history clarifies just how expansively the IRS might construe this rule when it comes to arguing for longer assessment periods. It states that items related to an unfiled international information return include (i) proposed tax adjustments to Form 1040 regarding items that should have been disclosed on the international information return, (ii) proposed adjustments to *any item*, to the extent that it is affected by the item not properly revealed on the international information return, and (iii) penalties and interest related to either of the preceding two adjustments.<sup>55</sup> To the disappointment of the Administration, “[e]xisting law does not include Form 8854 as one of the information returns that would trigger an extended statute of limitations.”<sup>56</sup>

The Green Book continues by explaining that Form 8854 is critical to the IRS’s ability to identify and audit taxpayers who expatriate. Indeed, if a taxpayer expatriates but omits Form 8854 with his final Form 1040, the IRS might be completely unaware that the taxpayer has left.<sup>57</sup> Why? The IRS receives data about expatriating taxpayers from the Department of State and other government agencies, but this comes *after* expatriation

has occurred and does *not* include the Social Security Number or other identifying information. This, notes the Green Book, makes it “more difficult and time-consuming for the IRS to match this information with taxpayer records.”<sup>58</sup> The Green Book also acknowledges that many people, particularly LTRs, are ignorant of the duty to file Form 8854 when they surrender the Green Cards, and the IRS “has no established methodology of identifying such cases.”<sup>59</sup>

What is the result of the current situation? Well, the IRS often does not discover that a taxpayer has expatriated until *after* the general three-year period for assessment of taxes, penalties, and interest has expired. Consequently, unless the IRS can prove that the taxpayer committed fraud, which presumably is difficult when dealing with complicated and obscure international tax duties, the IRS likely will be time-barred from imposing liabilities. The Green Book warns that “[t]hese cases involve substantial amounts of foregone exit tax and related taxes, and high net worth taxpayers can exploit the tax system by simply failing to file Form 8854 with their tax return.”<sup>60</sup>

## B. Proposed Changes for Rich Taxpayers

The Green Book essentially advocates adding Form 8854 to the list of international information returns in Code Sec. 6501(c)(8). The effect of this would be that, if an individual were to leave the United States and fail to enclose a Form 8854 with his final Form 1040, then the assessment period would not expire until three years after the taxpayer ultimately files Form 8854. Thus, in situations where an individual *never* files Form 8854, the assessment period *never* closes, and the IRS can take its sweet time starting an examination and imposing additional taxes, penalties, and interest. According to the Green Book, this change would “create parity” with other international information returns and “reduce abuse and non-compliance with respect to high net wealth expatriates.”<sup>61</sup>

## C. Comments Directed at Other Taxpayers

The Administration seems to have an entirely different stance when it comes to “lower-income individuals” who have spent most of their lives abroad. The Green Book makes several observations. It first notes that some dual citizens (*i.e.*, citizens of both the United States and a foreign country) who have always lived abroad may not have previously filed Form 1040 or

even obtained a Social Security Number or another acceptable form of tax identification. The Green Book then mentions that some dual citizens may be unable to maintain a bank account, in the foreign country where they are a citizen and resident, because of their U.S. status and inability to confirm U.S. tax compliance. The Green Book goes on to state that dual citizens will be considered covered expatriates, even though they have modest incomes and minimal foreign assets, if they cannot certify on Form 8854 compliance with U.S. tax laws for five years before expatriating. Finally, the Green Book recognizes the costs and “practical difficulties” of becoming U.S. compliant, such as finding and paying a U.S. tax advisor to prepare all required Form 1040, international information returns, Form 8854, and more.<sup>62</sup>

## D. Proposed Changes for Other Taxpayers

As explained above, when it comes to wealthy taxpayers expatriating, the Administration advocates stronger enforcement, as facilitated by extended assessment periods. It proposes the opposite approach in situations involving “lower-income dual citizens with limited U.S. ties.”<sup>63</sup> In particular, the Green Book suggests granting the IRS authority to “provide relief” for certain non-wealthy expatriating taxpayers, without supplying details about the extent of the relief envisioned, the relevant eligibility thresholds, or other key factors. The Green Book merely indicates that the benefits would only go to dual citizens with limited links to the United States, as demonstrated by having their primary residence abroad for an extended period and by not maintaining a U.S. “tax home.” The Green Book further explains that dual citizens could prove their income

and asset levels by submitting various documents to the IRS, including a foreign tax return. Finally, the Green Book seems to suggest that the size of the dual citizen’s U.S. tax liabilities from past years might be a factor, explaining that applicants could show that all or a portion of their foreign-source income would not be subject to U.S. income taxes thanks to the foreign-earned income exclusion in Code Sec. 911.<sup>64</sup>

## VI. Conclusion

The proposals in the Green Book raise various questions, the following among them: How would the “relief” that the IRS might craft in the future for “lower-income individuals” comport with the two existing exemptions for accidental Americans? Would the potential “relief” apply to both dual citizens and LTRs, or just to dual citizens as the Green Book currently indicates? Assuming the proposals in the Green Book were to come to fruition, would the RPCFC disappear altogether, or would it continue granting clemency to individuals who improperly expatriated in the past? If Form 8854 were added to the list of international information returns in Code Sec. 6501(c)(8), would the extended assessment period only allow the IRS to impose exit taxes, or income taxes, penalties, and interest, too? Even if unfiled Form 8854 were to trigger unlimited assessment periods, would existing law in other areas suffice to enable the IRS to conduct examinations of, and carry out collection actions against, “high net-wealth taxpayers” who took their proverbial marbles and left the United States years earlier?

Uncertainties abound, but what is clear is that taxpayers who might be affected by the Green Book, as well as their tax and legal advisors, should be following these developments and planning accordingly.

## ENDNOTES

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<sup>1</sup> Code Sec. 7701(a)(30)(A); Reg. §301.7701(b)-1; Code Sec. 61(a); Reg. §1.61-1(a).

<sup>2</sup> For a detailed discussion of common international filing requirements, see Hale E. Sheppard, *Extended Assessment Periods and International Tax Enforcement: Rafizadeh v. Commissioner, Unreported Foreign Assets, and Use of FATCA Weapons*, 44(5) J. INT’L TAXATION 25 (2018); Hale E. Sheppard, *IRS Issues New Form 14457 and Instructions regarding Its Comprehensive Voluntary*

*Disclosure Program*, 46(4) INT’L TAX J. 41 (2020); Hale E. Sheppard, *Lessons from an International Tax Dispute: Three Interrelated Cases, in Three Different Proceedings, Generating Three Separate Liabilities*, 46(5) INT’L TAX J. 43 (2020).

<sup>3</sup> Code Sec. 877A.

<sup>4</sup> HR Rep. No. 1450, 89th Cong., 2d Sess. 22–23 (1966); S. Rep. No. 1707, 89th Cong., 2d Sess. 28–29 (1966); See also *Dillon*, 56 TC 228, Dec. 30,768 (1971) (husband and wife expatriated, in an effort to avoid paying U.S. taxes, after husband became involved in a lucrative oil-production scheme but before he was paid from such scheme).

<sup>5</sup> Health Insurance Portability and Accountability Act of 1996, §511; HR Rep. No. 496, pt. 1, 104th Cong., 2d Sess. 148 (1996); Joint Committee on Taxation, 104th Cong., 2d Sess., *General Explanation of Tax Legislation Enacted in the 104th Congress*, at 378–379 (1996); See also Code Sec. 6039G and Notice 97-19, 1997-1 CB 394 (Feb. 24, 1997).

<sup>6</sup> American Jobs Creation Act of 2004, Code Secs. 804(a) through (c), and Code Sec. 804(e) (June 3, 2004); Joint Committee on Taxation, *Review of the Present-Law Tax and Immigration Treatment of Relinquishment of Citizenship and Termination of Long-Term Residency*, at pgs. 103–137 (JCS-2-03, Feb. 2003); S. Rep. No.

192, 108th Cong., 1st Sess. 148–149 (2003); HR Rep. No. 548, pt. 1, 108th Cong., 2d Sess. 253–254 (2004); HR Conf. Rep. No. 755, 108th Cong., 2d Sess. 568–580 (2004).

<sup>7</sup> P.L. 110-245, 122 Stat. 1624 HR 6081, 110th Cong., 2d Sess.; Heroes Earnings Assistance and Relief Tax Act of 2008, Code Sec. 301 (Jun. 17, 2008).

<sup>8</sup> Notice 2009-85, 2009-45 IRB 598 (Oct. 15, 2009).

<sup>9</sup> Code Sec. 877A generally applies to individuals who cease to be U.S. citizens or lawful permanent residents on or after June 17, 2008. See Notice 2009-85, IRB 2009-45, 598.

<sup>10</sup> Code Sec. 877A(g)(5); Code Sec. 877(e)(2); U.S. House of Representatives, Health Insurance Portability and Accountability Act of 1996 Conference Report, 104th Congress, 2nd Session, Report 104-736, pg. 324; IRS Publication 519 (*U.S. Tax Guide for Aliens*) (2012), pg. 22.

<sup>11</sup> 8 USC §1481(a)(5).

<sup>12</sup> 8 USC §1481(a)(1)-(4).

<sup>13</sup> Notice 2009-85, IRB 2009-45, 598, Section 2(A).

<sup>14</sup> Notice 2009-85, IRB 2009-45, 598, Section 2(A).

<sup>15</sup> Code Sec. 877A(g)(2)(B).

<sup>16</sup> Code Sec. 877A(g)(3)(B).

<sup>17</sup> Reg. §301.7701(b)-1(b)(2); Reg. §301.7701(b)-1(b)(3); Code Sec. 7701(b)(6).

<sup>18</sup> Code Sec. 877A(g)(2).

<sup>19</sup> Code Sec. 877A(a)(1).

<sup>20</sup> Code Sec. 877A(g)(1)(A); Notice 2009-85, IRB 2009-45, 598, Section 2(A); Code Sec. 877(a)(2)(A), (B) and (C).

<sup>21</sup> Code Sec. 6039G(a).

<sup>22</sup> Code Sec. 6039G(b).

<sup>23</sup> Notice 2009-85, IRB 2009-45, 598, Section 1—Overview. It states the following: “Section 877(i) provides that the Secretary shall prescribe such regulations as may be necessary or appropriate to carry out the purposes of Code Sec. 877A. The Treasury Department and the Internal Revenue Service (IRS) expect to issue regulations to incorporate the guidance set forth in this notice. Until such regulations are issued, taxpayers may rely on the guidance set forth in this notice.”

<sup>24</sup> Notice 2009-85, IRB 2009-45, 598, Section 2(A)—Individuals Covered—Definitions.

<sup>25</sup> Notice 2009-85, IRB 2009-45, 598, Section 8(C)—Filing and Reporting Requirements—Form 8854.

<sup>26</sup> Form 8854, Part IV, Section A, Question 6.

<sup>27</sup> 2011 Instructions for Form 8854, pg. 4.

<sup>28</sup> Code Sec. 877A(g)(1)(B)(i)(I) and (II).

<sup>29</sup> Code Sec. 877A(g)(1)(B)(ii)(I) and (II).

<sup>30</sup> S. Rep. No. 1707, 89th Cong., 2d Sess. 28–29 (1966). The Obama Administration, made aware of potentially unfair treatment of accidental Americans, proposed legislation in 2015 that would have provided relief to certain dual-citizens. It contained an exception to the definition of “covered expatriate” that was similar to the two existing exceptions in Code Sec. 877A. The major difference in the proposal was the last requirement. Under the proposal by the Obama Administration, the individual

would only need to have complied with U.S. tax duties as if he were a nonresident alien, not a U.S. citizen. This means that the individual would not have needed to report worldwide income to the IRS, disclosed information about foreign assets, etc. Rather, he only would have been required to report to the IRS all income derived from U.S. sources, which likely would be \$0 if he were truly an “accidental American.” See General Explanations of the Administration’s Fiscal Year 2016 Revenue Proposals, Department of Treasury, pg. 282 (Feb. 2015).

<sup>31</sup> IRS News Release, IR-2019-151 (Sep. 6, 2019).

<sup>32</sup> [www.irs.gov/individuals/international-taxpayers/relief-procedures-for-certain-former-citizens](http://www.irs.gov/individuals/international-taxpayers/relief-procedures-for-certain-former-citizens).

<sup>33</sup> [www.irs.gov/individuals/international-taxpayers/relief-procedures-for-certain-former-citizens](http://www.irs.gov/individuals/international-taxpayers/relief-procedures-for-certain-former-citizens).

<sup>34</sup> [www.irs.gov/individuals/international-taxpayers/relief-procedures-for-certain-former-citizens](http://www.irs.gov/individuals/international-taxpayers/relief-procedures-for-certain-former-citizens).

<sup>35</sup> [www.irs.gov/individuals/international-taxpayers/relief-procedures-for-certain-former-citizens](http://www.irs.gov/individuals/international-taxpayers/relief-procedures-for-certain-former-citizens).

<sup>36</sup> [www.irs.gov/individuals/international-taxpayers/relief-procedures-for-certain-former-citizens](http://www.irs.gov/individuals/international-taxpayers/relief-procedures-for-certain-former-citizens).

<sup>37</sup> [www.irs.gov/individuals/international-taxpayers/relief-procedures-for-certain-former-citizens](http://www.irs.gov/individuals/international-taxpayers/relief-procedures-for-certain-former-citizens).

<sup>38</sup> [www.irs.gov/individuals/international-taxpayers/relief-procedures-for-certain-former-citizens](http://www.irs.gov/individuals/international-taxpayers/relief-procedures-for-certain-former-citizens), FAQ #1.

<sup>39</sup> [www.irs.gov/individuals/international-taxpayers/relief-procedures-for-certain-former-citizens](http://www.irs.gov/individuals/international-taxpayers/relief-procedures-for-certain-former-citizens), FAQ #2.

<sup>40</sup> [www.irs.gov/individuals/international-taxpayers/relief-procedures-for-certain-former-citizens](http://www.irs.gov/individuals/international-taxpayers/relief-procedures-for-certain-former-citizens), FAQ #3.

<sup>41</sup> [www.irs.gov/individuals/international-taxpayers/relief-procedures-for-certain-former-citizens](http://www.irs.gov/individuals/international-taxpayers/relief-procedures-for-certain-former-citizens), FAQ #13.

<sup>42</sup> [www.irs.gov/individuals/international-taxpayers/relief-procedures-for-certain-former-citizens](http://www.irs.gov/individuals/international-taxpayers/relief-procedures-for-certain-former-citizens), FAQ #5.

<sup>43</sup> [www.irs.gov/individuals/international-taxpayers/relief-procedures-for-certain-former-citizens](http://www.irs.gov/individuals/international-taxpayers/relief-procedures-for-certain-former-citizens), FAQ #11.

<sup>44</sup> [www.irs.gov/individuals/international-taxpayers/relief-procedures-for-certain-former-citizens](http://www.irs.gov/individuals/international-taxpayers/relief-procedures-for-certain-former-citizens), FAQ #12.

<sup>45</sup> [www.irs.gov/individuals/international-taxpayers/relief-procedures-for-certain-former-citizens](http://www.irs.gov/individuals/international-taxpayers/relief-procedures-for-certain-former-citizens), FAQ #14.

<sup>46</sup> [www.irs.gov/individuals/international-taxpayers/relief-procedures-for-certain-former-citizens](http://www.irs.gov/individuals/international-taxpayers/relief-procedures-for-certain-former-citizens), FAQ #15.

<sup>47</sup> [www.irs.gov/individuals/international-taxpayers/relief-procedures-for-certain-former-citizens](http://www.irs.gov/individuals/international-taxpayers/relief-procedures-for-certain-former-citizens), FAQ #17.

<sup>48</sup> [www.irs.gov/individuals/international-taxpayers/relief-procedures-for-certain-former-citizens](http://www.irs.gov/individuals/international-taxpayers/relief-procedures-for-certain-former-citizens), FAQ #18.

<sup>49</sup> [www.irs.gov/individuals/international-taxpayers/relief-procedures-for-certain-former-citizens](http://www.irs.gov/individuals/international-taxpayers/relief-procedures-for-certain-former-citizens), FAQ #19.

<sup>50</sup> [www.irs.gov/individuals/international-taxpayers/relief-procedures-for-certain-former-citizens](http://www.irs.gov/individuals/international-taxpayers/relief-procedures-for-certain-former-citizens), FAQ #9.

<sup>51</sup> Department of the Treasury. General Explanations of the Administration’s Fiscal Year 2023 Revenue Proposals (Mar. 2022).

<sup>52</sup> Code Sec. 6501(a); Department of the Treasury. General Explanations of the Administration’s Fiscal Year 2023 Revenue Proposals (Mar. 2022), pgs. 87–88.

<sup>53</sup> Code Sec. 6501(c)(8).

<sup>54</sup> Code Sec. 6501(c)(8); Public Law 111-147 (Mar. 18, 2010), Title V, Subtitle A, Parts I through V, Code Sec. 511(b); Department of the Treasury. General Explanations of the Administration’s Fiscal Year 2023 Revenue Proposals (Mar. 2022), pg. 88.

<sup>55</sup> U.S. Joint Committee on Taxation. Technical Explanation of the Revenue Provisions Contained in Senate Amendment to the House Amendment to H.R. 1586, Scheduled for Consideration by the House of Representatives on August 10, 2010. JCX-46-10. Aug. 10, 2010, pg. 37. See also Chief Counsel Advisory 201147030 (Nov. 25, 2011).

<sup>56</sup> Department of the Treasury. General Explanations of the Administration’s Fiscal Year 2023 Revenue Proposals (Mar. 2022), pg. 88.

<sup>57</sup> Department of the Treasury. General Explanations of the Administration’s Fiscal Year 2023 Revenue Proposals (Mar. 2022), pg. 88.

<sup>58</sup> Department of the Treasury. General Explanations of the Administration’s Fiscal Year 2023 Revenue Proposals (Mar. 2022), pg. 88.

<sup>59</sup> Department of the Treasury. General Explanations of the Administration’s Fiscal Year 2023 Revenue Proposals (Mar. 2022), pg. 88.

<sup>60</sup> Department of the Treasury. General Explanations of the Administration’s Fiscal Year 2023 Revenue Proposals (Mar. 2022), pg. 88.

<sup>61</sup> Department of the Treasury. General Explanations of the Administration’s Fiscal Year 2023 Revenue Proposals (Mar. 2022), pg. 89.

<sup>62</sup> Department of the Treasury. General Explanations of the Administration’s Fiscal Year 2023 Revenue Proposals (Mar. 2022), pgs. 88–89.

<sup>63</sup> Department of the Treasury. General Explanations of the Administration’s Fiscal Year 2023 Revenue Proposals (Mar. 2022), pg. 89.

<sup>64</sup> Department of the Treasury. General Explanations of the Administration’s Fiscal Year 2023 Revenue Proposals (Mar. 2022), pg. 89.



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