"Accidental Americans" Rush to Renounce U.S. Citizenship to Avoid the Ugly U.S. Tax Web

By Patrick W. Martin

The author has been advising so-called "expatriates" since there was the first major change in the tax law in the last 20 years. That was in 1996. Fast-forward to the present, and the law is very different from the changes in 1996, or the changes from 2004 for that matter. The current law is based upon significant changes in 2008. A summary of the changes in the tax law for each of these years is attached as Exhibit A to this article.

In short, the current law requires "mark-to-market" U.S. income taxation based upon the total income or gain calculated against the fair market value of the worldwide assets of the U.S. citizen who renounces citizenship. The law treats these assets as if they are sold and imposes U.S. income taxation on the net gain reduced by US$600,000. In addition the law imposes a new tax on any U.S. person who receives gifts or bequests from the former U.S. citizen, with a rate of tax at the greater of the estate or gift tax rate (currently 35 percent and scheduled to increase to up to 55 percent in 2013).

This article explains in some detail how the tax law works for U.S. citizens who renounce and focuses on "Accidental Americans" as explained below. It also explains, in the last portion of the article, how many "Accidental Americans" might be spared the harsh tax results of renouncing U.S. citizenship if (1) they have spent little time living in the United States, (2) became U.S. citizens at birth and also another country, and (3) continue to be a citizen of (and taxed as a resident of) such other country.

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Apparently, Mexico is the country where more U.S. citizens reside, according to the State Department, and Canada is number two on the list. Approximately 1 million U.S. citizens lived in Mexico, while 687,000 were in Canada. Other countries with large numbers of U.S. citizens included the United Kingdom (224,000), Germany (211,000), Israel (184,000), Italy (169,000), Philippines (105,000), Australia (103,000), France (102,000) and Spain (95,000). According to State Department data, these 10 countries contain about 70 percent of all U.S. citizens living abroad.[1]

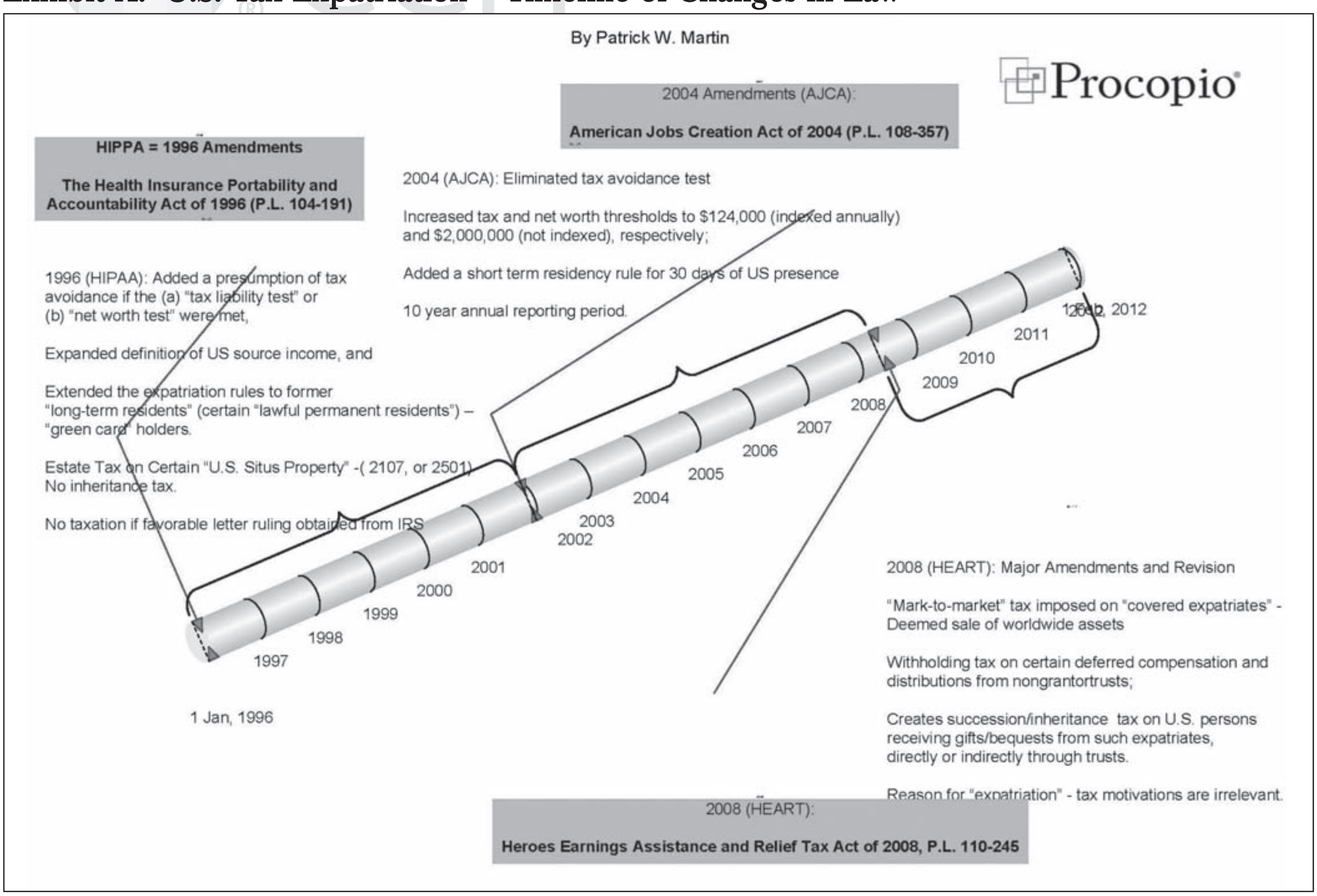
Factors to Consider Prior to Seriously Considering Renouncing U.S. Citizenship

Each "Accidental American" needs to fully understand the law and how it applies to their particular situation. This article explains how the current law generally works. The decision to renounce U.S. citizenship is a very serious one with consequences beyond taxation. Anyone considering renouncing should obtain legal counsel to advise them on the specific consequences in their particular case.

There are many factors that need to be considered in each case; some of these factors include the following:

- How long (if ever) has the person lived in the United States?
- Is there any future desire to live in the United States?
- What family members (if any) are U.S. citizens; specifically including parents and adult children?
- Will future heirs or beneficiaries of the estate of the person considering renouncing be "U.S. persons" for U.S. tax purposes (*i.e.,* U.S. citizens, U.S. lawful permanent residents, or persons residing predominantly in the United States)?
- Has a U.S. passport ever been obtained by the person considering renouncing U.S. citizenship (if so, for how many years has it been used)?
- Did the person also obtain citizenship in another country since birth? From what countries, how and when?
- What are the total values of worldwide assets of the person considering renouncing U.S. citizenship?

Exhibit A. U.S. Tax Expatriation – Timeline of Changes in Law



- If the value of the assets is less than about US$3 to US$5M+/-, then particular thought should be given to the lack of future access to the United States without a U.S. passport? Will it really be worth renouncing U.S. citizenship (cost-benefit analysis)?
- What is the adjusted tax basis, in each asset, as determined under U.S. law of the worldwide assets of the person considering renouncing U.S. citizenship? Are these capital assets?
- Calculations of tax basis of assets must be done under U.S. law. The tax basis under the law of residency is not sufficient.
- Has the person who is considering renouncing U.S. citizenship been filing U.S. federal income tax returns (if not, were U.S. income tax returns ever previously filed)?
- Has the person who is considering renouncing U.S. citizenship been filing U.S. federal information tax returns (*e.g.,* IRS Forms 5471, 3520, 8858, etc.)?
- Has the person who is considering renouncing U.S. citizenship been filing Form TD F 90-22.1, *Report of Foreign Bank and Financial Accounts* (the "FBAR")?
- Has the person who is considering renouncing U.S. citizenship been filing U.S. income tax returns in their country of residence?
- Has the person "renounced" (*i.e.,* erroneously, even if they thought they renounced) U.S. citizenship to a foreign government, *e.g.,* the Mexican government?

These are some of the many considerations that must be undertaken by anyone seriously considering renouncing U.S. citizenship.

2008 Change in Law—"Mark-to-Market" Income Tax Regime

There have been major changes in the law over the last two decades starting in 1996, then in 2004 and lastly in 2008.[2] The focus of this article is the current applicable law that created (1) a "mark-to-market" income tax regime as if the "covered expatriate" sold his or her worldwide assets, and (2) an "inheritance"/gift tax (not to be confused with the longstanding U.S. estate tax) for the first time in U.S. history for U.S. persons who receive inheritances or gifts from the "covered expatriate."[3]

The term "Accidental American" refers to the millions of U.S. citizens and lawful permanent residents (LPRs) residing outside the United States. Many of these individuals were born in the United States or acquired derivative citizenship based on a number of factors via one or both parents. However, other than their U.S. citizenship, they typically have no other direct family, business or personal ties to the United States. Many LPRs who worked in the United States for a few years or who acquired their "green card" through their U.S. parents have long ceased to live in the United States, returning to their country of origin. The author refers to each of these types of "U.S." individuals as "Accidental Americans" throughout this article.

The Accidental American is subject to U.S. income tax on his or her worldwide income, and to information reporting requirements the same as a U.S. citizen or LPR residing in the United States.[4] To avoid these tax consequences and the ongoing cost and complication of complying with the law, many Accidental Americans are simply renouncing their U.S. citizenship through the U.S. Embassy or U.S. Consulate Office abroad, something which is not a complicated process.

Myths About Renouncing U.S. Citizenship

There are many misunderstandings of how the law works when someone renounces U.S. citizenship. The author regularly hears a range of myths that will befall an "Accidental American" when and if, they renounce. These "myths" include the following:

- **Myth:** There is a 10-year period of U.S. income taxation after renouncing citizenship.
- **Fact:** The old tax law from 1996 and the modifications in 2004 had a 10-year period of taxation concept after "expatriation." There is no longer such a 10-year period of taxation for those persons who renounce on or after June 17, 2008.
- **Myth:** Former U.S. citizens will not be allowed to enter into the United States; *i.e.,* will be barred from re-entry at a point of entry by a U.S. immigration officer.
- **Fact:** Former U.S. citizens are generally entitled to any visa status, the same as any other non-U.S. citizen.
- **Myth:** Former U.S. citizens will not be allowed to ever re-obtain citizenship.
- **Fact:** Former U.S. citizens are generally entitled to U.S. citizen status, the same as any other non-U.S. citizen. Importantly, U.S. citizenship may simply not be available to any particular non-U.S. citizen, depending upon the particular circumstances.
- **Myth:** U.S. citizens do not need to renounce their U.S. citizenship if they live in a country with an income tax treaty with the United States; since

the tie breaker rules of residency will keep them from being U.S. income tax residents.

- **Fact:** U.S. citizens cannot escape worldwide taxation, both income and gift/estate taxes, by living outside the United States, since all U.S. bilateral income tax treaties and estate and gift tax treaties have a "savings clause" allowing the U.S. government to impose taxation on U.S. citizens notwithstanding the treaty.[5] This is how the U.S. tax net works on worldwide assets and income.

The next important consideration is if a citizen renounces citizenship, how is the tax calculated and to whom does it apply?

Deemed Sale of Property– "Mark to Market"

The mark-to-market rules require most former U.S. citizens and green card holders who renounce to pay U.S. income taxation on the net gain from the "deemed sale" of their worldwide assets. They are treated as if they sold all of their worldwide property (*i.e.,* the "deemed" sale or disposition) and must recognize the net gain on all the property from the deemed sale. This income tax regime applies to those who (1) renounce their U.S. citizenship (or "green card" holders who abandon their green card status—provided they have had it for at least eight of the last 15 years),[6] and (2) have a net worth of US$2M or more, or U.S. income tax liability greater than $124,000, adjusted for inflation.

Most importantly (particularly for the "Accidental American"), the poorest of taxpayers will be subject to the "mark-to-market" tax regime if they fail to certify, under penalties of perjury, that they have "met the requirements" under the federal tax law for the preceding five years.[7] This can become a terrible problem for someone residing overseas in their home country who has never filed U.S. income tax returns. Such a person cannot satisfy the criteria of certifying their compliance with the U.S. tax law and necessarily will fall into the "undesirable" category of a "covered expatriate."[8] In other words, every single individual who may renounce citizenship (even if they did not meet either the asset or tax liability thresholds) will be deemed a "covered expatriate"[9] for purposes of the tax law.

The statute provides that all the property of an individual subject to these rules is treated as sold on the day before the "expatriation" date at its fair market value; *i.e.,* the deemed sale.[10]

$600,000 Gain Exclusion and Certain Property Excluded

There is a $600,000 exclusion of gain from the calculation. In addition, certain property is not treated as sold for fair market value: items of deferred compensation and interests in a foreign pension plan or similar retirement program, tax deferred accounts such as individual retirement plans, 529 Plans,

Table 1

Schedule of Worldwide Assets of "Covered Expatriate"			
	Adjusted Tax Basis	**FMV**	**Gain /(Loss)**
Mexico City Residence	$750,000	$1,250,000	$500,000
Investment Portfolio in Europe	$1,500,000	$1,300,000	($200,000)
Investment Portfolio in Mexico	$550,000	$700,000	$150,000
California Real Estate	$600,000	$450,000	($150,000)
Mexico City Private Company	$400,000	$4,000,000	$3,600,000
Mexican Real Estate	$200,000	$1,100,000	$900,000
Totals	$4,000,000	$8,800,000	$4,800,000
	**Assume all Gain is Long Term Capital Gain		$4,800,000
	Exemption from Taxation		($600,000)
	Taxable Base — @ Current LTCG Rate of 15%		$4,200,000
	Tax Rate	15%	
	Total U.S. Tax		**$630,000**

Coverdell education savings accounts, health savings accounts and interests in nongrantor trusts.[11]

The following example demonstrates the type of U.S. income tax that might arise when she renounces U.S. citizenship; *i.e.,* on the net gain from the deemed sale of her worldwide assets, to the extent the net gain exceeds US$600,000. Assume an Accidental American ("Maria") living in Mexico (who is also a Mexican citizen) wishes to renounce her U.S. citizenship. She has total worldwide assets valued at US$8.8M. In addition, her adjusted tax basis (for U.S. purposes) is US$4M. For simplicity, assume all of Maria's assets are capital assets that have been held for more than 12 months, and hence she will be eligible for the current long-term capital gains (LTCG) rate of 15 percent on her net gain of US$4.8M. Maria's net gain is further reduced by US$600,000. Hence, her total federal income tax from renouncing her U.S. citizenship will be approximately US$630,000, as illustrated in Table 1.

This illustrates the importance of a detailed analysis of the adjusted tax basis and fair market value determination of the assets held by the U.S. citizen who is contemplating renouncing. Someone with very large assets may have little to no income tax from the "mark-to-market" calculation, if there is little to no gain in such assets. In contrast, someone who invested in an asset that appreciated greatly in value (*e.g.,* a large portfolio of Apple stock) could have significant U.S. income taxation upon renouncing U.S. citizenship. Renouncing during depressed economic times with depressed asset values, such as during the Great Recession, can be advantageous. For instance, if, Maria has only a US$10,000 fair market value in her shares of the Mexico City private company instead of US$4M, her U.S. federal income tax would be negligible, calculated as shown in Table 2.

Maria's actual U.S. income tax would actually be less, since the above calculation does not take into consideration standard deductions and personal exemptions that would be available to her.

Tax on a U.S. Citizen or Resident Who Receives a "Covered Gift" (or Covered Bequest) from a "Covered Expatriate"

The income taxation from the deemed sale, is only one side of the coin. The other side of the coin is the new tax created under the law from the 2008 amendments on certain bequests and gifts. Unlike the income tax upon renouncing citizenship, the "covered expatriate" is not subject to this other tax. Rather the U.S. person who receives certain gifts or bequests will be subject to the tax upon the receipt of the asset. Specifically, a U.S. citizen or U.S. resident who receives a "covered gift" or "covered bequest" from a "covered expatriate" is generally liable for U.S. gift or estate tax on the value of the transfer.[12]

Table 2

Schedule of Worldwide Assets of "Covered Expatriate"

	Adjusted Tax Basis	FMV	Gain /(Loss)
Mexico City Residence	$750,000	$1,250,000	$500,000
Investment Portfolio in Europe	$1,500,000	$1,300,000	($200,000)
Investment Portfolio in Mexico	$550,000	$700,000	$150,000
California Real Estate	$600,000	$450,000	($150,000)
Mexico City Private Company	$400,000	$10,000	($390,000)
Mexican Real Estate	$200,000	$1,100,000	$900,000
Totals	$4,000,000	$4,810,000	$810,000
	**Assume all Gain is Long Term Capital Gain		$810,000
	Exemption from Taxation		($600,000)
	Taxable Base — @ Current LTCG Rate of 15%		$210,000
	Tax Rate	15%	
	Total U.S. Tax		$31,500

The tax is determined by using the highest rate of estate tax,[13] which is currently 35 percent in 2012, or, if greater, the highest rate of gift tax set forth in Code Sec. 2502.[14]

A covered gift is defined as "any property acquired by gift directly or indirectly from an individual who, at the time of the acquisition is a covered expatriate."[15] In the above example, assume the Accidental American from Mexico later makes a gift of the shares in her Mexico City private company to her son who is also a dual national. If her son is a U.S. citizen or otherwise resident in the United States, her son (not mother) will pay a 35-percent tax on the value of the shares. In the first example, the tax would be approximately US$1,400,000 with a fair market value in the shares of US$4M. If the shares are only worth US$10,000 at the time of the gift, there would be no U.S. tax to the U.S. citizen son due to the annual exclusion amount discussed below.

This tax cannot be avoided by merely not making a lifetime gift and deferring any transfer to children until the death of the covered expatriate. A covered bequest is broadly defined as "any property acquired directly or indirectly by reason of the death of an individual who, immediately before such death was a covered expatriate."[16]

The recipient of a covered gift or bequest is entitled to an exclusion similar to the gift tax annual exclusion allowed to U.S. citizens and residents.[17] Therefore, the gift (or estate) tax is imposed only if the value of covered gifts and covered bequests received by the recipient during the calendar year exceeds the annual exclusion amount allowed under Code Sec. 2503(b) for such calendar year. The base exclusion is $10,000, as adjusted for inflation.[18]

Exceptions from Taxation–Many Accidental Americans May be Spared from the Exit Tax, Provided They Can Certify to Five Years of U.S. Income Tax Compliance

This article explains the complexity of the tax law and how significant taxation can result when a person renounces U.S. citizenship. However, the author would be remiss if the two exceptions from the application of this law were not discussed. In short, many Accidental Americans might avoid these adverse tax consequences all together, ***if,*** one of two exceptions apply ***and*** the person can certify as to their compliance with all provisions of the U.S. tax law for the preceding five year period.[19] This last criterion, *i.e.,* the certification rule for five years, will be the trap for the unwary.

The first exception applies to young persons who relinquish U.S. citizenship before attaining 18 1/2 years of age ***and*** have been residents of the United States for not more than 10 tax years before the date of relinquishment. Not many teenagers are giving much thought to the U.S. tax law and U.S. tax residency. Hence, this exception in practice has little effect.

The second exception is far more important for Accidental Americans who have long surpassed 18 1/2 years of age. If the Accidental American meets each of the following three criteria, she will not be deemed a "covered expatriate" ***provided*** the person also satisfies the five-year certification rule of Code Sec. 877(a)(2)(c):

1. Became at birth a citizen of both the U.S. and another country; ***and***
2. As of the expatriation date continues to be a citizen of (and is taxed as a resident of) such other country; ***and***
3. Has been a resident of the United States for not more than 10 tax years during the 15th tax year period ending with the tax year during the expatriation date.[20]

In short, there are four separate criteria that must be satisfied in order for the Accidental American to avoid the "mark-to-market" income tax regime upon renouncing U.S. citizenship. These criteria include (1) the above three, which are set forth in the revised definitions from the 2008 amendments,[21] plus (2) the certification of the individual under penalties of perjury that he or she has complied with all U.S. income tax obligations for the preceding five years and provides evidence of such compliance as the Treasury may require (*e.g.,* IRS Form 8854, *Initial and Annual Expatriation Information Statement*).

There are several circumstances where an Accidental American will not be able to satisfy these criteria. First and foremost, if U.S. income tax returns and U.S. information returns (for which there could be dozens of information reporting requirements—for persons residing outside the United States)[22] are not filed, such a certification could never be provided. Hence, in such a case the person would always fall into the "undesirable" category of a "covered expatriate" with the adverse tax consequences that follow.

The Accidental American who was merely born in the United States (*e.g.,* to Mexican parents while

Appendix A

TYPE OF INTERNATIONAL TRANSACTION	IRS/TREASURY FORM
Ownership or signature authority over a foreign bank account	**TD F 90-22.1** – Report of Foreign Bank and Financial Accounts ("FBAR")
Receipt of large gifts from foreign persons (including inheritances from foreign estates)	**IRS Form 3520** - Annual Return To Report Transactions With Foreign Trusts and Receipt of Certain Foreign Gifts
Ownership interest in a foreign corporation	**IRS Form 5471** - Information Return of U.S. Persons With Respect to Certain Foreign Corporations
Ownership interest in a foreign partnership	**IRS Form 8865** - Return of U.S. Persons With Respect to Certain Foreign Partnerships
Transfers of certain interests in a foreign partnership	**IRS Form 8865** - Return of U.S. Persons With Respect to Certain Foreign Partnerships
Transfers to a foreign trust	**IRS Form 3520** - Annual Return To Report Transactions With Foreign Trusts and Receipt of Certain Foreign Gifts
Distributions from a foreign trust	**IRS Form 3520** - Annual Return To Report Transactions With Foreign Trusts and Receipt of Certain Foreign Gifts
Transfers of assets to a foreign corporation	**IRS Form 926** - Return by a U.S. Transferor of Property to a Foreign Corporation
Officers and directors of certain foreign corporations	**IRS Form 5471** - Information Return of U.S. Persons With Respect to Certain Foreign Corporations
Ownership interest in and transfer of certain foreign disregarded entities	**IRS Form 8858** - Information Return of U.S. Persons With Respect To Foreign Disregarded Entities
U.S. citizens who renounce their citizenship and certain lawful permanent residents who abandon immigration status;	**IRS Form 8854** - Initial and Annual Expatriation Statement
Annual return of activities of a foreign trust with a U.S. owner	**IRS Form 3520-A** - Annual Information Return of Foreign Trusts with a U.S. Owner
U.S. citizens who have specified foreign financial assets in a foreign country	**IRS Form 8938** - Statement of Specified Foreign Financial Assets

Appendix B

IRS/TREASURY FORM	POTENTIAL PENALTY EXPOSURE FOR FAILURE TO FILE AND REPORT INTERNATIONAL TRANSACTION
TD F 90-22.1 – Report of Foreign Bank and Financial Accounts ("FBAR")	US$10,000 for each failure to file 50% of the account balance for failure to file or US$100,000; civil penalty Up to $500,000 and up to 10 years in prison; criminal penalty
IRS Form 3520 - Annual Return To Report Transactions With Foreign Trusts and Receipt of Certain Foreign Gifts	Up to 25% of the value of the tax-free gift or inheritance received from the foreign person
IRS Form 5471 - Information Return of U.S. Persons With Respect to Certain Foreign Corporations	US$10,000 for each failure to file; up to US$50,000 in total penalties
IRS Form 8865 - Return of U.S. Persons With Respect to Certain Foreign Partnerships	US$10,000 for each failure to file
IRS Form 8865 - Return of U.S. Persons With Respect to Certain Foreign Partnerships	US$10,000 for each failure to file
IRS Form 3520 - Annual Return To Report Transactions With Foreign Trusts and Receipt of Certain Foreign Gifts	Up to 35% of the value of the transfer of properties to the foreign trust (even if the transfers are income tax-free)
IRS Form 3520 - Annual Return To Report Transactions With Foreign Trusts and Receipt of Certain Foreign Gifts	Up to 35% of the value of the distributions of properties received from the foreign trust (even if the distribution is not subject to income tax)
IRS Form 926 - Return by a U.S. Transferor of Property to a Foreign Corporation	10% of the value of the property transferred up to US$100,000 maximum
IRS Form 5471 - Information Return of U.S. Persons With Respect to Certain Foreign Corporations	US$10,000 for each failure to file
IRS Form 8858 - Information Return of U.S. Persons With Respect To Foreign Disregarded Entities	US$10,000 for each failure to file
IRS Form 8854 - Initial and Annual Expatriation Statement	Various
IRS Form 3520-A - Annual Information Return of Foreign Trusts with a U.S. Owner	5% of the gross value of the trust assets (even if there is no taxable income)

studying in a U.S. graduate school) and immediately returned to live in Mexico may fall within this exception. He or she will be both (1) a U.S. citizen, by birth under the 14th Amendment of the U.S. Constitution, and (2) a Mexican citizen due to his or her Mexican parents.[23] The law, however, requires that he or she must continue to reside in Mexico at the time of renouncing U.S. citizenship and continue to be a Mexican income tax resident. If Maria, the Accidental American in our example, is living in Canada as a Canadian tax resident when she renounces U.S. citizenship, such exception will not apply and she would fall into the "undesirable" category of a "covered expatriate."

Assume, Maria in the above example with total assets of US$8.8M, is living in Mexico when she renounces her U.S. citizenship. Maria will have a very attractive U.S. tax result, if she (1) did not live in the United States for more than 10 of the last 15 years; (2) became a citizen of Mexico and the United States at birth and (3) continues to reside in Mexico and is a Mexican tax resident. Further, assume she has been accurately preparing and filing U.S. income tax returns and U.S. information tax returns for the last five years and is in a position to certify her compliance with all provisions of Title 26. In such a case, she should not be a "covered expatriate" and have no U.S. income taxation upon renouncing U.S. citizenship; *i.e.,* she will save approximately US$630,000 in U.S. income taxes. In addition, and maybe more importantly, since she has a sizeable estate, her U.S. citizen children will not be subject to the "inheritance"/gift transfer tax upon receiving gifts or bequests from Maria of most of the property that currently makes up her estate (the U.S.-California real estate excluded, which makes up a small portion of her estate).[24]

Conclusion

The current U.S. tax costs of renouncing U.S. citizenship can be harsh and can last for two generations. The first tax is the income tax to the person renouncing U.S. citizenship. The second tax falls on the next generation and applies to gifts or bequeaths from the "covered expatriate" to U.S. citizens or U.S. resident children, friends or family who receive such gifts or bequests. Fortunately, careful planning by the Accidental American can reduce significantly, the U.S. tax costs. More importantly, given the proper facts, certain Accidental Americans and their U.S. citizen heirs can avoid both types of U.S. taxes in their entirety. Finally, all of those who renounce U.S. citizenship will be subject to certain U.S. reporting requirements.[25] This would apply to even the least privileged of persons with little to no assets.

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Endnotes

1 *See*, presentation of Jason P. Schachter. Senior Statistician, Bureau of Statistics, ILO Geneva at the United Nations Expert Group Meeting on Migration Statistics, New York, NY, December 4–7, 2006.

2 There continues to be various legislative proposals on this topic, which has always been very politicized. *See* for instance, the press release in May 2012 by Senator Schumer: U.S. Senators Charles E. Schumer (D-NY) and Bob Casey (D-PA) unveiled a comprehensive plan to respond to those like Facebook co-founder Eduardo Saverin, who recently unleashed a scheme to renounce his U.S. citizenship in order to dodge taxes on profits he is expected to collect when the social-networking company goes public.

3 The author has witnessed a veritable rush to renounce U.S. citizenship by the "Accidental American" over the last 2+/- years. The rush seems to be accelerating.

4 *See* Code Sec. 61 and Reg. §§1.11(b) and 1.11(a)(1). Calculating the amount of tax for the Accidental American can be quite complex, due to the U.S. tax rules regarding foreign tax credits, controlled foreign corporations, passive foreign investment companies, among other concepts that are commonplace for persons residing outside the United States. In addition, there are a series of information return reporting requirements that typically carry a minimum penalty of US$10,000 for each violation; *e.g.,* Form TD F 90-22.1, *Report of Foreign Bank and Financial Accounts* or "FBAR," IRS Forms 3520 and 3520A, 5471, 8865, 8830, *etc.*

5 *See* footnote 14 of *T.N. Crow,* 85 TC 376, Dec. 42,339 (1985):

> 14/ ... The Treasury Department's explanation of the Maltese treaty ... : "Paragraph (3) contains the traditional 'saving clause' under which each Contracting State reserves the right to tax its residents, as determined under Article 4 (Fiscal Residence), and its citizens as if the Treaty had not come into effect. [Department of Treasury, Technical Explanation of the Agreement Between the United States of America and the Republic of Malta with Respect to Taxes on Income 2 (Published in Treasury Department Press Release R 367 on Sept. 24, 1981), 1984-2 C.B. 366.]" This interpretation is consistent with the typical interpretations accompanying recent treaties containing general savings clauses.

6 In the case of a lawful permanent resident, the term "expatriation date" under new Code Sec. 877A is the date the individual ceases to be a lawful permanent resident of the United States within the meaning of Code Sec. 7701(b)(6).

Code Sec. 877(e) was introduced by the Health Insurance Portability and Account-

Endnotes

ability Act of 1996 (P.L. 104-191) ("HIPPA"), and applies to individuals who:

- cease to be long-term residents under Code Sec. 7701(b)(6), or
- begin to be treated as residents of a foreign country under a U.S. Tax Treaty *on or after* February 6, 1995.

Code Sec. 877(e) provides comparable treatment between former green card holders and former U.S. citizens, so that any lawful permanent resident who (1) ceases to be a long-term resident within the meaning of Code Sec. 7701(b)(6), *or* (2) begins to be treated as a resident of a foreign country under a Tax Treaty between the U.S. and such foreign country (and who does not waive the benefits of the Treaty applicable to residents of the foreign country), is treated for purposes of Code Sec. 877 and Code Secs. 2107 (estate tax), 2501 (gift tax) and 6039G (information reporting requirements for expatriates) as an individual who has renounced U.S. citizenship.

Further, in order for an individual to be deemed a "long-term resident" under Code Sec. 877(e), the individual must be a lawful permanent resident of the United States (*e.g.,* a green card holder) for at least eight of the 15 tax years ending in the year the individual ceases to be a long term resident under Code Sec. 7701(b)(6), or begins to be treated as a resident of a foreign country under a U.S. Tax Treaty. *See* Code Sec. 877(e)(2).

7 *See* IRS Form 8854, *Initial and Annual Expatriation Statement.* The requirement of satisfying the federal tax law for the preceding five years, is no easy task, if a technical reading of the law applies. What happens if the taxpayer inadvertently miscalculated his or her taxes in one of the preceding five years—*e.g.,* took a deduction that they were not entitled to, misclassified a gain or loss as capital versus ordinary, miscalculated their itemized deductions, *etc.*)? Does this mean that the government can retroactively challenge a taxpayer's status as a "covered expatriate" arguing they failed to comply with some particular provision of the labyrinthine rules of Title 26? What if the taxpayer did not take a deduction he or she was entitled to, actually increasing their taxable income, would this not comply with this certification requirement? Many unanswered questions remain on this point.

8 *See* subparagraph (c) of Code Sec. 877(a)(2).

9 A "covered expatriate" is "an expatriate who meets the requirements of subparagraph (a), (b) or (c) of section 877(a)(2)":

- The average annual net income tax liability of the individual for the five preceding years (ending before the date of loss of U.S. citizenship) is greater than $124,000 (adjusted for inflation);
- The net worth of the individual on such date is $2 million or more; *or*
- The individual fails to certify under penalties of perjury that he or she has complied with all U.S. income tax obligations for the preceding five years and provides evidence of such compliance as the Treasury may require (*e.g.,* has not filed IRS Form 8854, *Initial and Annual Expatriation Information Statement*).

10 *See* Code Sec. 877A(a)(1).

11 *See* Code Sec. 877A(c).

12 *See* Code Sec. 2801(b).

13 *See* Code Sec. 2001(c) which establishes such rates.

14 *See* Code Sec. 2801(a).

15 *See* Code Sec. 2801(e)(1)(A).

16 *See* Code Sec. 2801(e)(1)(B).

17 Property that would be deductible for gift and estate tax purposes as marital or charitable deductions is also excluded from the definition of "covered gift or bequest" if the decedent or donor were a U.S. person (but for the expatriation). Code Sec. 2801(e)(3).

18 *See* Code Sec. 2503(b).

19 *See* Code Sec. 877(a)(2)(c) and notes 9 and 10.

20 *See* definition in Code Sec. 7701(b)(1)(A)(ii).

21 *Id.*

22 The statutory regime for information reporting requirements can be daunting, along with potential penalties for a "U.S. person," which includes "Accidental Americans." A summary of the type of transaction and form required is set out in Appendix A.

A summary of potential penalties is set out in Appendix B, and may help the Accidental American identify if they might have a transaction or item that should be reported on an information return.

23 Article 30 section A) II of the Mexican Constitution provides that a person who is born abroad (*i.e.,* outside of Mexico) to Mexican parents, is considered a Mexican national.

24 In addition to avoiding adverse income tax consequences, the Accidental American who meets these criteria will not cause her U.S. citizen (or other "resident alien") children, or other heirs, to be subject to the "inheritance"/gift transfer tax when the former U.S. citizen gifts or bequeaths assets to her U.S. citizen or "resident alien" children or heirs.

25 *See* Form 8854, *Initial and Annual Expatriation Statement.*