

The Current State of Expatriation

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I. INTRODUCTION AND BACKGROUND

Section 301 of the Heroes Earnings Assistance and Relief Tax Act of 2008 (“HEART” or the “Act”)¹ dramatically altered the playing field for individuals who relinquish their U.S. citizenship or terminate their long-term U.S. residence (*i.e.*, U.S. persons who “expatriate”). It did this by adding new sections 877A and 2801 to the Code,² which, respectively, impose “mark-to-market” and “succession tax” regimes on such individuals.

Prior to HEART’s enactment, expatriates generally were subject to a 10-year “alternative tax” regime on U.S.-source income, as defined, that was first introduced by the Foreign Investors Tax Act of 1966 (“FITA”).³ These rules were contained principally in sections 877, 2107 and 2501 of the Code.

In the intervening four plus decades, the alternative tax regime was modified twice, first by the Health Insurance Portability and Accountability Act of 1996⁴ (“HIPAA”) and then by the American Jobs Creation Act of 2004⁵ (“AJCA”). Both of these Acts generally strengthened the income and transfer tax rules applicable to expatriates under the alternative tax regime.

However, despite these enhancements, the U.S. rules applicable to tax expatriation remained the subject of a continuing Congressional debate that began in 1995, when the Clinton administration proposed

¹ Pub. L. No. 110-245 (2008).

² Except as otherwise indicated, all section references are to provisions of the U.S. Internal Revenue Code of 1986 (the “Code”), as amended, and to the Treasury regulations issued thereunder.

³ Pub. L. No. 89-809 (1966).

⁴ Pub. L. No. 104-191 (1996).

⁵ Pub. L. No. 108-357 (2004).

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a somewhat radical “exit tax” regime as part of its fiscal 1996 Budget. The ensuing debate, which included claims calling the exit tax proposal a violation of international human rights comparable to the exit tax imposed on citizens of the former Soviet Union who sought to emigrate,⁶ eventually focused on whether the tax opportunities and perceived abuses arising from expatriation can best be deterred or controlled through the alternative tax regime or whether an exit tax or mark-to-market regime would be more effective.⁷ The enactment of the HEART Act’s changes, which are generally effective from June 17, 2008, when President George W. Bush signed the legislation into law, appears to indicate that, at least for the foreseeable future, the tax consequences of expatriation by U.S. persons will be governed by the mark-to-market and succession tax regimes.

II. EXPATRIATION FOR CITIZENSHIP LAW PURPOSES

Before diving into a brief history of the tax consequences of “expatriation” and a more in-depth explanation of the current rules, it is worth delving into the current meaning of the term for U.S. citizenship law purposes.

In common vernacular, an American living abroad is said to be an “expatriate.” However, as a legal matter, an American citizen “expatriates” only when he or she relinquishes, or otherwise loses, U.S. citizenship. Many Americans consider such an act to be unpatriotic, and in times of war or political turmoil,⁸ that may, indeed, be part of the explanation, but there are many reasons why American citizens expatriate. In recent decades, many have relinquished their U.S. citizenship because they were citizens and residents of foreign countries that do not recognize dual citizenship.⁹

⁶ In fact, the two “exit taxes” had little in common. The tax proposed by the Clinton administration was intended to be levied on America’s wealthiest taxpayers and did not seek to collect the tax as a condition of departure. The Soviet exit tax, in practice, was levied on many of that country’s poorest taxpayers, who sought a better life in Israel or the West. Further, it was required to be paid before emigration would be approved. Finally, it is rumored that the Soviet Government would not accept Russian rubles in payment but required payment to be made only in “hard” Western currencies.

⁷ The “mark-to-market” approach generally has been sponsored by the Senate. Prior to the HEART Act and its immediate 2007 antecedent, the “Defenders of Freedom Tax Relief Act of 2007,” H.R. 3997, 110th Cong., 1st Sess. (Senate Amendment, Dec. 12, 2007), the most recent mark-to-market proposal was contained in the Tax Relief Act of 2005, S. 2020, 109th Cong., 1st Sess. (2005). The provision went to conference in early 2006, but failed to be included in the Tax Increase Prevention and Reconciliation Act of 2005 (“TIPRA”), Pub. L. 109-222 (2006). The language of the Senate’s 2005 bill was substantially identical to that of the Jumpstart Our Business Strength (JOBS) Act, S. 1637, 108th Cong., 2nd Sess. (2004), which vied in a prior conference with the House proposal contained in H.R. 4520, 108th Cong., 2nd Sess. (2004), that was incorporated into the AJCA virtually unchanged.

⁸ See, e.g., Tomas A. Tizon, *Vietnam-Era Activism Echoes Are Heard by U.S. Expatriates*, FT. LAUDERDALE SUN-SENTINEL, Mar. 26, 2005. As many as 50,000 Americans may have migrated to Canada during the Vietnam War. Approximately half are thought to have remained, even after President Carter granted amnesty to draft dodgers in 1977.

⁹ See, e.g., *Dual Citizenship: Dutchmen Grounded*, THE ECONOMIST, Jan. 7, 2012. Many countries that formerly did not recognize dual citizenship, including, e.g., the Philippines and South Korea, now accept it, which seems to be a growing trend. However, many others, including a majority of African nations and Japan and Singapore in Asia, continue not to recognize dual citizenship. Still others try to find a middle ground: India requires emigrants to renounce their nationality of birth but provides them with an “overseas citizenship” that furnishes them with many rights enjoyed by full Indian citizens, but not the right to vote. Beginning in 2012, France requires new citizens to sign an undertaking not to claim allegiance to another country while on French soil, but it does not bar dual citizenship.

Still others are wealthy Americans who have chosen to expatriate to avoid what they perceive as unnecessarily high income or estate taxes or, perhaps, an excess of regulation and reporting.¹⁰

Though relatively few in number, it is these “economic” expatriates whose stories in the national press have at times inflamed Congress to tighten the tax laws pertaining to expatriation and overseas tax avoidance more generally. This phenomena has undoubtedly contributed to the recent spate of expatriations, especially in the case of what is often referred to as “accidental” Americans. These are individuals born and raised outside the United States who, through an accident of birth, are U.S. citizens but who do not identify with the United States and do not wish to be caught up in its offshore tax enforcement initiatives. Nor do they wish information regarding their financial affairs to be routinely exchanged with the U.S. tax authorities pursuant to FATCA reporting.

In order to fully understand the dynamic at work here, it is first necessary to determine who is, and who is not, a U.S. citizen. Citizenship generally can be obtained only in one of two ways: (a) by naturalization, which is an administrative process by which an individual affirmatively seeks to obtain U.S. nationality;¹¹ and (b) by birth in the United States¹² or, in certain limited circumstances, by birth overseas to a parent who is a U.S. citizen. In the case of such births, wherever occurring, citizenship occurs by operation of law, without application or necessary intent by the parents.

It is the circumstance of U.S. citizenship arising from a birth outside the United States that frequently catches people by surprise, resulting in the existence of many persons who simply did not know they were U.S. citizens until their status came to light in connection with an immigration, tax or other similar administrative enquiry. Unlike the case of status arising from birth in the United States, the citizenship rules applicable to births overseas are not widely known. However, for more than seventy years, any person born abroad to two American citizen parents has been a U.S. citizen at birth, without need of application or registration, so long as one parent had residence in the United States at *any* time prior to the child’s birth.¹³ Even if a person born overseas has only one American parent, he may be a U.S. citizen at birth in certain circumstances. The laws have evolved over the years, but since 1986, a person born abroad to one American citizen parent obtains U.S. citizenship at birth if that parent was physically present in the United States for a total of five years prior to the overseas birth. The parent need not have been a U.S. resident for the five years; mere physical presence is sufficient. Additionally, two of the five years spent in the United States must have been after the parent reached the

¹⁰ *See, e.g.*, Karen de Witt, *Some of Rich Find A Passport Lost Is A Fortune Gained*, N.Y. TIMES, Apr. 12, 1995. (Quotes former Treasury Department Assistant Secretary for Tax Policy, Leslie B. Samuels as saying: “If you’ve gotten your riches from America, you should pay your fair share of taxes . . . These expatriates are really like economic Benedict Arnolds.”)

¹¹ As this is a process undertaken voluntarily by an individual, it does not give rise to “accidental” nationality and will not be discussed herein.

¹² Under 8 U.S.C. 1401(a) (and the Fourteenth Amendment), all persons “born in the United States, and subject to the jurisdiction thereof” are American citizens at birth. The sole exception to this rule is that an individual born in the United States to foreign parents having full diplomatic immunity will not be considered a U.S. citizen. Note, however, that a child born in the United States to foreign parents having only “official acts” immunity will be considered a U.S. citizen.

¹³ 8 U.S.C. § 1401(c).

age of 14 years.¹⁴ For foreign births occurring between 1941 and 1986, the American citizen parent was required to reside or be physically present in the United States for a total of 10 years prior to the overseas birth of a child, with five of those years occurring after the parent reached the age of 14 or 16 years.¹⁵ Lastly, from 1934 to 1941, a person born abroad to one American citizen parent received citizenship at birth if that parent was present in the U.S. at *any* time prior to the child's birth.¹⁶ The point to emphasize is that, under current law, generations of unknowing "accidental" Americans may exist.

The U.S. Immigration and Nationality Act ("INA") also establishes the methods by which a U.S. citizen might relinquish citizenship. The INA provides that a U.S. citizen will lose his citizenship by performing certain specified acts voluntarily and with the intention to thereby relinquish U.S. citizenship. Seven acts are considered "expatriating acts" by the INA. They are:

1. Naturalizing in a foreign state after reaching the age of 18;
2. Taking an oath, affirmation, or some other formal declaration of allegiance to a foreign country after reaching the age of 18;
3. Serving in foreign armed forces if the person serves as a commissioned or non-commissioned officer, or that armed force is engaged in hostilities against the U.S.;
4. Accepting a foreign government position after reaching the age of 18 if: (a) the person has or acquires the nationality of that state; or (b) service in that position requires an oath of allegiance;
5. Formally renouncing U.S. nationality before a U.S. diplomatic or consular officer while abroad;
6. Submitting a formal written renunciation of U.S. nationality while in the U.S. during time of war; or
7. Conviction of treason, armed insurrection or similar offense.

A person who commits any of the acts listed above is presumed to have done so voluntarily.¹⁷ That person must also do so with the *specific and contemporaneous* intent to renounce his U.S. citizenship. Until 1990, a person who committed any of the above listed acts was also presumed to have done so with

¹⁴ 8 U.S.C. § 1401(g).

¹⁵ In 1952, the requirements changed from residence to physical presence, and from 16 years of age to 14.

¹⁶ Different rules apply to children born in a U.S. possession, or born to unmarried parents. Suffice it to say that the rules of citizenship are complex and not easily applied to persons born abroad to a U.S. parent in the last 75 years.

¹⁷ 8 U.S.C. § 1481(b).

the intent to renounce his U.S. citizenship.¹⁸ In fact, American consular offices routinely informed U.S. citizens abroad that committing any of these expatriating acts would result in loss of U.S. citizenship. Foreign government officials also frequently advised U.S. citizens who sought employment with a foreign government or to become a member of a professional organization licensed by a foreign government that swearing a required oath of foreign allegiance would relinquish any claims to U.S. citizenship. Many foreign governments also require that a person renounce his U.S. citizenship when swearing an oath of allegiance, as dual citizenship was not or is not permitted in certain instances.

In 1990, the Bureau of Consular Affairs adopted an alternate presumption for three of the expatriating acts detailed in the INA. It is now presumed that a U.S. citizen intends to retain his U.S. nationality even if he naturalizes in a foreign country; takes a routine oath of allegiance; or accepts a non-policy level employment with a foreign government.¹⁹ To turn these actions into an “expatriating act,” a person must “affirmatively assert to a consular officer, after he or she has committed a potentially expatriating act, that it was his or her intent to relinquish U.S. citizenship.”²⁰

At first, the new presumption had a limited retroactive application. The Bureau of Consular Affairs initially gave persons who had presumptively lost their citizenship under the old rules the opportunity to have citizenship “reinstated.” To do so, a person was required to submit a formal claim to the Department of State. Citizenship was reinstated so long as, at the time of the expatriating act, the person had not specified in writing that he intended to relinquish his U.S. citizenship. Since few people did so, and because the presumption was automatic and did not require any formalization, citizenship could easily be retroactively reinstated.²¹ The INA no longer requires a written request for retroactive reinstatement of U.S. citizenship. In fact, the INA now requires a person who committed an expatriating act after 1961 to establish, by a preponderance of the evidence, that he intended to relinquish his citizenship at that time. If the person traveled on a U.S. passport, voted, paid U.S. taxes, or otherwise registered a child as a U.S. citizen after the potential “expatriating act” occurred, that person could not claim he contemporaneously intended to relinquish his citizenship.

Whether done so informally prior to 1990, or in writing after 1990, scholars universally agree that, prior to 1996, committing an “expatriating act” established the expatriation date for tax purposes as well.²²

¹⁸ See Bureau of Consular Affairs, Public Notice 2383, 61 Fed. Reg. 29,651 (June 12, 1996).

¹⁹ 22 C.F.R. § 50.30(a).

²⁰ 22 C.F.R. § 50.40(a).

²¹ Bureau of Consular Affairs, Public Notice 2383, note 18, *supra*.

²² See generally Joint Committee on Taxation, *Issues Presented by Proposals to Modify the Tax Treatment of Expatriation Pursuant to Public Law 104-7*, JCS – 17-95 No 6, 1995 WL 17828071 (I.R.S.). (June 1, 1995).

III. EXPATRIATION FOR TAX LAW PURPOSES: PRIOR LAW

A. FITA: Original Provision

Section 877, as originally added to the Code by FITA, generally imposed tax, calculated at the higher of the rates applicable to nonresident aliens who were not former U.S. citizens or at the rates applicable to U.S. citizens, on the U.S. source income of former U.S. citizens who expatriated for a principal purpose of tax avoidance for 10 years following expatriation. Thus, it was necessary to make two calculations of tax to determine which led to a higher tax charge and, hence, the method became known as the “alternative tax” regime. Congress’s reason for introducing the provision was because FITA generally eliminated progressive taxation of the U.S. income of nonresident aliens not effectively connected to a trade or business, and Congress did not wish to encourage individuals to surrender their citizenship and move abroad.²³

U.S. source income, for this purpose, generally had its usual meaning under the Code but was defined to include gains from the sale or exchange of property (other than stock or debt obligations) located in the U.S. as well as gains from the sale or exchange of stock or debt obligations issued by domestic corporations or other U.S. persons. In addition, gains from the sale or exchange of property having a basis determined by reference to such property, in whole or part, was also treated as U.S. source income for the 10-year period in order to catch gains from non-U.S. property acquired in nonrecognition transactions.

Under section 2107, also added by FITA, if an expatriate subject to the alternative tax regime of section 877 died within the 10 years following expatriation, then his U.S. estate included, in addition to U.S. situs property generally subject to estate tax in the case of a nonresident alien decedent, shares held at the date of death comprising a 10 percent or greater direct or indirect interest²⁴ in a foreign corporation considered owned more than 50 percent by the decedent, directly, indirectly or constructively,²⁵ in proportion to the foreign corporation’s underlying U.S. situated property. In addition, under section 2501(a)(3), as amended by FITA, the normal gift tax exclusion for intangible property of a nonresident alien did not apply in the case of transfers made within 10 years of expatriation by an expatriate subject to section 877’s alternative tax regime. Thus, such an individual was subject to gift tax on transfers of U.S. situs intangible property during the 10-year post-expatriation period.

For purposes of both the income and transfer tax provisions, if the IRS was able to show that it was reasonable to believe that a former U.S. citizen expatriated with a principal purpose of tax avoidance, the burden of proof on the issue was thrown back on the expatriate or, in the case of section 2107, his executor or personal representative.

²³ See, e.g., S. Rep. No. 89-1707 (89th Cong., 2nd Sess., 1966).

²⁴ Within the meaning of § 958(a).

²⁵ Within the meaning of §§ 958(a) and (b).

Prior to the renewed interest in tax expatriation that commenced with the Clinton administration's exit tax proposal in February 1995, there were only two significant reported cases involving section 877 and its related expatriation provisions. In *Kronenberg v. Commissioner*,²⁶ the IRS prevailed in its claim that the taxpayer had a principal tax avoidance motive where he expatriated two days before receiving a large corporate liquidating distribution. However, in *Furstenberg v. Commissioner*,²⁷ the taxpayer was able to demonstrate to the satisfaction of the Tax Court that tax avoidance was not the taxpayer's principal motivation where she had "lifelong ties to Europe" and had married a foreign aristocrat, notwithstanding that she also sought tax advice prior to expatriation. The importance of the decision lies in the fact that the Tax Court held that, to fall within the ambit of section 877 and its related provisions, a taxpayer's tax avoidance motive was required to be not just an important purpose of the expatriation but, indeed, "first in importance." It is likely that the IRS failed to bring many cases under section 877 because of the difficulties of proving a taxpayer's principal motivation within the meaning of the *Furstenberg* decision.

B. HIPAA: 1996 Modifications

The debate launched by the Clinton administration's 1995 exit tax proposal ultimately resulted in substantial changes to the tax expatriation rules but not in the enactment of an exit tax. Shortly after legislation incorporating the administration's proposal appeared, House Ways and Means Committee Chairman Bill Archer proposed legislation that generally retained, but significantly strengthened, the existing 10-year alternative tax regime. In part because Archer's proposal was "scored" by the staff of the Joint Committee on Taxation ("JCT") to raise almost four times the revenue that the exit tax proposal was scored to raise and also likely, in part, because the exit tax's proposal to tax income and gains not yet realized was considered to be a somewhat radical departure from existing U.S. tax policy, Archer's proposal carried the day and was enacted as part of HIPAA in 1996.²⁸

HIPAA, which was generally applicable to expatriations occurring on or after February 6, 1995, made a number of significant changes to the alternative tax regime of section 877. First and foremost, the category of "covered expatriates" was enlarged to include "long-term resident aliens," defined as "lawful permanent residents" (*i.e.*, green card holders) resident for tax purposes in eight of the prior 15 taxable years.²⁹ Expatriation was considered to have occurred at the date prescribed

²⁶ 64 T.C. 428 (1975).

²⁷ 83 T.C. 755 (1984).

²⁸ In this regard, it is worth noting—and somewhat ironic—that § 2801, the HEART Act's succession tax provision (and likely the provision scored to raise most of the \$411 million estimated to be raised under the new expatriation changes over the next 10 years), was a direct result of the scoring of the original exit tax proposal. The succession tax provision—which is likely the most controversial part of the HEART Act changes—was added to the Clinton administration's exit tax proposal in 1996 by the Senate Finance Committee in order to compete with the Archer proposal that was ultimately enacted as part of HIPAA.

²⁹ HIPAA § 501(f)(1), adding new § 877(e).

for citizens under nationality law (*i.e.*, as of the date of an expatriating act)³⁰ and for long-term residents under the tax residence rules.³¹

In order to avoid problems of proof raised by the *Furstenberg* decision, HIPAA also introduced the notion of “presumptive tax avoidance purpose” based on certain economic factors pertaining to a taxpayer. Thus, tax avoidance motive was presumed if an individual’s net average U.S. income tax liability in the five years preceding expatriation was \$100,000 or more (“income tax liability test”) or if his net worth at expatriation exceeded \$500,000 (“net worth test”).³² Exceptions were available for certain categories of individuals if they obtained a ruling from the IRS that tax avoidance was not a principal purpose of their expatriation.³³ In cases in which the Service was unable to make a definitive determination, it was authorized to issue a limited ruling that lifted the statutory presumption, but left the taxpayer subject to subsequent examination, if the taxpayer’s ruling request was considered to be complete and made in good faith.³⁴

HIPAA also significantly enlarged the categories of income considered to be U.S. source income. Thus, for example, income and gains derived from former controlled foreign corporations (“CFCs”) considered controlled by an expatriate within two years prior to expatriation were considered to be from U.S. sources if realized within the 10-year post-expatriation period.³⁵ Further, certain gains arising from otherwise non-taxable exchanges and “other similar occurrences” that resulted in a change of future income source from U.S. to non-U.S. were required to be recognized as U.S.

³⁰ This was subject to an exception for citizens expatriating after February 5, 1994, who had not furnished a statement confirming their loss of citizenship to the Department of State (“DOS”) prior to February 6, 1995, the general effective date of the HIPAA expatriation changes. HIPAA, § 511(g). Such individuals remained subject to § 877 for 10 years following the furnishing of such statement.

³¹ Section 877(e) refers to § 7701(b)(6) for purposes of determining when an individual ceases to be a lawful permanent resident. That section provides that an individual granted lawful permanent resident status will remain a tax resident until such status has been revoked or administratively or judicially determined to have been abandoned. The regulations, at Reg. § 301.7701(b)-1(b), state that abandonment will be considered to occur as of the date an individual provides written notice of such action to the Immigration and Naturalization Service (“INS”) or a consular officer, or the INS (or a consular officer) issues an order of revocation or abandonment. [The role of the INS has now been taken over by the U.S. Citizen and Immigration Services (“USCIS”), an agency of the Department of Homeland Security (“DHS”).] Note that, in the latter case, it is the *date of issuance* that marks cessation of residence and not the prior *effective date* of such an order.

³² HIPAA § 511(a), amending § 877(a)(2). Both figures were indexed for post-1996 years. For expatriations occurring in 2004, the year that the AJCA modified the expatriation rules, the figures were \$124,000 and \$622,000, respectively.

³³ HIPAA § 511(b)(1), adding § 877(c)(2). That provision set out the categories of expatriating *citizens* who could apply for a ruling. In Notice 97-19, 1997-1 C.B. 394 (the initial expatriation guidance that, *inter alia*, laid out the requirements of the ruling procedure), the IRS established substantially parallel classes of long-term residents that could apply for a ruling. These categories were modified somewhat in Notice 98-34, 1998-2 C.B. 29.

³⁴ The IRS established the “complete good faith” ruling in Notice 98-34, note 33, *supra*. The 2003 JCT Report, note 44, *infra*, questioned whether this limited ruling position was supported by HIPAA’s legislative history, and the IRS temporarily ceased issuing such rulings in 2003. When AJCA was enacted in October 2004 and it became clear that the expatriation ruling program would henceforth be eliminated, the IRS re-commenced issuing “complete good faith” rulings in order to finish work on its backlog of suspended rulings.

³⁵ HIPAA § 511(b)(1), adding new § 877(d)(1)(C). Such income was treated as U.S. source to the extent of the former CFC’s earnings and profits attributable to an expatriate’s stock accumulated while the expatriate met the control test.

source income.³⁶ In addition, if during the 10-year period following expatriation a taxpayer contributed property giving rise to U.S. source income to a foreign corporation that, had the taxpayer remained a U.S. person, would have been a CFC, then the foreign corporation was disregarded and the expatriate was considered to receive the underlying U.S. source income directly.³⁷

HIPAA also introduced limited information reporting for individuals who expatriate in order to assist the IRS to administer the provisions. An expatriating U.S. citizen was required to provide an information statement, including a statement of net worth, to the DOS when disclosing an expatriating act; the DOS routinely forwarded these information returns to the IRS. A departing long-term resident was required to provide the same information statement directly to the IRS with his tax return for the year of expatriation.³⁸ Further, an expatriate was required to file a U.S. tax return, including a worldwide income statement, for any of the 10 years following expatriation in which he had U.S. source income subject to tax.³⁹ In addition, HIPAA required that the DOS furnish copies of the Certificate of Loss of Nationality (“CLN”) of expatriating citizens to the IRS and that names of such persons be published quarterly in the *Federal Register*. The immigration authorities were also required to furnish the names of all persons whose green cards were revoked or considered to have been administratively abandoned.⁴⁰

Finally, the legislative history to the 1996 HIPAA expatriation changes indicates that the rules were intended to override inconsistent provisions of pre-existing income and estate and gift tax treaties for 10 years following enactment, or until August 21, 2006.⁴¹ Since enactment of the 1996 changes, Treasury generally has added language excluding former U.S. citizens and long-term residents from treaty benefit to the “saving clause” of new or re-negotiated treaties and protocols.⁴²

C. AJCA: 2004 Modifications

³⁶ *Id.*, adding new § 877(d)(2).

³⁷ *Id.*, adding new § 877(d)(4).

³⁸ HIPAA § 512(a), adding new § 6039G. This statement was provided on Form 8854, “Expatriation Information Statement.”

³⁹ This requirement was added by Notice 97-19, note 33, *supra*. The Notice states that a failure to include a worldwide income statement will cause a return not to be considered a true and accurate return. The consequence of that, if a taxpayer’s return is later examined, is a loss of entitlement to deductions and credits. *See generally* Reg. § 1.874-1.

⁴⁰ HIPAA § 512(a), adding new § 6039G(d).

⁴¹ H. Rep. No. 104-145, at 30 (1995); H. Rep. No. 104-496, at 155 (1996). However, several treaties negotiated and signed before, but ratified after, HIPAA’s date of enactment do not preserve the right of the U.S. to tax former long-term residents otherwise subject to § 877. *See, e.g.*, the income tax treaties with Austria (1996), Ireland (1997), Luxembourg (1996) and Switzerland (1996). Thus, the intended treaty override has not been effective to bar the use of these treaties by former long-term residents emigrating to these countries.

⁴² *See, e.g.*, the post-August 21, 1996 treaties with Thailand and Venezuela, the new treaties with the United Kingdom, Japan and Belgium, and the new protocols with Australia and Mexico, each of which reserves the right of the U.S. to tax former long-term residents subject to § 877. *See also* the December 2000 protocol to the estate and gift tax treaty with Germany, in which the “saving clause” was amended to preserve the right of the U.S. to tax the gifts and estates of former long-term residents for 10 years following expatriation. Note that Germany, which also has a 10-year expatriation provision under domestic law, receives a reciprocal treaty benefit.

The 2004 AJCA generally adopted recommendations made by the staff of the JCT in a 2003 report⁴³ (“2003 JCT Report”) that was spawned by the expatriation debate.⁴⁴ After a thorough — and lengthy⁴⁵ — review of the effectiveness of the 1996 HIPAA changes, the JCT staff concluded that there had been little, if any, enforcement of the expatriation rules by the responsible agencies, principally the IRS. The staff also noted certain defects inherent in the 1996 HIPAA regime. However, rather than suggest a fundamental change to the expatriation rules (*e.g.*, the mark-to-market regime), the JCT Report made a number of specific recommendations within the framework of the existing regime that were generally intended to make the rules easier to administer and enforce.

Thus, the AJCA generally left the 10-year alternative tax regime on U.S. source income in place but made a number of important changes. In the first place, the AJCA removed the requirement that an individual have a principal tax avoidance purpose and eliminated the ruling procedure. The income tax liability test threshold was changed only slightly to “greater than” \$124,000 (indexed annually beginning in 2005),⁴⁶ but the net worth test standard was increased substantially to \$2,000,000 (not indexed).⁴⁷ In addition, the AJCA added a third test, providing that an expatriate certify that he has fully complied with all U.S. tax requirements for the five years preceding expatriation.⁴⁸ Exceptions to the provision were limited to certain dual nationals at birth having no “substantial contacts”⁴⁹ with the U.S. and minors expatriating before age 18 ½, who were born in the U.S. to non-citizen parents and who have not been in the U.S. more than 30 days in any of the 10 years preceding expatriation.

⁴³ Joint Committee on Taxation, *Review of the Present-Law Tax and Immigration Treatment of Relinquishment of Citizenship and Termination of Long-Term Residency* (JCS-2-03), February 2003, available at www.gpo.gov/fdsys/pkg/GPO-CPRT-JCS-2-03.

⁴⁴ The JCT Report was undertaken in response to a 1999 request by then Ways and Means Committee Chairman Bill Archer (R-TX) to evaluate the 1996 expatriation changes, which Archer had sponsored. Archer was responding to renewed calls by House Democrats (including, notably, the current Ways and Means Committee Chairman, Charles Rangel (D-NY)) to replace the HIPAA changes with a mark-to-market regime based largely on the original 1995 exit tax proposal of the Clinton Administration.

⁴⁵ The JCT Report was originally due in May 2000, and much work had been undertaken to meet the original due date, including a detailed report prepared by the Government Accounting Office (“GAO”) in May 2000. Why the JCT Report was not issued then is unclear. However, when the Congressional Democrats again clamored for its release during 2002, considerable additional work had to be done to bring the information previously compiled up to date.

⁴⁶ The income tax liability test threshold for individuals expatriating in 2008, the year that the HEART Act changes supplanted those made by the AJCA, was \$139,000. Rev. Proc. 2007-66, 2007-2 C.B. 970 (Oct. 18, 2007), Sec. 3.29. The current income tax liability test threshold for individuals expatriating in 2014, is \$157,000. Rev. Proc. 2013-35, 2013-2 C.B. 537 (Nov. 1, 2013).

⁴⁷ AJCA § 804(a)(1), amending § 877(a)(2).

⁴⁸ AJCA § 804(a)(1), adding new § 877(a)(2)(C). The AJCA is silent as to when this certification must be made, but the requirement is now satisfied by completion and filing of Form 8854. The form’s instructions indicate that an expatriating individual will be subject to tax under § 877 if he has not complied with his tax obligations, regardless of whether he meets the income tax liability or net worth thresholds. In Notice 2005-36, 2005-1 C.B. 1007 (Apr. 22, 2005), the IRS granted relief from the potentially prejudicial effect of the retroactive statutory change requiring certification of tax compliance for five years preceding expatriation by allowing individuals who expatriated after June 3, 2004, to treat the date they provided notice of expatriation to the DOS or DHS, respectively, as their expatriation date, provided that such persons filed a revised Form 8854 by June 15, 2005.

⁴⁹ Under new § 877(c)(2)(B), added by AJCA § 804(a)(1), an individual is considered to have “substantial contacts” with the U.S. if he ever held a U.S. passport, was a U.S. tax resident within the meaning of § 7701(b), or spent more than 30 days in the U.S. in any of the 10 years preceding expatriation. This exception is available only to individuals who were dual citizens at birth and remain a citizen of the other country.

The AJCA also amended the expatriation gift tax rules to add a provision that parallels the expatriation estate tax rule of section 2107 and imposes tax on gifts of shares of a foreign corporation considered to be controlled by the expatriate to the extent of such foreign corporation's underlying U.S. property during the 10-year post-expatriation period.⁵⁰

In addition, the AJCA added a provision for determining when an individual is considered to have expatriated for *tax* purposes. New section 7701(n) provided that an individual will continue to be treated as a U.S. citizen or long-term resident until he both gives notice of his expatriation to the DOS or DHS, respectively, *and* furnishes an information statement required by amended section 6039G.⁵¹ To give effect to this provision, the instructions to revised Form 8854 set out in some detail the specific acts by which U.S. citizenship and long-term residence may be terminated. The instructions then state very clearly that, notwithstanding the occurrence of these acts, the obligation to file U.S. tax returns and report worldwide income does not terminate until the later to occur of giving notice of these acts to the appropriate agency or filing Form 8854, which expressly has no filing due date for this purpose.⁵²

Further, the AJCA strengthened the information reporting rules by requiring that an expatriate file an *annual* information statement for each of the 10 post-expatriation years regardless of whether the expatriate had any U.S. source taxable income for such year.⁵³ The annual return requirement

⁵⁰ AJCA § 804(d)(2), adding new § 2501(a)(5). As with § 2107, pertaining to the imposition of U.S. estate tax on shares of a closely-held foreign corporation owning U.S. property, new § 2501(a)(3)(B), added by AJCA § 804(d)(1), affords a tax credit for foreign gift taxes imposed on a transfer.

⁵¹ AJCA § 804(b), adding new § 7701(n). Section 6039G formerly required only that an expatriating citizen provide an initial information statement on the occurrence of the earliest of several events confirming the expatriating act. *See* former § 6039G(a), (c). The events were: (a) formal renunciation of nationality before a diplomatic or consular officer; (b) furnishing a statement of voluntary relinquishment confirming a prior event of expatriation; (c) issuance of a certificate of loss of nationality (“CLN”); or (d) a U.S. court’s cancellation of a naturalized citizen’s certificate of nationality. A former long-term resident was not required to submit the initial information statement until filing his tax return for the year of expatriation. *See* former § 6039G(f). The potential prejudice of this retroactive change to individuals expatriating after June 3, 2004, and before the issuance of guidance (especially to former long-term residents), was also relieved by the issuance of Notice 2005-36. *See* note 48, *supra*. Note that the interplay between § 7701(n) and the requirement that an individual certify compliance with all tax obligations for the five years preceding expatriation, as set forth in Form 8854, raises a potentially interesting issue of tax compliance standards. What level of compliance is sufficient to permit an individual (possibly a long-term non-filer making a voluntary disclosure) conclusively to expatriate for tax purposes? Presumably, the normal compliance standards as set forth in, *e.g.*, *Beard v. Comm’r*, 82 T.C. 766 (1984), *aff’d*, 793 F.2d 139 (6th Cir. 1986) will apply. A higher standard would make the statutory scheme unworkable.

⁵² Note that, as originally enacted, § 7701(n) also unintentionally appeared to affect the residency termination of aliens who are not long-term residents within the ambit of § 877. This is because it required that *all* aliens terminating U.S. residence status provide notice of termination to the DHS. Although such notice is frequently provided by departing green card holders on DHS Form I-407, no comparable form is required to be filed by substantial presence aliens who terminate residence. This error was clarified by a technical correction contained in the Gulf Opportunity Zone Act of 2005 (“GOZA”), Pub. L. 109-135, § 403(v)(2).

⁵³ AJCA § 804(e), amending § 6039G(a).

is also satisfied by filing revised Form 8854, which requires that a current balance sheet and worldwide income statement be prepared for each year.⁵⁴

Finally, the AJCA added a new short-term residence rule to the expatriation tax provisions.⁵⁵ Under it, an individual otherwise subject to the tax expatriation rules will be subject to income and transfer taxes on his *worldwide* income and property as a U.S. citizen or resident during any of the 10 post-expatriation years in which he is physically present in the U.S. for more than 30 days. This was the most controversial provision of the expatriation changes made by the AJCA and reflects a Congressional view that, if individuals wish to leave the U.S. taxing jurisdiction, they should “really leave” and should not be allowed to benefit from the generous provisions of section 7701(b) that generally permit an alien an average of 121 U.S. days per year without becoming a tax resident. A limited exception of up to 30 additional days of U.S. presence is permitted for certain expatriates performing services in the U.S. for an unrelated employer.⁵⁶

IV. OMISSIONS AND TECHNICAL ISSUES UNDER PRIOR LAW

Although the HEART Act repeals the alternative tax regime prospectively,⁵⁷ and thereby effectively moots many of the issues under prior law, because the prior rules continue to apply to individuals who expatriated under them and are still in their 10-year post-expatriation period, it remains necessary to understand prior law.

The issue most likely to come up under prior law concerns whether and when tax expatriation has occurred, especially in the case of long-term residents seeking to tie-break their residence to a foreign country for tax purposes while holding on to their green cards for immigration purposes. This is due to the dual notice requirements established by former section 7701(n) in order to complete tax expatriation and the uncertain relationship between that section, section 877(e)(1) and the effective date of a residence tie-breaker claim under a tax treaty—is the claim effective when actually filed, or does it relate back to the end of the taxable year preceding the year for which the claim is made?

Another possible issue that could arise under prior law concerns whether and when the tax treaty override of the HIPAA changes ceased to apply. The legislative history to the AJCA makes no refer-

⁵⁴ Annual information reporting is done on Form 8854, Part III. If an expatriate has taxable U.S. source income and is required to file Form 1040NR for the year, Form 8854 should be attached to it, and a second copy of the form filed with the IRS at Bensalem, PA. If an expatriate is not required to file a tax return for the year, Form 8854 must be filed only with the IRS at Bensalem, PA.

⁵⁵ AJCA § 804(c), adding new § 877(g).

⁵⁶ The classes of individuals potentially entitled to this exception include only expatriates becoming a citizen or resident fully subject to tax of a country where they, their spouse or either of their parents were born or expatriates who have not spent more than 30 days in the U.S. in any of the 10 years preceding expatriation. For this purpose, days of presence due to a medical condition arising while an individual is in the U.S. or while an individual is an “exempt individual” are disregarded. The exclusion of days as an “exempt individual” was another technical “clarification” of the AJCA rules by GOZA. *See* GOZA § 403(v)(1).

⁵⁷ HEART Act § 301(d).

ence to the issue of treaty override. Presumably, since section 877, the fundamental taxing provision of the alternative tax regime, was neither materially amended nor re-enacted by the AJCA, the 1996 treaty override provision remained intact only until August 21, 2006, the date that was 10 years after the HIPAA changes were enacted.

V. HEART ACT CHANGES

As previously indicated, the dramatic changes to the expatriation tax regime made by the HEART Act include both a mark-to-market tax regime to replace the former 10-year alternative tax regime on U.S. source income⁵⁸ and a succession tax regime on gifts and bequests received by U.S. persons from a covered expatriate.⁵⁹ The latter provision, which is perhaps the most dramatic change made by the HEART Act, is scored to raise most of the revenue that the new legislation is expected to bring in but, as yet, has not been implemented due to the Government's failure to issue any guidance.

A. Section 877A: Mark-to-Market Tax

New section 877A replaces the former 10-year alternative tax regime on U.S. source income of covered expatriates with a mark-to-market tax on gains in excess of \$600,000 (indexed for years after 2008; for 2014, \$680,000⁶⁰) from a deemed sale of an individual's worldwide assets on the day prior to the individual's expatriation date. As under prior law, the term "covered expatriate" includes individuals who renounce or relinquish U.S. nationality or terminate their status as long-term lawful permanent residents (*i.e.*, green card holders for at least eight of the 15 taxable years preceding expatriation) and whose average net income tax liability for the five years preceding expatriation exceeds \$124,000 indexed for inflation (for persons expatriating in 2014, \$157,000⁶¹) or whose net worth at the date of expatriation equals or exceeds \$2 million (not indexed). Certain dual nationals at birth who have not met § 7701(b)'s "substantial presence" residence test for more than 10 of the 15 taxable years ending with the year of expatriation and individuals losing U.S. citizenship before age 18 ½ who have not met the substantial presence test for more than 10 years are excepted.

Under the provision, a covered expatriate can irrevocably elect, on an asset by asset basis, to defer the payment of the mark-to-market tax attributable to an asset until the due date of the return for the year in which such property is sold or exchanged. (Guidance will be provided for dispositions in non-recognition transactions.) In order to make the election, a taxpayer must provide "adequate

⁵⁸ HEART Act § 301(a), adding new § 877A..

⁵⁹ HEART Act § 301(b), adding new § 2801.

⁶⁰ Rev. Proc. 2013-35, note 46, *supra*, at § 3.30. For individuals expatriating in 2014, the comparable gain exclusion figure was \$680,000. The annual gain exclusion figure is available in the Revenue Procedure that provides the annual inflation adjustments for each year, generally issued in October of each year for the succeeding tax year, or in Form 8854, applicable for a specific year. These forms are available at www.irs.gov/forms-&-pubs.

⁶¹ Rev. Proc. 2013-35, note 46, *supra*, at § 3.29. Form 8854, the "Initial and Annual Expatriation Statement," now provides the indexed income tax liability amounts for all tax years since 2004.

security” (including a bond conditioned on the payment of tax and interest and meeting the conditions set forth in § 6325 or other security acceptable to the IRS) and irrevocably waive the benefit of any U.S. tax treaty that would preclude assessment of the tax. The election will terminate as to any property not sold or exchanged when a taxpayer dies or when the IRS determines that security is no longer adequate. Interest accrues on the deferred tax at the normal underpayment rate.

Certain property, including deferred compensation items, “specified tax deferred accounts” (i.e., an individual retirement account and certain education and health savings accounts), and interests in nongrantor trusts are excepted from application of the mark-to-market tax.

“Deferred compensation items” include any interest in a qualified plan or other arrangement described in § 219(g)(5), interests in foreign pension, retirement or similar plans or arrangements, any item of deferred compensation, and interests in property to be received in connection with the performance of services to the extent not previously taken into account in accordance with § 83. Deferred compensation attributable to services performed outside the U.S. while a covered expatriate was not a U.S. citizen or resident is not included.

Tax on the payment of an “eligible deferred compensation item” is deferred until a covered expatriate receives a taxable payment (i.e., a payment that would be taxable if the individual were a U.S. person), at which time tax is collected by means of a 30 percent withholding tax under rules similar to those of subchapter B of Chapter 3 (i.e., section 1441 and following). However, no withholding tax is due under section 1441 or chapter 24 (i.e., wage withholding under section 3401 and following). Notwithstanding this, the tax is considered payable under section 871. An item is considered to be eligible deferred compensation if either the payor is a U.S. person or a foreign person who elects to be treated as a U.S. person for this purpose (and meets requirements to be established by the IRS), provided that the covered expatriate notifies the payor of his status and makes an irrevocable waiver of any right to claim benefit under a U.S. income tax treaty.

In the case of deferred compensation items that are not eligible deferred compensation, an amount equal to the present value of an individual’s account is treated as received and taxable on the day before expatriation. No early distribution tax is assessed, and appropriate adjustments will be made to subsequent distributions to reflect the prior taxation.

A covered expatriate’s interest in a “specified tax deferred account” is treated as distributed on the day before expatriation. Again, no early distribution tax is assessed, and appropriate adjustments will be made to subsequent distributions to reflect such treatment.

The new law provides that a trustee shall withhold tax at 30 percent from the taxable portion of a direct or indirect distribution from a nongrantor trust to a covered expatriate. Again, the “taxable portion” is that part of a distribution that would be taxable if the expatriate remained a U.S. person. If a trust distributes appreciated property, gain is recognized to the trust as if it had sold the property to the expatriate. The provision does not distinguish between domestic and foreign

trusts or U.S. or foreign trustees. Nor does it distinguish a nongrantor trust from a trust that is considered a grantor trust *as to a person other than the expatriate*. Thus, it imposes a withholding tax on post-expatriation taxable distributions to a covered expatriate from any trust of which the expatriate was a beneficiary immediately prior to expatriation to the extent that *the expatriate* was not also considered an owner, in whole or part, of such trust under the grantor trust rules. The fact that another person may have been treated as owner of the trust immediately prior to expatriation is irrelevant for this purpose. Withholding tax rules similar to those applicable to payments of eligible deferred compensation items are applied.

“Expatriation date” is defined to mean the date that a citizen relinquishes U.S. nationality or a long-term resident alien ceases to be a lawful permanent resident (*i.e.*, green card holder). Section 7701(n), added to the Code by the AJCA, which provided that a covered expatriate is treated as a U.S. person for tax purposes until the later of the date he gives notice to the IRS on Form 8854 or to whichever of the DOS or the DHS is relevant, is repealed. However, section 7701(a)(50), added by the HEART Act, provides that an individual shall not cease to be treated as a U.S. citizen before the date on which the individual’s citizenship is considered relinquished under section 877A(g)(4). That section provides that a citizen is considered to have relinquished U.S. citizenship at the earliest of the dates: (a) he renounces his nationality before a U.S. diplomatic or consular officer; (b) he provides a statement of voluntary relinquishment to the DOS; (c) the DOS issues the individual a Certificate of Loss of Nationality (“CLN”); or (d) a U.S. court cancels a naturalized citizen’s certificate of naturalization.

Section 7701(b)(6), which generally defines who is a “lawful permanent resident,” is amended to provide that an individual ceases to be a lawful permanent resident if he: (a) commences to be treated as a resident of a foreign country under the provisions of an applicable tax treaty with the U.S.; (b) does not waive tax benefits available under the treaty; and (c) notifies the IRS of the commencement of such treatment (*e.g.*, by claiming treaty benefits on a Form 8833 filed with his U.S. income tax return on Form 1040NR).⁶²

Finally, for purposes of the mark-to-market tax, all nonrecognition deferrals and extensions of time for the payment of tax are considered terminated as of the day before expatriation. In addition, solely for purposes of calculating the mark-to-market tax, the basis of property held when an

⁶² These provisions, added as “conforming amendments” by HEART Act § 301(c)(2), may eliminate some of the confusion caused under prior law by the interaction of § 877(e)(1) and § 7701(n). The former section defined the act of tie-breaking residence to a foreign country under an applicable tax treaty as an expatriating act, but the latter section provided that a long-term resident had not expatriated until he notified *both* the IRS and the DHS. The latter notice frequently wasn’t given by an individual who wanted to compute his U.S. tax liability as a nonresident alien but, at the same time, wished to retain his lawful permanent resident status for immigration purposes. Note, however, that the termination of “lawful permanent resident” status described above, which is set forth in the flush language at the end of § 7701(b)(6), technically applies only to persons expatriating under the HEART Act changes, pursuant to the statute’s effective date provisions. Thus, there could still be issues pertaining to the effective date of a treaty tie-breaker claim under prior law that must be addressed by guidance provided by Treasury and the IRS. However, as a matter of statutory construction, if a statute is clear on its face, a taxpayer is not required to look to the effective date provisions found in the statute’s legislative history. As a result, § 7701(b)(6) likely can be applied as it appears.

individual first became a U.S. resident for tax purposes and still held when he expatriates will be stepped up (but not down) to its fair market value on such date. Such an individual can irrevocably elect not to have this basis rule apply.

B. Section 2801: Succession Tax

New section 2801 imposes a tax, at the highest applicable gift or estate tax rates, on the receipt by a U.S. person of a “covered gift or bequest,” which is defined as a direct or indirect gift or bequest from a “covered expatriate” within the meaning of section 877A. Thus, the new succession (or inheritance) tax only applies to gifts and bequests from individuals who expatriate on or after June 17, 2008, the effective date of the new mark-to-market regime. The tax is assessed on, and intended to be paid by, the recipient of a covered gift or bequest. The succession tax will be reduced by any foreign gift or estate tax paid.

The new succession tax does not apply to gifts covered by the annual exclusion of section 2503(b), currently \$14,000 per donee per annum.⁶³ Nor does it apply to gifts or bequests entitled to a marital or charitable deduction. Thus, for example, gifts or bequests to a U.S. citizen spouse will be exempt from the tax, while gifts to an alien spouse will be limited to the amount allowed by sections 2503(b) and 2523(i), currently \$145,000 per annum,⁶⁴ and bequests to an alien spouse will benefit from a marital deduction if left to a qualified domestic trust, per sections 2056(d) and 2056A. The succession tax also will not apply to a taxable gift shown on a timely filed gift tax return or to property included in the estate of a covered expatriate that is shown on a timely filed estate tax return. Finally, from the interplay of relevant provisions of sections 877A and 2801, it appears that the succession tax also will not apply to gifts and bequests made by a covered expatriate during any period following expatriation when the expatriate is again subject to tax as a citizen or resident of the United States (and, therefore, not treated as a “covered expatriate”).⁶⁵

Section 2801 creates a special rule for covered gifts and bequests made to trusts. In the case of such a transfer to a domestic trust, the succession tax will be assessed on and paid by the trust. In the case of a covered gift or bequest made to a foreign trust, the succession tax will apply to the receipt by a U.S. person of a distribution, whether of income or capital, attributable to a transfer from a covered expatriate. A foreign trust is entitled to elect to be treated as a domestic trust solely for purposes of section 2801. Finally, in calculating his *income tax* liability on the receipt of a taxable distribution from a foreign trust attributable to a covered gift or bequest, a U.S. recipient will be entitled to deduct, under section 164, the amount of tax imposed under section 2801 that is attributable to gross income of the recipient but not to the capital portion of the distribution.

⁶³ Rev. Proc. 2013-35, note 46, *supra*, at § 3.34(1).

⁶⁴ *Id.* at § 3.34(2).

⁶⁵ See §§ 877A(g)(1)(C) and 2801(e)(1)(A).

VI. GUIDANCE UNDER THE HEART ACT: NOTICE 2009-85

There are many issues that need to be addressed in public guidance under the expatriation tax provisions of the HEART Act. After a hiatus of some months, Treasury and the IRS issued Notice 2009-85 (the “2009 Notice” or “Notice”),⁶⁶ which provides guidance for individuals subject to section 877A. The 2009 Notice does not expressly provide any new guidance regarding section 877. Nor does the Notice provide any guidance under section 2801, other than to confirm that satisfaction of the reporting and tax obligations for individuals receiving covered gifts or bequests is deferred until further guidance is provided. Additional guidance regarding section 877A can also be found in the substantially revised Form 8854 that was published most recently in December 2012 and Form W-8CE that was revised most recently in July 2012.⁶⁷

A. Mark-to-Market Tax

Regarding the operative provisions of the HEART Act’s central “mark-to-market” tax, the 2009 Notice generally confirms the statute’s principles in a straightforward manner, clarifying and explaining those provisions most requiring it. In discussing the definition of “covered expatriate,” the Notice confirms that certification of five-year tax compliance (the “certification test”) must be made on Form 8854 and filed on or before the due date of the taxpayer’s tax return for the year of expatriation. The Notice also confirms that all U.S. citizens who relinquish citizenship and all long-term residents who cease to be lawful permanent residents within the meaning of amended section 7701(b)(6) will be treated as covered expatriates if they fail to certify five-year tax compliance, notwithstanding that they fail to meet the income tax liability or net worth tests at the date of expatriation.

The Notice parrots the statute’s language regarding the exceptions to covered expatriate status for certain dual nationals at birth and individuals under age 18½ at the date of expatriation, but no effort is given to explain how the substantial presence test of section 7701(b)(3) should be applied to an expatriating citizen to determine if he was a U.S. resident in more than 10 of the 15 years preceding the year of expatriation. For example, does such an individual have the benefit of the “closer connection” exception to residence?⁶⁸

Importantly, the 2009 Notice confirms that the date of cessation of lawful permanent residence by a long-term resident, who “tie-breaks” his residence to a foreign country under the provisions of an applicable U.S. income tax treaty, occurs when the individual’s foreign residence “commences” for treaty purposes and not at the date that notice of such commencement is provided to the IRS.

⁶⁶ Notice 2009-85, 2009-2 C.B. 598 (Oct. 15, 2009).

⁶⁷ The revised Form 8854 (“Initial and Annual Expatriation Statement”) and Form W-8CE (“Notice of Expatriation and Waiver of Treaty Benefits”) can be found under the forms and publications heading on the IRS’s website at www.irs.gov.

⁶⁸ The Code, at § 877A(g)(1)(B)(ii), refers to the § 7701(b)(1)(A)(ii) definition, so the full provisions of the substantial presence test presumably apply, other than, e.g., the “exempt individual” categories that could never have applied to a former U.S. citizen.

That notice appears on Forms 8833 and 8854, filed with the individual's tax return for the year of expatriation (which frequently occurs as many as 18 months after the foreign residence "commencement" date).⁶⁹

The 2009 Notice also confirms that the determination of whether an individual meets the income tax liability or net worth tests for "covered expatriate" status, as set forth in section 877A(g)(1)(A) (by reference to section 877(a)(2)), is done pursuant to the principles of Notice 97-19, the initial guidance issued under the 1996 HIPAA changes to the expatriation tax provisions.⁷⁰ Thus, for purposes of section 877A, an expatriating individual's net U.S. income tax liability is still determined under section 38 (with joint return filers each responsible for the total net income tax liability shown on a return), and, for purposes of determining his net worth at expatriation, an individual is considered to own property that would be taxable on a gratuitous transfer under the *gift tax* provisions of Chapter 12 of Subtitle B of the Code (disregarding available exemptions, etc.).

For purposes of computing a covered expatriate's tax liability under the mark-to-market provisions, the 2009 Notice states that an individual is considered to own any property that would be considered to be within his *estate* under the provisions of Chapter 11 of Subtitle B of the Code (with certain adjustments), were he to die on the day before his expatriation date. Property considered owned through a *grantor* trust is included, but property considered owned through a non-grantor trust, pursuant to the principles set out in Notice 97-19 (which are applied for determining whether an individual meets the net worth threshold for covered expatriate status), is disregarded. This is because beneficial interests in non-grantor trusts, as well as deferred compensation items and specified tax deferred accounts, are expressly excepted from operation of the mark-to-market tax and subject to expatriation taxation under other provisions. Finally, the Notice provides that the valuation of property considered owned for purposes of the mark-to-market regime generally is to be made under estate tax principles. Thus, where appropriate, formal valuations are required.

In discussing section 877A's exclusion amount (currently \$680,000), the 2009 Notice states that the amount must be allocated pro rata across all assets having built-in gain and without regard to a taxpayer's election to defer tax with respect to certain assets. Thus, the exclusion cannot be allocated to the highest taxed income first. Further, the Notice states that, if the total built-in gain on all taxable assets is less than the exclusion amount, then the exclusion amount that can be al-

⁶⁹ See Notice 2009-85, note 66, *supra*, at § 4, Ex. 8. This is consistent with IRS practice under the HIPAA provisions, before the AJCA amendments introduced § 7701(n) and its "dual notice" requirement for expatriation to occur. The Service's acknowledgment of this practice is important, since it also permits taxpayers, in appropriate cases, to cease lawful permanent resident status before reaching the "8 out of 15" year threshold for long-term resident status. Note, however, that Notice 2009-85 also confirms that, while the date of the expatriating act might establish whether an individual is subject to the provisions of the 2004 AJCA or 2008 HEART Act expatriation regimes, if the former, the 10-year alternative tax regime will run from the date of the *second notice* under former § 7701(n) rather than the effective expatriation date. See Notice 2009-85 note 66, *supra*, at § 4, Ex. 7.

⁷⁰ See note 33, *supra*, and accompanying text. This is so notwithstanding that the original expatriation Notice has been obsoleted by Notice 2005-36.

located across the property will be limited to the amount of built-in gain.⁷¹ It is also clear from the Notice that built-in gain cannot always be reduced by built-in losses. The use of losses is generally limited by other applicable Code provisions (not including the wash sale rule of section 1091).⁷² With respect to basis issues involved in the mark-to-market regime, the 2009 Notice makes it clear that the basis of an asset will be adjusted for purposes of determining gain or loss on a subsequent disposition by the amount actually taken into account in determining gain or loss without regard to the exclusion amount attributable to the asset. As regards the in-bound basis step-up afforded to alien individuals at the time they become resident aliens (which is solely for purposes of the mark-to-market provisions), the Notice confirms that the basis in property is only stepped up (and not also down) and indicates that an individual can irrevocably elect *not* to have the automatic basis step-up to fair market value apply on an asset-by-asset basis. The 2009 Notice also indicates that Treasury and the IRS intend to exercise their regulatory authority to deny this basis step-up to U.S. real property interests and property used in a U.S. trade or business owned by a nonresident alien prior to becoming a U.S. resident.

With respect to a covered expatriate's right to defer the payment of the mark-to-market tax, the Notice establishes a 30-day cure period in the event that an individual's proffered security for payment of the mark-to-market tax becomes inadequate. The Notice discusses the conditions of, and procedures for entering into, a deferral election agreement and, importantly, attaches a template of a tax deferral agreement as an appendix. The Notice also explains at some length the calculation of the deferred tax considered attributable to each asset for which the election is made. Note, in particular, that the deferral election only applies to the tax arising as a result of section 877A and not to an individual's regular U.S. tax liability for the year of expatriation.⁷³

Finally, the 2009 Notice discusses the interaction of section 877A with other Code provisions providing for the deferral of gain. In general, an expatriation under section 877A terminates any other prior tax deferrals, and all such deferral terminations must be accounted for before determining the consequences of expatriation under section 877A. In particular, the Notice discusses the expatriation tax consequences arising in respect of a terminated section 367(a) gain recognition agreement and section 684. The Notice states that, if a covered expatriate's expatriation results in a deemed triggering event under a gain recognition agreement or in a transfer of assets comprised in a grantor trust to a foreign nongrantor trust, then the recognition of gain under sections 367 or 684 will be considered to arise prior to the deemed sale under section 877A on the day before the taxpayer's expatriation date. The clear consequence of this ordering provision is that the income

⁷¹ Interestingly, the Notice indicates that each individual is eligible for only one lifetime exclusion amount, as may be adjusted for inflation. Prior expatriation regimes have never addressed the consequences of serial or multiple expatriations.

⁷² Thus, losses on personal use property not held for investment purposes (*e.g.*, an individual's principal personal residence) cannot be taken.

⁷³ The instructions to Form 8854 indicate that, in order to determine the maximum tax that can be deferred, a taxpayer is required to prepare two hypothetical tax returns, one reflecting all income, including the section 877A gain and loss, and the other including all income without the section 877A gain and loss.

considered recognized under the busted gain recognition agreement or deemed transfer of assets to a foreign nongrantor trust cannot be offset by section 877A's gain exclusion amount.⁷⁴

B. Tax on Deferred Compensation

As for the three exceptions to the general mark-to-market rule, the 2009 Notice first confirms the breadth of what constitutes an "item of deferred compensation." In particular, the Notice confirms that property received in connection with the performance of services is included whether or not such property is substantially vested, but only to the extent not previously taken into account in accordance with section 83. The Notice reiterates the statutory conditions for application of the deferred 30 percent withholding tax on the taxable portion of post-expatriation distributions of "eligible deferred compensation" but unfortunately only promises future guidance regarding the elective procedure for a non-U.S. person to be treated as a U.S. person so that otherwise "ineligible deferred compensation" may also benefit from the deferred 30 percent withholding tax regime. Absent such an election, the Notice confirms that the present value of a covered expatriate's accrued benefit will be treated as received by the taxpayer on the day before expatriation and must be included on the taxpayer's tax return for the portion of the year preceding the expatriation date.⁷⁵ The Notice discusses at some length the appropriate adjustments that may be made to subsequent distributions from an ineligible deferred compensation plan to ensure that amounts included in future distributions will not be subject to income tax a second time.

The 2009 Notice confirms that the rules pertaining to deferred compensation items do not apply to any deferred compensation attributable to services performed outside the United States while a covered expatriate was not a U.S. citizen or resident, whether before or after expatriation. Until further guidance is issued, the Notice permits a taxpayer to use any reasonable method consistent with existing guidance pertaining to the sourcing and taxation of deferred compensation⁷⁶ to determine amounts that may be excluded.

C. Specified Tax Deferred Accounts

⁷⁴ Whether this ordering principle is justified is questionable, given that the event triggering gain under §§ 367 and 684 is the same event giving rise to a deemed sale of the individual's worldwide assets under § 877A's mark-to-market provisions.

⁷⁵ The taxation of ineligible deferred compensation is a particular hardship for, *e.g.*, long-term resident employees of the World Bank and other international organizations who may wish to return to their countries of origin following retirement. Absent the ability for the former employer to elect to be treated as a U.S. person in order to operate the withholding tax regime, such retirees are subject to tax on the present value of their accrued benefit under a retirement plan but may not be entitled to take a distribution for purposes of paying the tax. The IRS is aware of this potential hardship and has indicated that it would be willing to enter into a contractual arrangement under which a foreign retirement plan administrator could operate the necessary withholding tax mechanism. Whether a foreign plan administrator would be willing to enter into such an arrangement or the IRS would be able to work out a satisfactory arrangement to secure future tax payments likely would be the principal obstacles reaching an agreement that would permit the election.

⁷⁶ *E.g.*, Treas. Reg. § 1.861-4(b)(2), Rev. Rul. 79-388, 1979-2 C.B. 270, and Rev. Proc. 2004-37, 2004-1 C.B. 1099.

Regarding “specified tax deferred accounts,” the 2009 Notice does little more than confirm the scope of the term (*i.e.*, what statutory schemes are covered) and the manner of taxation for such items. The Notice also reiterates the provisions contained in the instructions to Form W-8CE.⁷⁷

D. Interests in Nongrantor Trusts

In the case of “interests in nongrantor trusts,” the 2009 Notice generally confirms the rules set forth in the statute, namely that the “taxable portion” of distributions to a covered expatriate, who was a beneficiary but not also an owner of a trust on the day before the expatriation date, are subject to a 30 percent withholding tax. The Notice also seeks to clarify who is a trust beneficiary in broad terms (*i.e.*, a person permitted to receive a direct or indirect distribution under a trust’s terms or local law having power to apply trust income or corpus for his own account, or *a person to whom income or corpus would be paid if current trust interests were terminated*) but does not address the obvious questions concerning beneficial interests in nongrantor trusts that may arise *after* the date of expatriation (*e.g.*, pursuant to a discretionary trust power to add or exclude beneficiaries). The Notice does add that, if a trust that was a nongrantor trust prior to expatriation becomes a grantor trust as to a covered expatriate following expatriation, the conversion of status will be treated as a taxable distribution to the covered expatriate to the extent of his interest in the trust as “owner.”

There is no statutory provision in section 877A that would permit a foreign trustee of a foreign trust to elect to be treated as a U.S. person for purposes of withholding the 30 percent tax on taxable distributions to a covered expatriate, as there is in the case of a foreign payor of deferred compensation (for which there is, as yet, no guidance). Further, Treasury and the IRS apparently have determined that they do not have sufficient regulatory authority to create such a parallel mechanism, which might actually aid in the collection of this tax, which otherwise appears to be largely unenforceable. (Such a provision may also afford foreign fiduciaries with U.S. operations a measure of relief against being caught up in a future U.S. tax enforcement action.) However, the Notice does confirm the existence of an elective procedure whereby a covered expatriate can apply to obtain a letter ruling from the IRS as to the value, if ascertainable, of his interest in a nongrantor trust as of the day before his expatriation date.⁷⁸ If a valuation ruling is forthcoming, the covered expatriate will be considered to have received the value of his trust interest immediately prior to expatriation, and tax will be due with his tax return for the period ending on his expatriation date. As a consequence, no subsequent trust distribution will be subject to the 30 percent withholding tax under section 877A(f),⁷⁹ and the covered expatriate will be entitled to claim treaty benefits vis-à-vis any distribution from the trust under an applicable income tax treaty.⁸⁰

⁷⁷ See generally discussion at pages 22-23, *infra*.

⁷⁸ This procedure was foreshadowed in a revision of Form 8854 that appeared prior to issuance of Notice 2009-85. In making a ruling request, a taxpayer is required to follow the procedures set out in Rev. Proc. 2014-4, 2014-1 I.R.B. 125.

⁷⁹ Although a distribution may, of course, be subject to U.S. tax under other Code provisions, if carrying out U.S. source income or income effectively connected with a U.S. trade or business.

⁸⁰ It is difficult to predict whether expatriating U.S. taxpayers will consider the possible availability of such an elective procedure to be useful. The obvious advantage to making this election is to limit the taxation of distributions from nongrantor trusts to the

E. Filing and Reporting

Under broad regulatory authority contained in section 6039G, the 2009 Notice expands the reporting that is due from covered expatriates in years following the year of expatriation. Under prior law (in particular, the 2004 AJCA changes), a covered expatriate was required to file annual information returns on Form 8854 for the 10-year post-expatriation period that he remained subject to tax under the alternative tax regime, whether or not he had any income tax liability. In any year that a covered expatriate had U.S. source income on which tax due was not fully withheld at source, a covered expatriate was also required to file a Form 1040NR.

The Notice states that a covered expatriate having eligible deferred compensation items or interests in nongrantor trusts must annually file Form 8854 to certify either that no distributions have been received or to report distributions that have been received. Unlike under prior law, there apparently is no time limit on this obligation. The Notice also confirms that, in accordance with Treas. Reg. section 1.6012-1(b), a covered expatriate having taxable income (*i.e.*, eligible deferred compensation or distributions from nongrantor trusts) for which taxes are not fully withheld at source must file a tax return on Form 1040NR. As foreign fiduciaries are unlikely to withhold and remit a 30 percent tax on distributions from nongrantor trusts, this creates an affirmative filing obligation for covered expatriates subject to all usual return filing rules. Any covered expatriate who has elected to defer payment of the mark-to-market tax must also file an annual Form 8854 through the year that the deferred tax and all interest is paid.

The 2009 Notice also confirms that a covered expatriate who has a deferred compensation item, a specified tax deferred account, or a beneficial interest in a nongrantor trust generally must file Form W-8CE with the relevant payor on or before the earlier of the day prior to the first distribution on or after the individual's expatriation date or 30 days after the expatriation date. With respect to a distribution of an eligible deferred compensation item or an interest in a nongrantor trust, the form generally provides notice to the payor that the individual has waived any otherwise applicable treaty benefits. However, in the case of a nongrantor trust, if the covered expatriate has indicated on the form that he will request a letter ruling from the IRS as to the value of his beneficial interest on the day before his expatriation date, the trustee is "required" to furnish the individual information necessary to calculate such value.⁸¹ In the case of an ineligible deferred compensation item, Form W-8CE is notice to the payor that the individual is a covered expatriate

value of the interest existing at the date of expatriation, if this can be determined. Otherwise, under section 877A, there could be a liability to pay the withholding tax forever, in which case it may be imposed on wealth that did not exist while the taxpayer was a U.S. person. This election might offer some advantages to expatriates having beneficial interests in domestic nongrantor trusts. Whether an expatriate would wish to make this election vis-à-vis a beneficial interest in a foreign nongrantor trust, against which the IRS may have no practical ability to collect the withholding tax, is doubtful.

⁸¹ The instructions to Form W-8CE indicate that the necessary information includes (but is not limited to): (a) a copy of the trust deed; (b) a list of the assets (and their values) held on the day before the expatriation date; (c) information regarding other potential trust beneficiaries; (d) birth dates for all measuring lives for the trust's perpetuity period; (e) policies followed by the trustees when making discretionary distributions that might constitute an "ascertainable standard;" and (f) any other relevant information.

who is treated as receiving an amount equal to the present value of his accrued benefit on the day before his expatriation date. This is also notice to the payor that adjustments may have to be made to future distributions to account for the tax required to be paid by the covered expatriate as a result of his expatriation. Finally, in the case of a specified tax deferred account, Form W-8CE is notice to a payor that the individual is a covered expatriate for whom adjustments may be required on future distributions from the account. Within 60 days of receiving the form, the payor is required to provide a statement to the covered expatriate of the account balance on the day before the expatriation date.

VII. ADDITIONAL EXPATRIATION ISSUES REQUIRING GUIDANCE

As indicated above, the 2009 Notice does not discuss the issues that may arise under section 2801, the succession tax provision introduced by the HEART Act, other than to say that guidance will be forthcoming and that satisfaction of the reporting and tax obligations for individuals receiving covered gifts or bequests is deferred until such guidance is provided.⁸²

The 2009 Notice also does not address several other important issues, including: (a) whether, and on what terms, the deferred tax election can apply to property disposed of in nonrecognition transactions; and (b) how the new rules are to be coordinated with U.S. tax treaties. In the case of the new tax mark-to-market tax, which is imposed on gains *deemed to arise* on the day before expatriation, the statute's inherent bias is that the income generally will be residence (*i.e.*, U.S.) based and should not result in any double taxation. However, as a practical matter, gains arising from the subsequent *actual* disposition of a covered expatriate's assets, as well as deferred compensation and nongrantor trust distributions received subsequent to expatriation, are likely not to be U.S. source income and generally will also be taxed by the expatriate's country of residence at realization or receipt.⁸³ Thus, there are likely to be *bona fide* treaty issues where a covered expatriate resides in a U.S. treaty partner following expatriation. Clearly, there will also have to be guidance on foreign tax credit issues that are bound to arise.⁸⁴

In particular, there likely will be issues with the 30 percent withholding tax imposed on payments of eligible deferred compensation and distributions from nongrantor trusts that is considered imposed under section 871. Section 906(b)(3), pertaining to the allowance of foreign tax credits to nonresident aliens (which a covered expatriate becomes), expressly provides that a foreign tax credit is not allowed

⁸² The IRS is developing a new form, Form 708 ("U.S. Return of Tax for Gifts and Bequests Received From Expatriates"), for the purpose of making a return under the provisions of section 2801. The form is referred to in the 2010 version of Form 3520, Part IV. (Note that this information is not referred to in the 2013 version of Form 3520.) The instructions to Form 3520, item 57, state that a taxpayer's tax payment obligations with respect to any § 2801 tax liability will not be due until the date indicated on Form 708, once issued. *See* Announcement 2009-57, 2009-2 C.B. 158 for additional information.

⁸³ That an expatriate may have made what amounts to a coerced waiver of treaty benefits in order to try to comply with U.S. reporting obligations so that, *inter alia*, his expatriation might be considered complete under §§ 877(a)(2)(C) and 877A(g)(1)(A), should not be found to preclude him from claiming treaty benefits under otherwise applicable residence-based tax treaties.

⁸⁴ Note that, in the case of the § 2801 succession tax, the statute expressly provides that credit will be given for foreign gift and estate/inheritance taxes.

against any tax imposed by section 871(a). This is reasonable, because section 871 generally imposes tax on certain U.S. source income of nonresident aliens. However, as indicated above, amounts subject to tax under sections 877A(d)(1) and (f)(1) frequently will not be from U.S. sources and so should be entitled to foreign tax credits.

Two further points should be made about the need for additional guidance under the new expatriation tax rules. First, although the fundamental precept of the mark-to-market tax is that a covered expatriate is taxed on his wealth at the date of expatriation, there appears to be no income cap on taxable amounts received from nongrantor trusts. The new election to be treated as receiving the value of an individual's interest in such a trust, if ascertainable, is certainly an attempt to resolve or ameliorate this issue, but in many cases it may not be possible to fairly ascertain the value of a beneficiary's contingent, discretionary interest in such a trust with sufficient precision for either the expatriate or the IRS to be comfortable. Nor is there a wealth cap on taxable amounts received from a covered expatriate that are subject to the succession tax. If it is even administrable, this tax might be imposed on individuals and wealth that are generations removed from the covered expatriate's expatriation date.

Finally, as with the 2004 AJCA that preceded it, the HEART Act does not address the so-called "Reed amendment" provision of immigration reform enacted in 1996.⁸⁵ That provision bars re-entry to the U.S. of former citizens who expatriated for a principal tax avoidance purpose in the opinion of the Attorney General.⁸⁶ Because of certain statutory defects, it has never been implemented or enforced.⁸⁷ The 2003 JCT Report recommended changing the provision to bar U.S. re-entry only to former citizens who have not fully complied with their expatriation tax obligations, but this unfortunately was not included with the AJCA's expatriation changes, notwithstanding that its provisions generally followed the 2003 JCT Report recommendations and tax avoidance purpose is no longer relevant to tax expatriation. Several prior mark-to-market proposals, including some under consideration in 2007, also included provisions based on the 2003 JCT Report, but these provisions unfortunately were not

⁸⁵ The Reed amendment was contained in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (Pub. L. No. 104-208), enacted September 30, 1996.

⁸⁶ Responsibility for administering and enforcing the provisions of the Reed amendment was formerly within the province of INS, an agency within the Department of Justice ("DOJ"). Because the role of the INS has now been transferred to USCIS, an agency of DHS, overall responsibility presumably has shifted from the Attorney General to the Director of DHS.

⁸⁷ There are several apparent statutory flaws with the Reed amendment. First, it is unclear from the language of the statute whether it encompasses all acts of expatriation or only those expatriations accomplished by formal oath of renunciation. Second, it is unclear what the applicable tax avoidance standard is or should be; this is especially troublesome since tax avoidance has ceased to be relevant to enforcement of the expatriation tax provisions. Since the objective of the provision is to bar certain former citizens from re-entering the U.S. and, therefore, effectively to penalize them, it is questionable whether due process would permit the necessary tax avoidance to be presumed based upon certain economic factors, as was the case under HIPAA's § 877 changes. More likely, USCIS, which now administers the provision, would be required to make a factual determination on a case-by-case basis. However, its ability to do this would be severely limited, since, under § 6103, the IRS is precluded from disclosing specific taxpayer information even to other federal agencies, except in limited circumstances that would not extend to enforcement of the Reed amendment. Notwithstanding these problems, it is known that USCIS (and, before it, INS) was working to develop regulations to implement the Reed amendment, and the project was on the DHS's regulatory agenda as recently as 2006. *See* 71 Fed. Reg. 22643 (Apr. 24, 2006). The current status of the regulation project is unknown, but the inability of the IRS to provide tax information pertaining to specific taxpayers may require tax legislation to amend § 6103, if the project is to move forward. Several of the former mark-to-market proposals would have done that.

part of the HEART Act. As the Reed amendment continues to have a chilling effect on U.S. citizens considering expatriation (notwithstanding that, in its present formulation, it likely is unenforceable), it is to be hoped that Congress will address this problem.

VIII. CONCLUSION

Controlling the tax consequences of expatriation has attracted considerable attention, and given rise to much spirited debate in Congress and elsewhere, since the Clinton administration first proposed an exit tax in its fiscal 1996 budget.⁸⁸ The proposed solution contained in 1996's HIPAA, although no doubt affecting the actions of many wealthy individuals considering the potential tax benefits arising from expatriation, was not, in the opinion of the 2003 JCT Report, ultimately successful in deterring tax-motivated expatriation. Nor, certainly, was it successful in raising the revenues envisioned by the 1996 scoring for the HIPAA provisions. The 2003 JCT Report concludes that this was attributable, in no small part, to the failure of the IRS to fully and properly administer and enforce the 1996 changes, although the report also acknowledges that the alternative tax regime has some inherent weaknesses.

The changes contained in 2004's AJCA were intended to facilitate easier administration and improved enforcement of the amended expatriation tax rules by removing the difficult, frequently uncertain and expensive (for both taxpayers and the Government) ruling program and requiring enhanced information reporting by expatriating taxpayers. In addition, the new short residence rule contained in section 877(g) was introduced to deter expatriation by many U.S. taxpayers. Whether this was sound fiscal or social policy is questionable, especially in the case of former long-term residents, who may have left the U.S. in retirement to return to the countries from which they originally arrived. Many such persons have children and grandchildren who have remained in the U.S., as well as continued U.S. vacation residences and other investments. Limiting their presence so drastically with the threat of renewed worldwide taxation seems short-sighted. However, in the final analysis, the alternative tax regime after the AJCA likely wasn't in place long enough to determine whether it achieved its intended goals.

Exactly what the goals of an expatriation tax should be is perhaps the core of the problem. Congress has several times indicated that tax neutrality is the correct policy — the law should neither serve as an inducement to leave U.S. tax solution nor as a bar to doing so. Unfortunately, the actions of Congress have not always followed this course. The mark-to-market and succession tax regimes contained in the HEART Act are likely less a further philosophical or emotional onslaught against individuals who choose, for whatever reason, to leave full U.S. tax solution than a short-sighted and misguided effort to close the ever-present “tax gap.” The several new taxing provisions, especially those pertaining to eligible deferred compensation, interests in nongrantor trusts, and the succession tax are not even wholly consistent with the implicit objective to tax an individual's wealth as he leaves the U.S. tax system. Further, additional IRS resources likely will be required to efficiently administer and try to enforce the tax. However, even in an increasingly transparent financial world with greater cross-border coop-

⁸⁸ Indeed, the actions of the U.S. even spurred the enactment of limited expatriation tax provisions in a number of other countries, including France, Germany and the Netherlands.

eration amongst national tax administrations, it will be difficult to impose and collect tax on foreign income and assets from individuals who are no longer generally within the U.S. jurisdiction. Whether this is the final expatriation tax solution remains to be seen. The expatriation provisions found in the HEART Act are not sound tax policy, but they are scored to raise not insignificant revenue from a segment of the population for whom Congress — and likely many Americans — do not have much sympathy.

In May 2012, news surfaced that Eduardo Saverin, a young immigrant from Brazil who was one of the founding owners of Facebook Inc., had renounced his U.S. citizenship and was residing in Singapore, where gains from an impending IPO of Facebook would not be taxed. Senators Charles Schumer (D-N.Y.) and Bob Casey (D-Pa.), incensed by Saverin's action, co-authored a tax bill, the "Expatriation Prevention by Abolishing Tax-Related Incentives for Offshore Tenancy" (the "Ex-PATRIOT Act"), S. 3205, 112th Cong., 2nd Sess. (2012), that would impose a 30 percent capital gains tax (or twice the otherwise applicable tax rate under then existing law), collected by means of withholding, and also potentially bar Saverin or other similar "specified expatriates" (*i.e.*, tax dodgers) from returning to the United States. After the fanfare accompanying its introduction subsided, the bill went nowhere. Ironically, when the Facebook stock plummeted soon after the IPO, it became apparent that the taxes Saverin incurred under the mark-to-market provisions of § 877A might possibly have far exceeded what he may have owed had he remained a U.S. citizen through the IPO (and likely insider "lock-up" period following it). Whether there was an element of poetic justice in this is beside the point. What the development reflected is that expatriation is a tax phenomenon that is likely driven more by emotion than by well-considered and sound tax policy. *See, e.g.*, Jim Puzanghera, *Two Senators Want to Stop Facebook's Saverin from Dodging Taxes*, L.A. TIMES, May 18, 2012.

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