

## Choosing to Renounce US Citizenship or Legal Permanent Residence (Green Card)

Departures Effective June 17, 2008 Forward

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

### Expatriation After June 16, 2008:

Effective June 16, 2008 (different rules applied to expatriation: 1) before June 4, 2004, 2) Between June 3, 2004 and June 17, 2008 and 3) after June 16, 2008 in accordance with IRS Notice 2005-36, by Section 804 of the American Jobs Creation Act of 2004, and then Effective June 17, 2008 in accordance with The Heroes Earnings and Assistance Relief Act of 2008) IRC Section 877- Expatriation- was amended in addition to the Form 8854- Expatriation Information Statement- reporting requirements.

Expatriation is defined as: 1) applying to US citizens or 2) long term residents whom have renounced. A long term resident is defined as a green card holder- legal permanent resident- in at least 8 of the last 15 tax years ending with the year your residency ends. Do not count any tax year where you were treated as a tax resident of a foreign country that has an income tax treaty with the US and where you do not waive treaty benefits. Such that only tax years with a green card while you are present in the US count towards the 8/ 15 tax year rule.

If you meet the above requirements 1) or 2), the expatriation rules will apply to you if ANY of the following apply: 1) Your average annual net income tax for the 5 years ending before the date of expatriation is more than \$145,000- for 2009 (2008- \$139,000), 2) Your net worth is 2 million or more on the date of your expatriation or 3) (effective June 3, 2004 forward) You fail to certify on Form 8854- Expatriation Information Statement- that you have complied with all US federal tax obligations for the 5 years preceding the date of expatriation. Effective June 3, 2004 there no longer remains a 'presumption' of tax motivation and therefore you can no longer request a private letter ruling to avoid IRC Sec 877. If you meet these tests you are now subject to the IRC Sec 877- Expatriation provisions.

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

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

- 1) Dual citizens- defined as: At birth a US citizen and citizen of another country and you continue as a citizen there, in addition to being taxed there as a resident of that other country and were not US resident for more than 10 years during the last 15 years or
- 2) Certain minors- defined as: expatriation before 18 ½ years old and were a resident of the US for not more than 10 years before expatriation.

Old rules before June 17, 2009- US Presence & Tax Consequences After Expatriation:

As long as you do not meet the above 2 exceptions, if during the 10 year period following expatriation you are physically present in the US for more than 30 days per calendar year, you will be treated as a US resident alien and taxed on your worldwide income for that whole calendar tax year. Requiring the filing of a resident US income tax return Form 1040. Do not count any days up to a limit of 30 days in which you performed personal services in the US for an unrelated employer if either of the following apply: 1) You have ties with other countries—obtained citizenship/ residency of another country after expatriation in which you/ spouse or either parents were born and you become fully liable for income tax in that country or 2) You are physically present in the US for less than 30 days per calendar year during each of the 10 years after expatriation.

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

You are considered to have expatriated the latter of the date you relinquish US citizenship or terminate long-term residency. There is no longer effective after June 16, 2008 a requirement to file a Form 8854 to establish an effective expatriation date.

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

Former Long- Term Residents- You are considered to have terminated your long-term residency the earliest of: 1) The date you voluntarily relinquish/ abandon your 'green card' by filing with DHS Form I-407 with a US consular or immigration officer, 2) date you became subject to a final administrative order for removal from the US under the IN Act and actually left the US, 3) dual resident of the US and the country of new residence has income tax treaty with the US, you are resident of that new country and filed Form(s) 8833 and 8854.

EXPATRIATION TAX:

Old tax before June 17, 2009- If the expatriation rules apply: 1) (new effective June 3, 2004 forward) you must file Form 8854 Initial and Annual Expatriation Information Statement each year during the 10 year period following expatriation even if you owe no tax (there is a \$10,000 penalty for failure/ incorrect filing) and 2) You are subject to US tax on Form 1040NR at graduated rates on US source gross income and gains unless you are subject to the higher 30% flat tax or reduced by treaty. A statement listing your dividends, interest, all items of US or foreign source whether or not US taxable.

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

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

These new rules align the US with tax rules similar in other income tax treaty countries. Accordingly if these individuals meet the expatriation rules they will now be treated as if they sold (deemed sale) all of their property for fair market value on the day prior to the expatriation date. The mark-to-market tax is imposed on the property's net unrealized gains to the extent it exceeds \$626,000- for 2009 (2008- \$600,000). That will become \$627,000 in 2010.

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

Step-up in Basis-For purposes of determining the tax imposed, a stepped up basis rule applies to property that was held by an individual on the date the individual first became a U.S. resident (within the meaning of Code Sec. 7701(b)). The individual is treated as having a basis on that date of not less than the fair market value of the property on that date. However, the individual may make an irrevocable election not to have this rule apply.

Mark-to-market exceptions-:

1) Eligible Deferred Compensation Items (per IRC Sec 219(g)(5)- all basic work related qualified retirement plans- (401(k)/ 403(b)/ Annuity Plans and Contracts, SEP's, Simple Retirement Accounts, foreign pension plan or IRC Sec 83)- subject to 30% withholding at source and make irrevocable waiver of any right to claim any reduction in withholding under ant treaty with the US,

2) Ineligible Deferred Compensation items- treated as having received the present value of the accrued benefits the day prior to expatriation,

3) Interests in Nongrantor Trusts- subject to 30% withholding at source and make irrevocable waiver of any right to claim any reduction in withholding under ant treaty with the US and

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

Expatriation tax return- if you are subject to the mark-to-market tax, you must file Form 1040 or dual status 1040NR with Form 1040, as appropriate and attach Form 8854- Expatriation Information Statement.

Once the actual sale of property occurs adjustments are made to the amount of the gain or loss realized to take into account the gain or loss under these new mark-to-market rules, without regards to the \$626,000- for 2009 (2008- \$600,000) exemption.

Opportunity exists for an individual to elect to defer payment of the mark-to-market tax imposed upon deems sale, where interest at the prescribed rate would apply. The election is irrevocable and is made on a property-by-property basis. Under this deferment the deferred tax attributable to the property is due when the return is due for the taxable year in which the property is actually disposed of. However a bond must be furnished to the Secretary and be conditioned upon payment of the amount of tax due, plus interest and must be in accordance with the regulation requirements including being accepted by the Secretary. This election is made on Form 8854. Additionally you must make an irrevocable waiver of any right under any treaty of the US which would preclude assessment or collection of the mark-to-market tax.

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