Bloomberg Tax

Tax Management
International Journal™

Exit Tax: Through the Maze of §877A

By Ragini Subramanian[*]

The U.S. Department of Treasury recently published the names of individuals who renounced their U.S. citizenship or terminated their long-term U.S. residency (''expatriated'') during the third quarter of 2017.[1] With well over 1,300 names in the first quarter, 1,700 names in the second quarter and 1,400 names in the third quarter (with some decline in the fourth quarter), 2017 was one of the noteworthy periods in the history of U.S. expatriation, and prompts the writing of this article. One may think that with so many choosing to expatriate, the process must be far from onerous. Not quite! Relinquishing U.S. citizenship or U.S. residency is not easy, as myriad of complex U.S. tax laws must be complied with before and sometimes even after expatriation. Before undertaking expatriation, taxpayers should carefully consider the kinds, value, and location of assets they hold, before and after expatriation, how will they be taxed in the United States as well as in the country that will be home after expatriation, and many other factors.

This article reviews pre- and post-compliance requirements under the U.S. tax laws for individuals who are thinking about expatriating — that is, giving up their U.S. citizenship or long-term U.S. residency. It also touches upon planning and other considerations, before and after actual expatriation, as they relate to the U.S. tax laws.

The primary Internal Revenue Code sections that govern individuals who wish to relinquish, renounce, or give up their U.S. citizenship, or long-term U.S. resident status include §877, §877A, §6039G, and regulations thereunder.[2] Section 877 primarily applies to expatriation before June 17, 2008, §877A applies to expatriation after June 17, 2008, and §6039G largely deals with the reporting requirements of expatriating individuals. As of this writing, no regulations under §877, §877A, or §6039G have been issued. Notice 2009-85[3] provides guidance in the meantime for §877A and §6039G. Notice 97-19[4] provides guidance for §877 and §6039G.

In this article, I discuss the expatriation provisions of §877A, §6039G, and guidance under Notice 2009-85 (not the expatriation under §877). For the purposes of this article, these code sections and Notice 2009-85 are collectively referred to as ''U.S. expatriation provisions'' or ''expatriation provisions.'' To the extent Notice 2009-85 applies certain provisions of Notice 97-19 to §877A, the term ''expatriation provision'' or ''U.S. expatriation provision'' will also include the provisions of Notice 97-19. Let us begin.

Here is a list of some things to think about before expatriating:

I. Are You a U.S. Citizen or a U.S. Resident?

II. Are You a ''Covered'' Expatriate'' or a ''Non-Covered'' Expatriate''?

III. Why Does It Matter Whether You Are a ''Covered'' or a ''Non-Covered'' Expatriate?

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[1] Fed. Reg. Doc. 2017-23885, filed Nov. 1, 2017.

[2] All section references are to the Internal Revenue Code of 1986, as amended (the ''Code''), or the Treasury regulations thereunder, unless otherwise noted.

[3] Applicable to individuals whose expatriation date is on or after October 15, 2009.

[4] As modified by Notice 98-34 and Notice 2005-19.

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IV. What Is the Value, Type, and Location of the Assets Owned by You on the Day Before Expatriation?

V. Are You Compliant With All U.S. Tax Obligations?

VI. What Is Your Date of Expatriation?

VII. Are You Subject To Tax Under The U.S. Expatriation Provisions and When Is This Tax Payable?

VIII. What Needs To Be Done Before Expatriating?

I. ARE YOU A U.S. CITIZEN OR A U.S. RESIDENT?

The U.S. expatriation provisions apply to U.S. citizens and to long-term residents of the United States. Note that the expatriation provisions use the term ''long-term residents of the United States'' and not ''U.S. residents or lawful permanent residents of the United States.'' Not all lawful permanent residents of the United States or U.S. residents are long-term residents of the United States, but all long-term residents of the United States are lawful permanent residents of the United States or U.S. residents.

Section 877A defines a long-term resident of the United States as an individual who is a lawful permanent resident of the United States (but not a citizen of the United States) as defined in §7701(b)(6), in at least eight out of 15 taxable years ending with the taxable year in which such individual ceases to be a lawful permanent resident of the United States.[5]

Section 7701(b)(6) defines lawful permanent resident of the United States as an individual:

- who has been granted such status under the U.S. immigration laws, and
- whose status as such has not been revoked and has not been administratively or judicially determined to have been abandoned.

If in any taxable year the individual is treated under an applicable treaty as a resident of a foreign country and does not waive the benefit of such treaty, and notifies the Secretary of the commencement of such treatment, he is not treated as a lawful permanent resident of the United States for such tax year.[6]

In summary, the first thing to consider, before one forges ahead to comply with the expatriation provisions, is whether one is a U.S. citizen or a lawful permanent resident of the United States. If U.S. citizen, read on and see what you need to do before expatriating. If a lawful permanent resident of the United States, the next two questions to investigate are:

1. For how long? and
2. Are you considered a resident of another country during that period because you applied to be treated as such under the existing treaty?

If the final answers to these questions are eight out of 15 years and NO, read on and see what you may need to do before expatriating.

II. ARE YOU A 'COVERED' EXPATRIATE OR A 'NON-COVERED' EXPATRIATE?

The next item to consider is whether an individual is a ''covered'' expatriate or a ''non-covered'' expatriate. This determination is made as of the date of expatriation[7] (see *VI. What Is Your Date of Expatriation?* below).

Neither §877A nor Notice 2009-85 defines the term ''non-covered'' expatriate. It is safe to say, however, that a ''non-covered'' expatriate is an individual who is not a covered expatriate.

A covered expatriate is any U.S. citizen who relinquishes his citizenship, or any long-term resident of the United States who ceases to be a lawful permanent resident of the United States within the meaning of §7701(b)(6),[8] and with respect to whom either of the following statements are true:[9]

- such individual's annual net income tax for the five preceding years ending before the year of expatriation exceeds $162,000 for 2017 (adjusted for inflation each year — $165,000 for 2018)[10] (''tax liability'' test), or
- such individual's net worth is $2 million or more as of the expatriation date (''net worth'' test), or
- such individual fails to certify, under penalty of perjury, his compliance with all U.S. federal tax

[5] §877A(g)(5), §877(e)(2), §7701(b)(6).

[6] §877(e)(2), §7701(b)(6). See also §877A(g)(2) for the definition of the term ''expatriate.''

[7] Notice 2009-85, §2. Individuals Covered.

[8] The individual ceases to be a lawful permanent resident of the United States within the meaning of §7701(b)(6): (1) at the time when such status is revoked and has been administratively or judicially determined to have been abandoned, or (2) if the individual commences to be treated as a resident of the foreign country, does not waive the benefits of such treaty applicable to the residents of the foreign country, and notifies the Secretary of the commencement of such treatment.

[9] §877A(g)(1)(A), §877(a)(2), §877A(g)(2).

[10] For 2012: $151,000; for 2013: $155,000; for 2014: $157,000; for 2015: $160,000; for 2016: $161,000.

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obligations for the five years preceding the tax year that includes the expatriation date (''certification'' test).

Note that an individual who otherwise does not meet the parameters of the ''tax liability'' test or the ''net worth'' test can be a covered expatriate if he or she fails to certify compliance with all U.S. federal tax obligations on Form 8854 (see *V. Are You Compliant With All U.S. Tax Obligations?* below, for more on ''certification'' test).

There are two exceptions to the ''tax liability'' and the ''net worth'' test for certain U.S. citizens (but not for long-term residents of the United States). These two exceptions do not apply to the ''certification'' test. Under these two exceptions, certain U.S. citizens — even though they otherwise meet the ''net worth'' or the ''tax liability'' tests — are considered as not meeting those tests and consequently not considered covered expatriates. These U.S. citizens are:

Dual citizens. Persons who are citizens of the United States and another country by birth and are subject to tax of such other country, and are not residents of the United States for more than 10 out of the 15 years ending with the tax year during which expatriation occurs.

Minors. Minors with respect to whom the relinquishment of the U.S. citizenship occurs before such individuals attain age 18 ½ and the individuals are not residents of the United States for more than 10 years before the date of relinquishment of the U.S. citizenship.[11]

For purposes of the ''tax liability'' test, an individual's net U.S. income tax is determined by §38(c)(1).[12] The term ''net income tax'' means the sum of the regular tax liability and the alternative minimum tax imposed by §55, reduced by the allowable credits; the term ''net regular tax liability'' means the regular tax liability reduced by the sum of the allowable credits.[13] An individual who files a joint income tax return must take into account the net income tax that is reflected on the joint income tax return for purposes of the ''tax liability'' test.[14]

For purposes of the ''net worth'' test, the individual is considered to own an interest in property that would be taxable as a gift under Chapter 12 (Gift tax) Schedule B (Transfers) of the Internal Revenue Code if the individual were a citizen or resident of the United States who transferred the interest immediately prior to expatriation.[15] Detailed valuation rules apply to various types of property interests for purposes of net worth test which are not discussed in this article. These valuation rules are laid out in Notice 97-19.[16] Note that Notice 2009-85 directs to Notice 97-19 for the parameters related to §877A ''net worth'' test.

The classification of a ''covered'' or a ''non-covered'' expatriate is important as we will see in the sections that follow. If you are a covered expatriate read every single section of this article. If you are a ''non-covered'' expatriate, because you do not meet the requirements of ''net worth'' or ''tax liability'' tests, read on to make sure that you are not a covered expatriate.

WHY DOES IT MATTER WHETHER ONE IS A 'COVERED' OR A 'NON-COVERED' EXPATRIATE?

Whether one is a covered or a ''non-covered'' expatriate matters due to the difference in the tax treatment afforded to each category. More complex tax rules apply to a covered expatriate than to a ''non-covered'' expatriate.

A ''non-covered'' expatriate can leave the country upon filing all the necessary tax returns and Form 8854 for the tax year in which she expatriates. For the year of expatriation, the taxpayer is subject to tax liability on the income and gain in accordance with normal tax rules applicable to a U.S. tax resident, or a U.S. citizen, up to the period of her residency in the United States, and as a non-resident after the expatriation date. More on this in *VIII. What Needs To Be Done Before Expatriating*, below.

A covered expatriate, on the other hand, is subject to mark-to-market or an alternative tax regime, depending on the type of assets held as of the expatriation date. For example, the deferred compensation items, the specified tax deferred accounts, and an interest in a non-grantor trust are subject to an alternative tax regime, whereas all other assets — including interest in a grantor trust — are subject to the mark-to-market regime. A careful analysis of types, location, and value of assets held by a covered expatriate on the day before expatriation is necessary to know the individual's U.S. tax liability before and after expatriation, elections that may be made, or steps that may be taken to maximize the taxpayer's U.S. tax po-

[11] §877A(g)(1).

[12] Notice 2009-85, §2.B. Tax Liability and Net-Worth Tests; Notice 97-19, §III, Tax Liability and Net Worth Tests.

[13] §38(c)(1). That is the credits allowable under Subparts A and B of Part IV of the Internal Revenue Code. These include child tax credit, dependent care credit, foreign tax credit, adoption expenses, credit for elderly, education credits, etc.

[14] Notice 97-19, §III. Tax Liability and Net Worth Tests.

[15] Notice 97-19, §III. Tax Liability and Net Worth Tests. Note that Notice 2009-85 directs to Notice 97-19 for the parameters related to Section 877A net worth test.

[16] See Notice 97-19, §III. Tax Liability and Net Worth Tests.

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sition, and compliance requirements before and after expatriation under mark-to-market and/or alternative tax regimes as applicable. Let us look at each of these two expatriation tax regimes applicable to covered expatriates.

Assets Subject to Mark-to-Market Tax Regime

The mark-to-market regime is fraught with complexity. For ease of understanding, one can break it down in three components:

- Deemed sale of the property held by the expatriating individual and application of the exclusion amount to determine taxable gain;
- In-bound step-up-to-basis rules applicable to long-term residents of the United States to determine taxable gain; and
- Determination of what property is considered held by the expatriating individual to which the deemed sale, exclusion amount, and basis rules should be applied.

Deemed Sale and Application of the Exclusion Amount

Under the mark-to-market tax regime, a covered expatriate is deemed to have sold, on the day before the expatriation date, all the property she held on such date, at its fair market value.[17] The unrealized gain upon this deemed sale on such date, reduced by an exclusion amount, is subject to tax in the year of expatriation, without regard to any other provision of the tax code.[18] Any available gain deferral or tax deferral will cease on the day before expatriation.[19] For example, property acquired under the §1031 deferred exchange rules will be subject to tax as if sold on the day before the expatriation date.

The exclusion amount, adjusted for inflation each year, is $699,000 for 2017 and $713,000 for 2018.[20] The exclusion amount reduces proportionately, but not below zero, the unrealized gain from all the assets deemed sold on the day before expatriation.[21] Loss upon deemed sale cannot offset the unrealized gain to which the exclusion amount is applied. The loss is allowed to the extent permitted by the Code, except that the wash sale rules of §1091 do not apply. Thus, for example, capital loss deduction is limited to $3,000 per year for a married couple filing a joint return.[22] When the property is eventually sold, the amount of any gain or loss actually realized is adjusted for gain and loss taken into account under the mark-to-market tax regime — but without regard to the exclusion amount.[23]

Let's look at some examples of how this works.

Example 1: Assume that Taxpayer A is a covered expatriate who owns properties X, Y, and Z, all located in the United States and each subject to the mark-to-market regime. Assume further that none of these properties are U.S. real property interest, and are not held by the taxpayer in a trade or business in the United States.

[17] §877A(a)(1).

[18] §877A(a)(2)(A), §877A(a)(3).

[19] §877A(h)(1)(A), §877A(h)(1)(B).

[20] §877A(a)(3).

[21] §877A(a)(3)(B); Notice 2009-85, §3B. Allocation of the exclusion amount.

[22] §877A(a)(2)(B); Notice 2009-85, §3B. Allocation of the exclusion amount; *see also* §1211(b) for rules on limitation on losses.

[23] §877A(a)(2).

	Fair Market Value on the day Before Expatriation	Basis	Recognizable Gain/ Loss	Application of Exclusion Amount	Gain/Lost Subject to Tax in the Year of Expatriation
	A	B	C=B-A	D**	E=D-C
X	$ 3,725,000.00	$ 3,700,000.00	$ 25,000.00	$ 25,000.00	$ -
Y	$ 4,500,000.00	$ 4,000,000.00	$ 500,000.00	$ 500,000.00	$ -
Z	$ 200,000.00	$ 300,000.00	$ (100,000.00)	Not Applied	$ (100,000.00)

** Total Gain = $525,000 ($25,000 + $500,000)

Application of Exclusion Amount

Property X: $699,000 × ($25,000/$525,000) = $25,000
Property Y: $699,000 × ($500,000/$525,000) = $500,000

Note that the exclusion amount cannot be more than the gain to be excluded.

In the year of expatriation, the gain to be included on Form 1040 for Property X = $0, for Property Y = $0. The loss of $100,000 or applicable portion thereof should be reported on the appropriate schedule or forms (e.g., Schedule D, Schedule E, Form 4797) associated with Form 1040 in the year of expatriation.

Example 2: Same facts but different fair market values and basis for each of the properties.

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	Fair Market Value on the day Before Expatriation	Basis	Recognizable Gain/ Loss	Application of Exclusion Amount	Gain/Lost Subject to Tax in the Year of Expatriation
	A	B	C=B-A	D**	E=D-C
X	$ 3,725,000.00	$ 3,500,000.00	$ 225,000.00	$ 216,931.03	$ 8,068.97
Y	$ 4,500,000.00	$ 4,000,000.00	$ 500,000.00	$ 482,068.97	$ 17,931.03
Z	$ 200,000.00	$ 300,000.00	$ (100,000.00)	Not Applied	$ (100,000.00)

** Total Gain = $725,000 ($225,000 + $500,000)

Application of Exclusion Amount

Property X: $699,000 × ($225,000/$725,000) = $216,931
Property Y: $699,000 × ($500,000/$725,000) = $ 482,068.97

In the year of expatriation, the gain to be included on Form 1040 for Property X = $8,068, for Property Y = $17,931. The loss of $100,000 or applicable portion thereof should be reported on the appropriate schedule or forms (e.g., Schedule D, Schedule E, Form 4797) associated with Form 1040 in the year of expatriation.

Let's say that two years after expatriation, the taxpayer sells Property X for $4,000,000. The basis of the property for the purposes of gain calculation upon actual sale is $3,950,000 ($3,725,000 fair market value on the day before expatriation plus $225,000 gain in Column C from the above table upon deemed sale on the date of expatriation) which is without taking into account the exclusion amount. The taxable gain upon actual sale of property will be $50,000 ($4,000,000 – $3,950,000).

While this rule of ''not taking into account the exclusion amount in calculating gain upon subsequent sale of the property'' seems quite magnanimous, it may not be of any use to the taxpayer under certain circumstances. Here is an example of this situation. The mark-to-market regime applies whether the property is located in the United States or outside the United States. Assume that the property subject to mark-to-market was located outside the United States. Any gain upon subsequent sale of this property will be subject not to U.S. tax but to the tax laws of the new home country of the expatriated individual. The taxable amount will most likely be the fair market value upon sale less the original basis of the property. In the case of Example 2 above, it will most likely be $500,000 ($4,000,000 less $3,500,000). The rule of not taking into account the exclusion amount in calculating gain upon subsequent sale of the property is irrelevant to this sale.

In-Bound Step-Up-to-Basis Rules Applicable to Long-Term Residents of the United States to Determine Taxable Gain

Normal rules of basis determination for the purposes of computing gain as above apply to the U.S. citizens. However, a special in-bound step-up-in-basis rule applies to long-term residents of the United States. If this individual owned the property (which is now subject to mark-to-market tax regime applicable to covered expatriate) prior to becoming a U.S. resident, the basis of such property is not the original purchase price, but it is not less than the fair market value on the day the individual became the U.S. resident.[24] Let's look at the example of this as laid out in Notice 2009-85.

Assume that Taxpayer A, a non-resident of the United States, became a lawful permanent resident of the United States on April 1, 1995. She is a long-term resident of the United States. She decides to expatriate, and her date of expatriation is July 1, 2010. She is subject to mark-to-market tax regime applicable to covered expatriates. The value of the two assets she owns is as follows:

- Asset S with a basis of $400, fair market value of $700 on April 1, 1995, and fair market value of $1300 on July 1, 2010
- Asset T with a basis of $500, fair market value of $300 on April 1, 1995, and fair market value of $800 on July 1, 2010

Neither of these assets are U.S. real property interest, nor effectively connected with a U.S. trade or business. In accordance with the in-bound step-up-in-basis rule, the default result for taxable gain in the year of expatriation (2010) would be:

- Gain on Asset S = $600 ($1,300 less $700)
- Gain on Asset T = $300 ($800 less $500)

A long-term resident of the United States can, however, elect not to apply this in-bound step-up in basis rule.[25] In that case, her gain with respect to Asset S would be $1,300 less $400 = $900.[26] The election is

[24] §877A(h)(2), Notice 2009-85, §3.D. In-bound step-up in basis for nonresident alien becoming resident aliens.

[25] §877A(h)(2).

[26] Notice 2009-85, §3.D. In-bound step-up in basis for nonresident aliens becoming resident aliens.

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made on a property-by-property basis[27] on Form 8854, which is filed in the year of expatriation.[28] Essentially, if the expatriating individual can establish fair market value on the date she becomes a U.S. resident, the in-bound step-up in basis can help reduce the gain subject to the mark-to-market tax regime.

Property Considered Owned by the Expatriating Individual

While all of the above may seem quite complicated, the determination of what is the property in the hands of a covered expatriate, on a day before the expatriation date, is equally daunting, especially for individuals with millions of dollars in different types of assets. The rule in this respect is described in Notice 2009-85.[29] It states that for purposes of computing the tax liability under a mark-to-market regime, a covered expatriate is considered to own any interest in property that would be taxable as part of his gross estate for federal estate tax purposes under Chapter 11 of Subtitle B of the Code as if he dies on the day before the expatriation date as a citizen or resident of the United States. Whether property would constitute part of the gross estate is determined without regards to credit under §2010 through §2016. A covered expatriate is also deemed to own his beneficial interest(s) in each trust (or portion of a trust), that would not constitute part of his gross estate.[30] This article will not go into what is considered includible in one's estate, as it is a topic by itself. Suffice it to say that determining what is and what is not included in the gross estate of an ultra-high-net-worth individual and therefore subject or not subject to mark-to-market tax regime is not an easy task. And if you are thinking of gifting your assets, think carefully — because if not correctly structured, the gifted asset may still be included in the estate of an expatriating individual and therefore subject to a mark-to-market tax regime. With that said, let's review the alternative tax regime applicable to a covered expatriate.

Assets Subject to Alternative Tax Regime

As stated earlier, not all assets are subject to a mark-to-market tax regime. The following assets are subject to an alternative tax regime:

- Deferred compensation items,
- Specified tax deferred accounts, and
- Interest in non-grantor trust.

The timing of tax and the value of the asset subject to tax depends on the type of asset and the elections made by the expatriating individual. A failure to fully analyze these assets can result in missed pre-expatriation planning opportunities as discussed below.

Deferred Compensation Items

These include:[31]

A. Any interest in a plan or arrangement described in §219(g)(5), that is:[32]

- a §401(a) plan that includes a trust exempt from tax under §501(a);
- an annuity plan described in §403(a);
- a plan established for its employees by the United States, by a State or political subdivision thereof, or by an agency or instrumentality of any of the foregoing (but not an eligible deferred compensation plan under §457(b);
- an annuity contract described in §403(b);
- a simplified employee pension (within the meaning of §408(k)); or
- a simplified retirement account (within the meaning of §408(p)); or
- any contribution to a trust described in §501(c)(18).[33]

B. Any interest in a foreign pension plan or similar retirement arrangement or program.

C. Any property, or right to property, which the individual is entitled to receive in connection with the performance of services to the extent not previously taken into account under §83 or in accordance with §83.[34]

In this context, statutory or non-statutory stock options (under §421–§424); stock-settled stock appreciation rights; stock-settled restricted stock units,[35] con-

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[27] Generally speaking, such election cannot be made with respect to the U.S. real property interest and property used or held for use in connection with the conduct of a trade or business in the United States. See §897(c) for what is a U.S. real property interest.

[28] *See* Notice 2009-85, §3.D. In-bound step-up in basis for non-resident aliens becoming resident aliens.

[29] Notice 2009-85, §3.A. Identification of a covered expatriate's property and determination of fair market value.

[30] The covered expatriate's beneficial interest in such a trust shall be determined under the special rules set forth in Notice 97-19, §II.

[31] §877A(d)(4).

[32] Notice 2009-85, §5B. Deferred compensation items, Definitions.

[33] Section 501(c)(18) is a trust created before June 25, 1959, forming part of a plan providing for the payment of benefits under a pension plan funded only by contributions of employees, etc.

[34] §877A(c)(1), §877A(d)(4)(A)–(D).

[35] Note that as compared to the stock-settled stock appreciation

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stitute a property or right to property.[36] Whether such property or right to property is considered previously taken into account would depend on whether it is transferred to the individual on or before the date of expatriation and whether, before the expatriation date, it is vested and related taxes have been paid (and tax returns filed) or, having made a §83(b) election, the individual has paid taxes related to such election[37] (and filed a tax return). In this case, if the tax return is due after the expatriation date, the item is considered previously taken into account if the transferred property is subject to appropriate tax withholding.

D. *Any item of deferred compensation.* This means any amount of compensation if, under the terms of the plan, contract, or other arrangement providing for such compensation or compensation arrangement), the covered expatriate has a legally binding right as of the expatriation date to such compensation, the compensation has not been actually or constructively received on or before the expatriation date, and pursuant to the compensation arrangement the compensation is payable to (or on behalf of) the covered expatriate on or after the expatriation date. Such term, however, does not include any deferred compensation item that is described above in A, B, or C. An item of deferred compensation generally includes an amount whether or not substantially vested, that constitutes nonqualified deferred compensation for purposes of §404(a)(5) (determined without regard to Reg. §1.404(b)-1T, Q&A-2), including a cash-settled stock appreciation right, a phantom stock arrangement, a cash-settled restricted stock unit,[38] an unfunded and unsecured promise to pay money or other compensation in the future (other than such a promise to transfer property in the future), and in a trust described in §402(b)(1) or §402(b)(4) (commonly referred to as a secular trust).[39]

Simply put, a deferred compensation item includes U.S. or foreign pension or retirement plans, payments under deferred compensation arrangements, stock or cash-settled stock appreciation rights, stock purchase, stock option, and restricted stock plans. However, determination of the taxable component excludes the deferred compensation item that is attributable to services performed outside of the United States while the covered expatriate was not a U.S. citizen or resident.[40]

The timing of taxation of an asset that is a deferred compensation item depends on whether it is an eligible or an ineligible deferred compensation item.

Generally, an eligible deferred compensation item is taxed when payable to the expatriating individual, and the taxable component of such item is subject to withholding by the payor at 30%.[41] The expatriating individual is subject to tax on this item even if on the date of the payment such individual is not a U.S. resident or citizen — that is, if he has already expatriated. An eligible deferred compensation item is any deferred compensation item with respect to which:

1. the payor is the United States person or the payor is the one who elects to be treated as a United States person,[42] and
2. the covered expatriate has notified the payor of such item of his status as a covered expatriate and elected irrevocably to waive any right to claim any reduction under any treaty with the United States in withholding on such items.[43]

This election is made on Form 8854 for each deferred compensation item.[44] The covered expatriate must provide Form W-8CE to the payor on the earlier of (1) the day before the first distribution after the expatriation date, or (2) 30 days after the expatriation date. The purpose of this form is to provide the payor with notice that the individual is a covered expatriate who has waived treaty benefits and that payments to such individual is subject to 30% withholding. While the responsibility to pay the 30% withholding tax is on the payor, the covered expatriate must annually file Form 8854 to certify that no distribution of the eligible deferred compensation item has been received, or to report the amount of distribution received.[45]

The tax code does not define the term ''ineligible deferred compensation item.'' Notice 2009-85, however, states that a deferred compensation item that is not an eligible deferred compensation item is an ineligible deferred compensation item. Essentially if the required election discussed above is not made, a deferred compensation item is an ineligible deferred compensation item.

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rights or stock-settled restricted stock units, the cash-settled stock appreciation rights and cash-settled restricted stock units are considered an item of deferred compensation under §877A(d)(4)(c).

[36] Notice 2009-85, §5B. Deferred compensation items, Definitions.

[37] *Id.*

[38] Note that as opposed to cash-settled stock appreciation rights or cash-settled restricted stock units, the stock-settled stock appreciation rights and stock-settled restricted stock units are not an item of deferred compensation but will be governed by §877A(d)(4)(D) as property or right to property under §83.

[39] Notice 2009-85, §5B(4). Deferred compensation items, Definitions.

[40] §877A(d)(5).

[41] §877A(d)(1)(A), §877A(d)(1)(B).

[42] §877A(d)(3)(A).

[43] §877A(d)(3)(B).

[44] Notice 2009-85, §8.C; Form 8854: Initial waiver of treaty benefit for eligible deferred compensation items *and annual reporting requirements.*

[45] Notice 2009-85, §8.D. Form W-8CE.

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As to the taxation of an ineligible deferred compensation item, generally speaking, the present value of the covered expatriate's accrued benefit is treated as received by the expatriating individual on the day before the expatriation date as if there is a distribution.[46] An early distribution tax is not applied, and appropriate adjustment is made to subsequent distributions from the plan to reflect such treatment.[47]

If the deferred compensation item is the one described above (that is, the property subject to §83), it is taxable on the date before the expatriation as if the property is not subject to substantial risk of forfeiture on the date before the expatriation.

In the case of an ineligible deferred compensation item as well, the covered expatriate is required to provide Form W-8CE to the payor on the earlier of (1) the day before the first distribution after the expatriation date, or (2) 30 days after the expatriation date. However, the purpose here is to provide notice to the payor that the individual is a covered expatriate who is treated as receiving an amount equal to the present value of her accrued benefit on the day before the expatriation date and with respect to which appropriate adjustments must be made to subsequent distributions to reflect the tax imposed by reason of such treatment.[48] Within 60 days of receipt of Form W-8CE, the payor is required to provide to the covered expatriate a written statement setting forth the present value of the covered expatriate's accrued benefit on the day before the expatriation date. As one may observe, W-8CE is one way to get a written confirmation of the present value of the accrued benefit that is reported on the tax return of the expatriate in the year of expatriation.

In summary, a deferred compensation item is taxed either on the day before expatriation or any time in the future when it is actually paid (even if the expatriating individual is no longer a U.S. resident or a U.S. citizen), and this timing depends upon whether the item is an eligible or an ineligible deferred compensation item. In the case of an eligible deferred compensation item, the covered expatriate may remain subject to future compliance — for example, the need to file Form 8854 annually even after expatriation is otherwise complete. An eligible deferred compensation item when distributed is subject to 30% withholding rate, but an ineligible deferred compensation item is not. Whether or not to elect to treat a deferred compensation item as eligible or ineligible is a matter of pre-expatriation tax planning and personal choice. Some considerations in making this choice include: tax rate under a treaty between the United States and the expatriate's new home country, desire to annually think about the need to file Form 8854, tax rate in the United States in the year of expatriation and future tax rate in the new home country, the need to file a non-resident tax return in the United States upon receipt of distribution, etc.

Specified Tax-Deferred Accounts

Specified tax deferred accounts include:[49]

1. an individual retirement plan (as defined in §7701(a)(37)) that is
   (a) an individual retirement account described in §408(a) and
   (b) an individual retirement annuity described in §408(b),

but not an arrangement described in §408(k) or §408(p) (note that these arrangements are considered deferred compensation items under §877A(d)(4));

2. a qualified tuition program (as defined in §529);
3. a qualified ABLE program (as defined in §529A);
4. a Coverdell education savings account (as defined in §530);
5. a health savings account (as defined in §223); and
6. an Archer MSA (as defined in §220).[50]

Specified tax deferred accounts are taxable in the year of expatriation. On the day before the expatriation date, the expatriating individual is deemed to have received a distribution of her entire interest in the specified deferred account.[51] No early distribution tax applies to such deemed distribution and subsequent adjustment is permitted in the event of subsequent distribution from the plan.[52]

The covered expatriate must provide Form W-8CE to the payor on the earlier of (1) the day before the first distribution after the expatriation date, or (2) 30 days after the expatriation date. The purpose of this form is to provide the payor notice that the individual is a covered expatriate who is treated as receiving a distribution of his entire interest in the specified deferred account on the day before the expatriation date and with respect to which appropriate adjustments must be made to subsequent distributions to reflect the

[46] §87A(d)(2)(A).
[47] §877A(d)(2)(B), §877A(d)(2)(C).
[48] Notice 2009-85, §8.D; Form W-8CE.
[49] §877A(c)(2).
[50] §877A(e)(2).
[51] §877A(d)(5).
[52] §877A(3)(1)(B), §877A(3)(1)(C).

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tax imposed by reason of such treatment.[53] Within 60 days of receipt of Form W-8CE, the payor must provide to the covered expatriate a written statement setting forth the amount of the covered expatriate's entire interest in her account on the day before her expatriation date.[54] Again, as one may observe, Form W-8CE is one way to get a written confirmation of the value of the interest in the plan on the day before expatriation to be reported on the expatriate's tax return in the year of expatriation.

Interest in a Non-Grantor Trust

Section 877A defines a non-grantor trust as a trust or any portion of a trust that the individual is not considered the owner of[55] immediately before the expatriation date.[56] While a grantor trust is subject to the mark-to-market tax regime, a non-grantor trust is subject to alternative tax regime.[57]

Generally, the distributions from a non-grantor trust are taxable only when made. The taxable portion is the amount that would have been includible in the income of the covered expatriate had he been a U.S. resident or citizen.[58] This taxable portion is subject to withholding at 30% by the trustee of the trust. The covered expatriate however is required to inform the trustee of a non-grantor trust of his covered expatriate status by giving to the trustee a Form W-8CE on the earlier of (1) the day prior to the first distribution on or after the expatriation date or (2) 30 days after the expatriation date.[59] The trustee of the trust is required to withhold a 30% tax on such taxable portion[60] and is liable for non-withholding under §1461.[61] It the trustee fails to withhold the 30% tax, the covered expatriate is required to file a tax return for that year.

The 30% tax cannot be reduced under an applicable treaty with the United States unless the covered expatriate:

1. obtains from the Internal Revenue Service a letter ruling as to the value, if ascertainable, of his or her interest in the trust as of the day before the expatriation date;[62]
2. supplies a copy of the ruling and a certification signed under penalties of perjury that the tax due on the value of the interest in the trust has been paid to the IRS; and
3. elects on Form 8854 that he has received the value of his or her interest in the trust on the day before the expatriation date and pays tax on such valuation on his timely filed tax return for the year of expatriation.[63]

Once this procedure is completed, the covered expatriate can request reduced withholding under an applicable treaty. The covered expatriate may not make the election if the IRS determines that his or her interest in the trust does not have an ascertainable value as of the day before the expatriation date.

In summary, the alternative tax regime is no less burdensome than the mark-to-market regime. The final objective of each of the tax regimes (mark-to-market and alternative) is the same: impose tax on assets in the hands of expatriating individual on the day before the expatriation, and if the tax is not collected (e.g., in the case of eligible deferred compensation item, or taxable portion of income from non-grantor trust) before expatriation, collect the same at a flat rate (30%) irrespective of what the tax bracket of the individual is at a later date. Unlike mark-to-market, the alternative tax regime does not refer to federal gross estate in determining what property is in the hands of an expatriating individual. It would seem, therefore, that one may gift these assets before expatriation to keep them out of the calculation of the net worth test. However, this should be done only after a thorough review of the applicable federal gift and estate tax regulations, and any applicable penalties for early withdrawal.

Given the complexity associated with mark-to-market and alternative tax regimes applicable to a covered expatriate, it would make sense to review possible strategies where the individual is not considered a covered expatriate. These strategies should, however, take into account immediate versus future tax and compliance burdens.

IV. WHAT ARE THE VALUES, TYPES, AND LOCATIONS OF THE ASSETS OWNED BY YOU ON THE DAY BEFORE EXPATRIATION?

For an expatriating individual, knowing the value of an asset[64] is important for some of the following illustrative reasons.

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[53] Notice 2009-85, §8.D; Form W-8CE.

[54] Notice 2009-85, §8.D; Form W-8CE; Section 6, Specified Tax Deferred Accounts.

[55] Under Subpart E of part 1 of Subchapter J of Internal Revenue Code.

[56] §877A(f)(3).

[57] §877A(c)(3).

[58] §877A(f)(2).

[59] *Id.*

[60] §877A(f)(1)(A).

[61] Notice 2009-85, §7.C. Withholding.

[62] The procedures set out in Rev. Proc. 2009-4 (or any subsequent publication that replaces Rev. Proc. 2009-4) is followed to seek this ruling.

[63] Notice 2009-85, §7.C. Withholding.

[64] This article does not discuss the rules related to valuation of

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1. If the combined value of all assets owned by an expatriate on the day before expatriation is more than $2 million (''net worth'' test), the individual is a covered expatriate. A covered expatriate is subject to mark-to-market or alternative tax regime, whereas a ''non-covered'' expatriate is not. Knowing the covered or ''non-covered'' status is essential to planning the exit tax strategies (e.g., sell the asset or keep the asset, defer tax, or pay tax at expatriation).
2. Certain assets in the hands of a covered expatriate are subject to mark-to market tax. Built-in gain (if any) after applying the exclusion amount is taxed in the year of expatriation. The asset value is important to determine the gain or loss and thereby the tax liability as of the date of expatriation and whether or not to elect to defer tax.
3. A deferred compensation item in the hands of a covered expatriate is subject to the alternative tax regime, and the timing of taxation of such an asset depends on an election to treat this as an eligible or an ineligible deferred compensation item. Knowing the value of this asset is important to plan this timing of taxation.

It is noteworthy that the value of an asset for purposes of ''net worth'' test is not the same as its value to determine gain under the mark-to-market tax regime. The former is under Notice 97-19, §II, while the latter is under Notice 2009-85. Notice 97-19 applies the valuation rules used for gift tax purposes, and Notice 2009-85 applies the valuation rules used for estate tax purposes. Can this lead to a mismatch between the value that is subject to the ''net worth'' test and the value that is used to determine tax liability under the mark-to-market tax regime? Possibly. Until the regulations are finalized, this discrepancy may cause compliance headaches for some ultra-high-net-worth expatriates with assets that are subject to the mark-to-market tax regime.

This valuation mismatch is, however, not an issue for the assets that are subject to the alternative tax regime. Generally, the taxable amount is tied to the taxable payment from the asset, or the present value of the asset, or the taxable distribution from the asset. In most instances, the trustee of the deferred compensation plan, or the specified tax deferred account, or the trustee of the non-grantor trust is able to provide this valuation.

For an expatriating individual, knowing the type of asset is important for reasons similar to those for knowing the value of the asset.

Some assets in the hands of an expatriating individual are subject to the mark-to-market tax regime and some to the alternative tax regime. Knowing which of the assets are subject to which regime is important for pre-expatriation tax planning and for post-expatriation compliance planning. For example,

- Some assets subject to alternative tax regime may require Form 8854 annually even after expatriation, and a Form W-8CE may have to be filed for others.
- One would group all built-in gain assets that are subject to mark-to-market regime to apply exclusion amount and calculate the taxable gain. The assets subject to the alternative tax regime are kept out of this calculation.
- The owner of the grantor trust may cause himself to become an owner of a foreign trust upon expatriation, or a covered expatriate's expatriation may cause him to cease be treated as the owner of the trust. The trust may in that case be required to recognize gain on appreciated property under other provisions of the Internal Revenue Code,[65] and in that case the gain cannot be reduced by the exclusion amount of §877A(a)(3).

Knowing the location of the asset is important for some of the following illustrative reasons.

- The proceeds from the sale of the U.S. real property interest by a non-resident alien is subject to 15% withholding under FIRPTA regulations.[66] If the expatriating individual owns a U.S. real property interest, it may be worthwhile to review the tax implications of sale of such property before or after expatriation.
- A taxpayer's principal residence may no longer benefit from the principal residence exclusion rules if she does not live in that residence for at least two years (while continuing to own it) out of the five years before the date of the sale.

A lot to think about here. The above is just a flavor of why one needs to know the value, the type, and the location of the assets. Knowing this is important to analyzing and possibly mitigating the tax burden as well as the compliance burden.

V. ARE YOU COMPLIANT WITH ALL U.S. TAX OBLIGATIONS?

Section 877A(g)(1)(A) and §877(a)(2)(C) require an expatriating individual to certify under penalty of

assets for the purposes of ''net worth'' test or to determine gain under mark-to-market tax regime. For these valuations rules please refer to Notice 97-19 and Notice 2009-85.

[65] See §684 in this regard.

[66] Foreign Investment in Real Property Tax Act of 1980 (FIRPTA). *See* §897.

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perjury that, or to submit evidence that, she has met the requirements of Title 26 of the Internal Revenue Code for the five tax years preceding the tax year of expatriation. Failure to certify or to submit evidence makes the expatriating individual a covered expatriate as discussed above.

What does it mean to sign this certification or submit evidence? Simply put, the expatriating individual should be compliant with all the tax return filings necessary, including personal, corporate, partnership, LLC, trust, estate, and any other requirements, such as filings for payroll tax, employment tax, or gift tax. In addition, the individual must comply with foreign information reporting requirements, such as Forms 8938, 114, 5471, 5472, 3520, 3520-A, 926, 8621, 8865, 8858, etc. If the non-compliance relates to foreign reporting, the penalties and consequences can be far more serious.[67] Compliance with tax obligations would also mean that the taxpayer has paid any and all applicable taxes, penalties, and interest. This includes taxes payable by the expatriating individual under the expatriation provisions unless an election to defer these taxes is properly made by the taxpayer (see *VII. Are You Subject to Tax Under the U.S. Expatriation Provisions and When Is This Tax Payable?* below).

What happens if the taxpayer is not compliant? A taxpayer who wants to expatriate but is not tax-compliant will be well advised to become compliant before filing Form 8854 and to either certify compliance or leave this item on Form 8854 unchecked. A word of caution, however: A Form 8854 with certification box unchecked is a likely candidate for an audit. And if one checks off the certification box but is not compliant, one should be prepared for penalties associated with making a false statement if audited.

In my view, the ''certification'' test should not be taken lightly. Before signing a certification of compliance, one must seek professional review of tax returns for five years preceding the year of expatriation. Subject to advice from the professional, one should proceed to comply rather than begin the expatriation procedure. Depending on the level of non-compliance, the date of expatriation may be delayed.

VI. WHAT IS YOUR DATE OF EXPATRIATION?

The question seems simple but it is not. One may desire to leave the United States as soon as possible but the issue is how to plan toward a date, and what is the exact date that one is considered to have expatriated? As discussed above, the value of the assets and the tax associated with each is determined on the day before expatriation.

Let us first review what, according to the statute, is the expatriation date.

First the U.S. citizens. Section 877A(g)(3) defines the term ''expatriation date'' as the date an individual relinquishes U.S. citizenship. Section 877A(g)(4), Notice 2009-85, and the instructions to Form 8854 all provide that a U.S. citizen will be treated as relinquishing her U.S. citizenship on the earliest of the following four possible dates:

1. The date the individual renounces her U.S. nationality before a diplomatic or consular officer of the United States pursuant to paragraph (5) of section 349(a) of the Immigration and Nationality Act (8 U.S.C. 1481(a)(5)). This renunciation must be subsequently approved by the U.S. Department of State by issuing to the individual a certificate of loss of nationality.

2. The date the individual furnishes to the State Department a signed statement of voluntary relinquishment of U.S. nationality confirming the performance of an act of expatriation specified in paragraph (1), (2), (3), or (4) of section 349(a) of the Immigration and Nationality Act (8 U.S.C. 1481(a)(1)–8 U.S.C. 1481(a)(4)). This voluntary relinquishment must be subsequently approved by the Department by issuing to the individual a certificate of loss of nationality.

3. The date the State Department issues to the individual a certificate of loss of nationality.

4. The date a court of the United States cancels a naturalized citizen's certificate of naturalization.

In the case of a long-term resident of the United States, §877A(g)(3)(B), Notice 2009-85, and instructions to Form 8854 provide that the expatriation date in the case of a long-term resident of the United States is the date on which the individual ceases to be a lawful permanent resident of the United States within the meaning of §7701(b)(6). An individual ceases to be a lawful permanent resident of the United States on the earliest of the following four possible occurrences:

1. The individual voluntarily abandons his lawful permanent resident status by filing Department of Homeland Security Form I-407, with a U.S. Consular or immigration officer.

2. The individual's status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with immigration laws has been revoked or has

[67] *See* Ragini Subramanian, *Foreign Reporting Obligation — Resolving Delinquency*, NATP Tax Prof'l. J. (Summer 2017), for more on penalties associated with non-compliance with foreign reporting obligations.

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been administratively or judicially determined to have been abandoned.

3. The individual became subject to a final administrative or judicial order for his/her removal from the United States under the Immigration and Nationality Act.
4. A dual status resident of the United States and of a foreign country with which the United States has an income tax treaty:
   a. commences to be treated as a resident of a foreign country under the provisions of a tax treaty between the United States and the foreign country,
   b. does not waive the benefits of the treaty applicable to residents of the foreign country, and
   c. notifies the Secretary of such treatment on Forms 8833 and 8854.[68]

The next question is when does one want this date to be? Of course, the choice generally belongs to an individual wanting to expatriate (unless one is forced out of the country for some reason (e.g., administrative or judicial, which we will not discuss here), and this date can be anytime during the year. However, from a planning standpoint, one may want to come up with a date that can provide maximum benefit. What do I mean? Let us take some examples.

Example 1: Let's assume that an individual is a covered expatriate only because she meets the net worth test and because the only asset owned is a vacation home worth $2 million with a built-in gain, subject to the mark-to-market tax regime, in Country X (not U.S.). The decision to hold onto this property or sell it before expatriating will depend on the amount of the built-in gain — more than or less than the exclusion amount, how much more or less — and whether liquid asset is available to pay the tax. If this review results in a decision that the property should be sold before expatriating, the individual may need to postpone the date of expatriation.

Example 2: Let's assume that upon examination of returns for five years before the potential date of expatriation, the individual is informed by her tax lawyer that she was not compliant because income with respect to a foreign asset was not reflected on the tax returns. The individual may consider postponing her expatriation date until after amended returns are properly filed and she is able to certify compliance.

Example 3: Let's assume that an individual is a covered expatriate and owns, among other assets, a $3 million home in Florida. She surrenders her U.S. citizenship while continuing to own this Florida home and expatriates to Country X. She sells this home a year after expatriation. The sale proceeds upon sale of this home are subject to 15% withholdings under FIRPTA rules of §897. This individual could have waited one year before actually relinquishing her U.S. citizenship, if the only intention was to avoid FIRPTA provisions.

In summary, one should consider the expatriation date very carefully before approaching the relevant authorities and surrendering citizenship or long-term residency in the United States. The perceived tax burden under the U.S. tax laws should be weighed against the burden of U.S. expatriation tax provisions and possible post-expatriation provisions. A careful analysis of the tax regime of the new home country should also be undertaken. A consultation with a tax professional is highly recommended.

VII. ARE YOU SUBJECT TO TAX UNDER U.S. EXPATRIATION PROVISIONS AND WHEN IS THIS TAX PAYABLE?

Subject to exceptions, any tax under the expatriation provision of §877A is payable in the year of expatriation. Any period for acquiring property in a nonrecognition transaction (e.g., §1031 deferred exchange) terminates on the day before the expatriation.[69] Any extension of time for payment of tax ceases to apply on the day before the expatriation date, and the unpaid portion of such tax is due and payable[70] on the earlier of the date the tax is due and payable and the due date of the expatriating individual's return for the tax year.[71] If the expatriation of the taxpayer causes a U.S. domestic trust to become a foreign trust, the rules of §684 requiring recognition of immediate gain will apply before mark-to-market regime becomes applicable.[72]

A non-covered expatriate must therefore pay any tax due up to the year of his/her expatriation. A covered expatriate on the other hand can elect to defer tax

[68] See Reg. §301-7701(b)-7 for information on other filing requirements for dual status residents.

[69] §877A(h)(1).

[70] §877A(h)(1)(B).

[71] Notice 2009-85.

[72] §877A(h)(3); Notice 2009-85.

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payable under the mark-to-market regime but not under an alternative tax regime.[73]

Tax deferral by a covered expatriate on assets subject to mark-to-market tax regime: A covered expatriate may elect to defer tax on the property subject to mark-to-market regime until the earlier of the due date (without extensions) of the covered expatriate's income tax return for

(a) the taxable year in which the asset is disposed of by sale, non-recognition transaction, gift, or other means, or

(b) the taxable year that includes the date of death of the covered expatriate. However, a covered expatriate may pay any tax deferred under §877A(b), together with accrued interest, at any time.[74]

The election is made on asset-by-asset basis and, once made, is irrevocable.[75] Thus, one can defer tax under the mark-to-market regime with respect to one asset but not with respect to the other. In order to make this election, the expatriating individual has to comply with certain requirements. These are:

- Provide an adequate security for the property to ensure payment of the tax. This security can be in the form of a bond that meet the requirements of §6325, or another form acceptable to the IRS. The IRS must agree that the security is adequate.[76] This can be in the form of a duly executed deferral agreement acceptable by the IRS. A sample of this agreement can be found in Appendix A to Notice 2009-85.
- Make an irrevocable waiver of any U.S. treaty right that would preclude assessment or collection of any tax imposed by reason of the expatriation provisions.[77]
- Appoint a U.S. agent to act as the covered expatriate's limited agent for purposes of accepting communication related to a tax deferral agreement and other matters related to the covered expatriate.[78] A sample of document to appoint a U.S. agent can be found at Appendix B to Notice 2009-85.

In summary, depending on the type and total value of assets held at expatriation, no tax deferral may be available. A decision to defer or not to defer tax on asset subject to the mark-to-market tax regime must be taken with great care, as the documentation requirement for this are quite involved. If the only reason to expatriate is to get away from the U.S. tax system, seeking tax deferral may defeat the purpose!

VIII. WHAT NEEDS TO BE DONE BEFORE EXPATRIATING?

A few obvious things to think about before expatriating — give thoughtful consideration to the items discussed above, elections to be made, the potential date of expatriation, and post-expatriation compliance requirements.

The next step would be to surrender U.S. citizenship or long-term U.S. residency as discussed above in *VI. What Is Your Date of Expatriation*?

The next step would be to file a Form W-8CE with necessary elections, with the trustee of the asset that is subject to alternative tax regime. While one may not need to file this before expatriation, note that the trustee can provide a very clear picture of the taxable value of the property which is reported on the tax return.

The final step would be to file a tax return in the United States for the year of expatriation. Unless the expatriation occurs on January 1, the expatriating individual will file a dual status tax return for the year of expatriation. This means that a Form 1040will be filed for part of the year the taxpayer is the resident or citizen of the United States and a Form 1040NR after expatriation date. On Form 1040, worldwide income on the day before the expatriation is reported. On Form 1040NR, only the income effectively connected with the United States or U.S.-source FDAP income (e.g., dividend, interest, rent, etc.) is reported. Also file Form 8854 along with the tax return filed for the year of expatriation.

Finally, the decision to expatriate is not for the faint of the hearts. One must fully review the tax impact of expatriation in the United States and in the new home country, based on the value, type, and location of assets held by the individual. So before undertaking it, seeking professional advice would really be the first step in getting through the myriad of issues merely touched upon in this article.

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[73] Except that the tax on an eligible deferred compensation item is payable by a covered expatriate when taxable payment of such item is made.

[74] §877A(b)(1), §877A(b)(2).

[75] §877A(b)(6).

[76] §877A(b)(4)(A), §877A(b)(4)(B).

[77] §877A(b)(5).

[78] Notice 2009-85.

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