



**California Society of CPAs
20th Annual Tax and Accounting Institute**

Taking Your Tax Practice International

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I. U.S. Income Tax Residency

- A. Why Important?
 - 1. U.S. income tax residents are taxed on worldwide income.
 - 2. Nonresidents are only taxed on income from U.S. sources.
- B. U.S. Income Tax Residents
 - 1. U.S. citizens.
 - 2. U.S. green card holders (lawful permanent resident).
 - 3. Foreign nationals meeting the “substantial presence test.”
 - 4. Domestic corporations, partnerships, trusts and estates.
- C. Substantial Presence Test
 - 1. 31 or more days during the current year, and 183 or more days during the 3-year period that includes the current year and the 2 preceding years, counting: (i) all the days present in the current year; (ii) 1/3 of the days present in the first preceding year; and (iii) 1/6 of the days present in the second preceding year. Nonresident may spend up to 121 days in the U.S. each year without meeting substantial presence test.
 - 2. Must count each day physically present for any period of time, except:
 - (i) Commuting from Canada or Mexico.
 - (ii) Present less than 24 hours in transit to point outside the U.S.
 - (iii) Medical condition developed in U.S. and unable to leave.
 - (iv) Teacher, professor, trainee or researcher on J or Q visa, or student on F, J, M, or Q visa; exemptions limited in time and must file Form 8843.
 - (v) Diplomatic or consular visas.
 - (vi) Professional athletes in U.S. for competition.
- D. Exceptions to Substantial Presence Test
 - 1. Treaty Article 4 – residency tie-breaker rules and center of vital interests located in a foreign country (Form 8833).
 - 2. Closer Connection (Form 8840).
 - (i) Present in U.S. for less than 183 days during current year;
 - (ii) Maintain a tax home in a foreign country for entire year (main and regular place of business); and
 - (iii) Have a closer connection to that same foreign country – factors are similar to California residency test.
 - 3. Generally preferable to qualify under closer connection exception to avoid having to file U.S. foreign information reporting forms and FBARs.

II. Nonresident Income Taxation

- A. U.S.-Source FDAP Income (interest, dividends, rents, royalties)
 - 1. 30% gross withholding at the source.
 - (i) Obligation of payor.
 - (ii) Payor must file Form 1042.
 - 2. Treaty may reduce or eliminate withholding.
 - (i) Must obtain U.S. TIN and provide Form W-8BEN to payor to claim reduced or no withholding.
 - (ii) Payor must still file Form 1042.

3. Certain categories of income exempt from tax and withholding, including:
 - (i) Capital gains other than from real estate (e.g., stock sales).
 - (ii) Bank deposit interest.
 - (iii) Portfolio interest – U.S. treasuries, most publicly traded bonds, and qualifying private debt instruments (must still file Form 1042).
 4. Nonresident generally not required to file U.S. tax return if there was sufficient withholding.
- B. U.S.-Source Income Effectively Connected to U.S. Trade or Business
1. Taxed on net basis at graduated rates (similar to U.S. tax residents), and nonresident must file U.S. tax returns.
 - (i) Whether activity rises to level of “trade or business” is subjective analysis of whether activity is regular, considerable and continuous, but providing services is always trade or business.
 - (ii) May give payor Form W-8ECI to avoid withholding.
 2. Compensation of independent contractors and dependent employees may be exempt from tax under treaty (must file Form 8233).
 3. Nonresident partner of U.S. partnership deemed to be in trade or business of partnership.
 - (i) Partnership obligated to withhold quarterly on nonresident partner’s distributive share of income at highest marginal rates.
 - (ii) Partnership FDAP income subject to 30% withholding and nonresident may qualify for treaty reduced or no withholding.
 4. Foreign corporation engaged in U.S. trade or business may also be subject to “branch profits” tax.
 - (i) 30% tax on dividend equivalent amount.
 - (ii) Parity for foreign corporation operating through domestic sub.
 - (iii) Treaty (e.g. Mexico) may reduce branch profits tax rate.
- C. Nonresident Investment in U.S. Real Property Interests
1. Operating income – rents.
 - (i) 30% gross withholding if nonresident’s rental activity does not rise to level of trade or business (e.g., triple-net lease, property manager); no deductions.
 - (ii) May file a “net” election to deem real estate activity as trade or business for net taxation (depreciation, property tax, interest and other expense deductions).
 2. Sale, exchange or other disposition – FIRPTA.
 - (i) Gain treated as effectively connected to U.S. trade or business.
 - (ii) 15% gross withholding as a provisional tax (must file Form 8288).
 - (iii) 10% gross withholding for sales of certain primary residences where amount realized between \$300,000 and \$1,000,000.
 - (iv) May apply for reduced withholding certificate.
 3. Nonrecognition transactions.
 - (i) Nonresident may do §1031 exchange, or §351 or §721 contribution to domestic corporation or partnership; reporting required.
 - (ii) Nonresident generally may not do §351 contribution to foreign corporation unless foreign corporation makes §897(i) election to be treated as domestic corporation.
 4. Ownership through U.S. corporation.
 - (i) Corporation is a “U.S. real property holding corporation” if >50% of the value of its assets consists of U.S. real estate.

- (ii) 15% withholding tax applies to sale or disposition of stock.
 - (iii) May sell stock free from U.S. tax if, at time of sale, corporation has no U.S. real property interests due to being sold in a taxable transaction within past 5 years.
 - (iv) Dividends may be subject to reduced or no withholding under applicable treaty.
5. Ownership through foreign corporation.
- (i) Foreign corporation may file a “net” election for net taxation of operating income.
 - (ii) Branch profits tax applies.
 - (iii) Foreign shareholder may sell stock without U.S. tax.
6. Ownership through foreign corporation owning U.S. subsidiary.
- (i) Branch profits tax does not apply.
 - (ii) Dividends from U.S. subsidiary to foreign parent may be subject to reduced or no withholding under applicable treaty .
 - (iii) May sell stock of foreign parent without U.S. tax.

III. Nonresident Gift and Estate Taxation

- A. Transfer Tax Definition of Nonresident
1. Not a U.S. citizen or U.S. resident.
 2. A U.S. “resident” for transfer tax purposes is a person who has acquired U.S. “domicile,” meaning the person was in the U.S., for even a brief period of time, with the intent to remain in the U.S.
- B. Nonresident Gift Tax
1. Nonresidents only subject to gift tax on gifts of U.S. real estate and U.S.-situs tangible personal property (physically located in the U.S.).
 2. Gifts of intangible property (e.g., stock in domestic companies) are not subject to gift tax.
 3. No unified credit (lifetime exemption), but qualify for annual exclusion (\$14,000), tuition exclusion and medical exclusion.
- C. Nonresident Estate Tax
1. Nonresidents subject to estate tax on all U.S.-situs property.
 - (i) U.S.-situs property includes stock in domestic companies, domestic partnership and LLC interests, debt obligations issued by U.S. persons (except for certain portfolio debt obligation), and personal property located in the U.S.
 - (ii) Exceptions include bank deposits if the interest was exempt from income tax, portfolio debt obligations, and certain life insurance.
 2. Nonresidents have only \$60,000 of estate tax exemption (as compared to U.S. residents: \$5,450,000 for 2016, and \$5,490,000 for 2017).
 3. Nonresidents may avoid U.S. estate tax by holding their U.S. assets through a foreign corporation (including a foreign corporation that has made a §897(i) election to be treated as a domestic corporation), a domestic corporation owned by a foreign corporation, or a foreign nongrantor trust.
 4. Revocable living trust and life insurance is an option to address estate tax for individually held real estate.
- D. Transfer Tax Treaties

IV. Expatriation

- A. Acts of Expatriation
1. U.S. Citizens: (i) formal renunciation before appropriate U.S. official; (ii) obtaining naturalization in a foreign country; or (iii) serving in armed forces of foreign state that is engaged in hostilities with the U.S.
 2. Long-Term Green Card Holders: (i) green card is relinquished; (ii) green card is revoked or deemed to be abandoned under immigration laws; or (iii) individual commences to be treated as resident of foreign country under a tax treaty between such country and the U.S., or does not waive tax benefits available under an applicable tax treaty. A long-term green card holder is an individual who has held a green card for any portion of at least 8 of the 15 taxable years ending with the taxable year in which relinquishment occurs.
- B. “Covered Expatriate” Tests
1. Average annual net income tax for the 5 years preceding year of expatriation exceeds \$161,000 for 2016 (\$162,000 for 2017); or
 2. Net worth as of expatriation date is \$2,000,000 or more; or
 3. Fail to certify on Form 8854 that is in compliance with all U.S. federal tax obligations for the 5 years preceding the year of expatriation.
 4. Exceptions to income tax and asset tests:
 - (i) Individual who became dual citizen at birth and continues to be citizen of and taxed as resident of the other country and who has not been a U.S. resident for more than 10 of the 15 years ending with the year of expatriation; and
 - (ii) U.S. citizens who relinquish citizenship before age 18-1/2 provided they were not a U.S. resident for more than 10 taxable years before such relinquishment.
- C. Tax Consequences for Covered Expatriates
1. Mark-to-market exit tax imposed on net gain from deemed sale of assets.
 - (i) Gain exclusion of \$693,000 for 2016, and \$699,000 for 2017.
 - (ii) Losses on deemed sale taken into consideration.
 - (iii) Basis adjustments.
 - (iv) May file irrevocable election to defer payment of tax (on asset-by-asset basis), but must (a) provide adequate security such as a bond, and (b) irrevocably waive any right under a treaty that would preclude assessment or collection.
 2. Gift tax imposed on U.S. citizen or resident alien who receives property as a gift or bequest from a covered expatriate.
 3. Special rules for eligible deferred compensation, IRAs and nongrantor trusts – not subject to mark-to-market, but 30% withholding.
- D. Reed Amendment
1. Former citizens who renounce for tax avoidance purposes are ineligible for visas for admission back into U.S.
 2. No implementing regulations issued; not enforced.

V. U.S. Tax Residents Earning Income Abroad

- A. Foreign Earned Income Exclusion (Form 2555).
 - 1. \$101,300 for 2016, and \$102,100 for 2017.
 - 2. Tax home must be abroad, and must meet either the bona fide resident test, or the physical presence test.
 - (i) Bona fide resident test requires taxpayer to be resident of foreign country for entire tax year (extension available – Form 2350) – facts and circumstances.
 - (ii) Physical presence test requires taxpayer to be present in foreign country at least 330 days in 12-month period.
 - 3. Foreign tax credits attributable to excluded income not allowed.
- B. Foreign Housing Exclusion.
- C. Foreign Tax Credits (or Deduction).
 - 1. Passive category.
 - 2. General category.
- D. Income Tax Treaties.
 - 1. Income from employment (dependent personal services) not taxable in host country if employee not present for 183 days or more, and compensation is not paid by resident of host country.
 - 2. Income from self-employment (independent personal services) generally not taxable in host country unless contractor has “fixed base.”
- E. Totalization Agreements.

VI. Foreign Entity Classification

- A. Foreign Corporations
 - 1. List of “per se” foreign corporations.
 - 2. Others may elect to be classified as partnership or disregarded entity.
- B. Planning for Foreign Corporations
 - 1. Partnership treatment to achieve pass-through of start-up losses and enable owners to take foreign tax credit for foreign taxes paid.
 - 2. Corporation treatment to achieve deferral.
- C. Foreign Trusts – Court/Control Test

VII. Controlled Foreign Corporations (CFC)

- A. Tests:
 - 1. U.S. shareholders own >50% value of foreign corporation; or
 - 2. U.S. shareholders hold >50% of vote of foreign corporation.
- B. Tax Consequences.
 - 1. Each U.S. shareholder must include his pro rata share of CFCs undistributed Subpart F income as “deemed” dividend (E&P limitation).
 - (i) Not a “qualified” dividend subject to capital gains rate.
 - (ii) Indirect foreign tax credit generally unavailable to individual shareholders; corporate shareholders receive indirect tax credit.

2. Gain on sale of stock treated as a dividend to extent of earnings and profits attributable to such stock (qualified dividend if from treaty country).

C. Main Categories of Subpart F Income.

1. Foreign personal holding company income – i.e., passive income.
2. Foreign base company sales income – i.e., property purchased from related person or sold to related person, and property not manufactured in CFC's home country or sold for consumption in CFC's home country.
3. Foreign base company services income – i.e., services performed for related person, and services not provided in CFC's home country.

VIII. Form 5471 for Foreign Corporations (Sections 6038 and 6046)

A. Filing Required by:

1. US Officers/Directors (non-owners) Where U.S. Person Acquires 10% (vote/value) of Stock or an Additional 10% of Stock (creeping acquisitions).
2. US Person Who: (i) Acquires > 10%; (ii) Disposes Dropping Interest Below 10%; (iii) Becomes US Person While Owning > 10% (substantial presence).
3. US Person in Control (>50% vote/value) of Foreign Corporation.
4. "US Shareholder" (>10% vote) Owning Shares of CFC.
=> Treaty Nonresident Position Does Not Excuse Filing – Still US Person (closer connection?).

B. Complex Ownership Attribution Rules.

C. Category of Filer Determines Information That Must Be Reported (schedules).

D. Multiple Filer Exception: One person may file Form 5471 (and applicable schedules) for persons who have the same filing requirements, and must identify such persons. All persons identified must attach a statement to their income tax return.

E. 5471 Must Be Attached to Filer's Timely Filed Tax Return; Automatic Penalty.

F. Over-Reporting and "Substantially Incomplete" Form – CCA 200429007.

G. Penalties:

1. \$10,000 Penalty for Each Foreign Corporation Not Reported.
2. FTC Calculation: Foreign Taxes Deemed Paid Reduced by 10%.
3. Potential Criminal Penalties.

IX. Form 5472 for Domestic Reporting Corporation (Sections 6038A and 6038C)

A. Reporting Corporation:

1. > 25% Foreign-Owned U.S. Corporation (direct/indirect/constructive).
2. Foreign Corporation Engaged in a U.S. Trade or Business (net election?).

B. Must Report Related Party Transactions.

1. Includes Accrued Amounts, e.g., Interest.
2. Reasonable Estimates – At Least 75% and Not More Than 125%.

- C. 5472 Must Be Attached to Filer's Timely Filed Tax Return; Automatic Penalty.
- D. Over-Reporting and "Substantially Incomplete" Form – CCA 200429007.
- E. Penalties:
 - 1. \$10,000 Penalty for Failure to File.
 - 2. \$10,000 Penalty for Failure to Maintain Records.
 - 3. Potential Criminal Penalties.
- X. Form 926 Transfers to Foreign Corporations (Sections 6038B and 367)**
 - A. Transfers of Tangible and Intangible Property by U.S. Person to Foreign Corporation.
 - 1. Cash Transfers:
 - (i) Directly or Indirectly Holds > 10% Vote/Value After the Transfer.
 - (ii) \$100,000 Transferred in Previous 12 Months.
 - 2. Intangible Transfers.
 - => Treaty Nonresident Position Does Not Excuse Filing – Still US Person (closer connection?)
 - B. 926 Must Be Attached to Filer's Timely Filed Tax Return for Year of Transfer.
 - C. Penalties:
 - 1. 10% of FMV of Property at Time of Transfer.
 - 2. Limit of \$100,000 Unless Failure Due to Intentional Disregard.
- XI. Form 8865 for Foreign Partnerships (Sections 6038, 6038B and 6046A)**
 - A. Filing Required by:
 - 1. U.S. Person Who Controls Foreign Partnership (>50% Interest in Capital, Profits, or Deductions/Losses).
 - 2. U.S. Person Who Owned > 10% Interest While Partnership Controlled by U.S. Persons Owning > 10% Interest.
 - 3. U.S. Person Who Contributes Property to Partnership and: (i) Owns > 10% Interest After the Transfer; or (ii) Contribution > \$100,000 in 12 Months.
 - 4. U.S. Person That Had Reportable Event.
 - (i) U.S. Person: (i) Acquiring Direct > 10% Interest (creeping); or (ii) Interest Increasing by > 10% (redemptions)
 - (ii) U.S. Person Disposition: (i) Decreasing Interest Below 10%; or (ii) Decreasing Interest by > 10%

=> Treaty Nonresident Position Does Not Excuse Filing – Still US Person (closer connection?)

- B. Complex Ownership Attribution Rules.
- C. Category of Filer Determines Information That Must Be Reported (schedules); If Partnership Files 1065, Filer May Attach 1065 In Lieu of Schedules.
- D. Multiple Filer Exceptions, With Statements for Non-Filers.

- E. 8865 Must Be Attached to Filer's Timely Filed Tax Return.
- F. Over-Reporting and "Substantially Incomplete" Form – CCA 200429007.
- G. Penalties:
 - 1. \$10,000 Penalty for Failure to File.
 - 2. FTC Calculation: Foreign Taxes Deemed Paid Reduced by 10%.
 - 3. Potential Criminal Penalties.

XII. Form 8858 for Foreign Disregarded Entities (Sections 6011, 6012, 6031 and 6038)

- A. U.S. Persons That Are "Tax Owners" of Foreign Disregarded Entities (FDE) or That Own Interests in Foreign Tax Owners of FDEs Must File:
 - 1. U.S. Persons That Are Tax Owners of FDEs at Any Time During Year.
 - 2. U.S. Persons Required to File 5471 (Categories 4 and 5) for CFC That is Tax Owner of FDE.
 - 3. U.S. Persons Required to File 8865 (Categories 1 and 2) for Controlled Foreign Partnership That is Tax Owner of FDE.

=> Treaty Nonresident Position Does Not Excuse Filing – Still US Person (closer connection?)

- B. Separate 8858 (and all applicable schedules) Required for Each FDE.
- C. Multiple Filer Exceptions, With Statements for Non-Filers.
- D. 8858 Must Be Attached to Filer's Timely Filed Tax Return.
- E. Penalties:
 - 1. \$10,000 Penalty for Failure to File.
 - 2. FTC Calculation: Foreign Taxes Deemed Paid Reduced by 10%.
 - 3. Potential Criminal Penalties.

XIII. Form 3520 for Foreign Trusts and Foreign Gifts (Sections 6048, 6039F)

- A. Filing Required by:
 - 1. Responsible Party for Reporting Reportable Event
 - (i) Creation of Foreign Trust by U.S. Person (taxable transfer of property?)
 - (ii) Transfer of Money or Property to Foreign Trust by U.S. Person.
 - (iii) Death of U.S. Person if: (i) Decedent Treated as Owner of Foreign Grantor Trust; or (ii) Portion of Foreign Trust Included in Estate.
 - 2. U.S. Person Treated as Owner of Foreign Grantor Trust.
 - 3. U.S. Person Received Distribution from Foreign Trust (including uncompensated use of trust property – HIRE Act).
 - 4. US Person Who Received Either: (i) Gift of >\$100,000 from Nonresident Alien or Foreign Estate (including related persons); or (ii) Gift of >\$15,671 (2016) from Foreign Corporations or Foreign Partnerships (including related

=> Treaty Nonresident Position Does Not Excuse Filing – Still US Person (closer connection?)

- B. Two U.S. Transferors or Grantors of Foreign Trust, or Two US Beneficiaries of Foreign Trust, May Jointly File 3520 if They File Joint Income Tax Return.
- C. Form 1040 Schedule B Question (signed by taxpayer and preparer under penalty of perjury).
- D. 3520 Filed in Ogden by Due Date of Filer's Income Tax Return.
- E. Penalties for Non-Filing or Incomplete Filing Equal to Greater of:
 - 1. \$10,000.
 - 2. 35% of Gross Value of Property Transferred to Foreign Trust for Creation or Transfer to Foreign Trust by U.S. Person.
 - 3. 35% of Gross Value of Distributions Received from Foreign Trust by U.S. Person.
 - 4. 5% of Gross Value of Trust Assets Treated as Owned by U.S. Person.
 - 5. Failure to Report Gifts: 5% of Amount of Gift for Each Month Failure Continues, not to Exceed 25%.
- F. Revenue Ruling 2013-14 Holds That Most Mexican Fideicomisos are Not Foreign Trusts for Purposes of Section 6048 (3520 and 3520-A no longer required).

XIV. Form 3520-A for Foreign Trusts (Section 6048(b))

- A. Filed by Foreign Trust with U.S. Owner.
 - 1. Technically Obligation of Trustee.
 - 2. Foreign Trustees Do Not Comply; U.S. Grantor/Owner May File Substitute Form 3520-A.
- B. 3520-A Filed in Ogden by 15th Day of Third Month After Trust's Tax Year End (March 15).
 - 1. Foreign Grantor Trust Owner Statement Provided to U.S. Grantor/Owner.
 - 2. Foreign Grantor Trust Beneficiary Statement Provided to U.S. Beneficiary.
- C. Penalties for Non-Filing or Incomplete Filing Equal to Greater of:
 - 1. \$10,000.
 - 2. 5% of Gross Value of Trust Assets Treated as Owned by U.S. Person.

XV. Form 8938 for Foreign Financial Assets (Section 6038D)

- A. U.S. Individuals Required to File:
 - 1. For U.S. Individuals Residing in the US, Foreign Financial Assets With Aggregate Value (i) > \$50,000 at End of Year, or (ii) > \$75,000 at Any Time During Year.
 - 2. For U.S. Individuals Residing Abroad, Foreign Financial Assets With Aggregate Value (i) > \$200,000 at End of Year, or (ii) > \$300,000 at Any Time During Year.

=> Treaty Nonresident Position Does Not Excuse Filing – Still US Person (closer connection?).

- B. Pursuant to Notice 2013-10, Specified Domestic Entities Not Required to File Until 2011 Proposed Regulations are Finalized (could be 2016).
- C. Reportable Foreign Financial Assets Include:
 - 1. Foreign Accounts (Including Pension Plans).
 - 2. Interests in Foreign Entities, Trusts and Estates.
 - 3. Financial Instruments, Loans and Contracts with Foreign Issuer.
- D. 8938 Must Be Attached to Filer's Timely Filed Tax Return.
- E. 8938 Must be Filed Even if Foreign Financial Assets Reported on Other Forms (e.g., 5471, FBAR).

XVI. FinCen Form 114 "FBAR" (31 USC 5314 – Bank Secrecy Act)

- A. "U.S. Person" with Financial Interest in or Signature Authority Over Foreign Financial Accounts the Aggregate Value of Which > \$10,000 at any Time During Year.
 - 1. Corporation Where U.S. Person Owns > 50% Vote/Value.
 - 2. Partnership Where U.S. Person Owns >50% Profits/Capital.
 - 3. Grantor Trusts Owned by U.S. Person.
 - 4. Non-Grantor Trusts Where U.S. Person has >50% Present Beneficial Interest in Income or Assets.
 - 5. Revocable Trusts and Disregarded Entities?
- B. Exceptions for Foreign Accounts Held by U.S. Qualified Plans.
- C. Form 1040 Schedule B Question (signed under penalty of perjury by taxpayer and preparer).
- D. Must be Electronically Filed on FinCen Web Site.
 - 1. H.R. 3236 – New filing deadline: April 15, starting for tax years beginning after Dec. 31, 2015 (e.g., FBAR for 2016 due on April 15, 2017). A 6-month extension to October 15 is available, but unclear if separate extension required for FBAR or whether Form 4868 also extends FBAR.
- E. 6-Year Statute of Limitations (even if forms not filed).
- F. Penalties:
 - 1. \$10,000 Civil Penalty for Non-Willful (also 5-year recordkeeping).
 - 2. Greater of \$100,000 or 50% of Account for Willful.
 - 3. Criminal Penalties.
 - 4. Penalty Mitigation Guidelines – See IRM 4.26.16.6.

XVII. How Will They Know?

- A. FATCA and Disclosure of U.S. Account Holders by Foreign Banks.
- B. Treaty-Based Information Exchanges.
- C. Data Mining from 2009, 2011, 2012 and 2014 Offshore Voluntary Disclosure Programs.

- D. Swiss Bank Program and Disclosure Under Non-Prosecution Agreement.
- E. Cooperation from Taxpayers, Advisors and Others Who Have Been Prosecuted.
- F. New International Enforcement Personnel.

=> Current Landscape: extreme pressure for timely international reporting and compliance, which requires understanding of complex code provisions and foreign information returns.

XVIII. Addressing Noncompliance

- A. 2014 Offshore Voluntary Disclosure Program (OVDP).
 - 1. Must file 8 years of amended returns to report omitted foreign income and 8 years of foreign information returns.
 - 2. Payment of tax, interest, 20% accuracy-related penalties, failure to file and late payment penalties, and 27.5% OVDP penalty based on highest value of accounts during 8-year period (or 50% penalty if account held in a bank listed as “facilitator”).
 - 3. Must agree to extend statute of limitations on assessment.
 - 4. Must waive reasonable cause defense to penalties.
 - 5. Must disclose institutions, advisors and other facilitators.
 - 6. Principal benefit: taxpayer “generally” not criminally prosecuted, and reasonable degree of certainty of cost to become compliant.
 - 7. No set deadline, but may be revoked and terms could change at any time.
 - 8. May opt out – seek guidance from Taxpayer Advocate.
- B. “Streamlined” Procedures – Domestic and Offshore.
 - 1. 3 years of tax and informational returns, plus 6 years of FBARs.
 - 2. Taxpayer must certify under penalty of perjury that noncompliance was “nonwillful.”
 - 3. Offshore: No penalties; only tax due and interest. Applicable to U.S. taxpayers that spent at least 330 full days outside of the U.S. in one of last 3 calendar years.
 - 4. Domestic: 5% penalty, plus tax due plus interest. Applies only to amended (not delinquent) returns.
- C. “Delinquent” Information Return Submission Procedures.
 - 1. FBARs: No penalties if (i) income properly reported and tax paid, and (ii) taxpayer has not been previously contacted by IRS.
 - 2. International Returns: No penalties if (i) income properly reported and tax paid, (ii) reasonable cause, (iii) not under examination, and (iv) taxpayer has not been previously contacted by IRS.
- D. “Quiet” Disclosures – Pros/Cons/Issues.
 - 1. How far to go back?
 - (i) Open years under 3-year statute of limitations?
 - (a) Amended tax returns used against taxpayer as omission?
 - (b) Does this bolster reasonable cause defense?
 - (ii) Only going forward?
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 - 2. Rely on reasonable cause defense – preparer may have to fall on sword.
 - (i) Taxpayer exercised reasonable care (education, information provided, etc).

- (ii) Tax opinion recommended.
 - 3. Questionable reasonable cause defense but:
 - (i) Potential penalty exposure less than OVDI penalty (nonwillful).
 - (ii) Insignificant omitted income (statute of limitations issues).
- E. Preparer Tax Return and Foreign Information Reporting Responsibilities Under Circular 230.
 - 1. Section 10.22 – Preparer Must Exercise Due Diligence:
 - (i) In preparing returns and statements.
 - (ii) In determining the correctness of statements (returns) made to IRS.
 - 2. Section 10.34 – Preparer May Rely in Good Faith on Client Information.
 - (i) Reasonable inquiries if information from client seems incomplete/incorrect or implies potential foreign transactions.
 - (ii) Duty to advise on filing requirements and potential penalties.
 - 3. Year-end tax planners should include questions on foreign transactions and assets and preparer should impress upon client the importance of information reporting.

XIX. Statute of Limitations on Assessment (SOL)

- A. General Rules for Title 26.
 - 1. SOL generally begins to run once return filed, but not before original due date of return.
 - 2. Mailbox rule: date return mailed is date return filed.
 - 3. IRS generally has 3 years from date return filed to assess additional tax.
- B. Primary Exceptions to 3-Year General SOL Rule.
 - 1. 6-year SOL where: (a) taxpayer omits income which exceeds 25% of the income reported on the return; or (b) taxpayer omits deemed dividend from CFC in any amount.
 - (i) Extended SOL applies to entire return, not just omitted income.
 - (ii) Overstated basis now constitutes an omission of income.
 - (iii) IRS has burden to show 25% omission.
 - 2. Unlimited SOL for false or fraudulent return.
 - (i) Mere negligence not enough. Taxpayer must have specific purpose of evading tax known or believed to be owing.
 - (ii) IRS has burden of showing fraud by “clear and convincing” evidence (badges of fraud).
 - 3. Unlimited SOL for failure to file return.
 - 4. Extension by agreement (Form 872).
 - (i) Agreement only effective if signed before SOL has expired for year(s) to be extended.
 - (ii) Extension of SOL for Title 26 does not extend SOL for Title 31.
 - 5. Contesting summonses (quash), and John Doe summonses outstanding for more than 6 months (e.g., UBS, HSBC India).
- C. Closing Agreements and OVDP.
- D. Foreign Information Reporting Forms.
 - 1. Failure to file foreign information reporting form extends SOL for entire return until 3 years from date reporting form is filed.

2. If failure to file reporting form due to reasonable cause, SOL only open for items on reporting form (not entire return).
- E. Omission of Income from Foreign Assets.
1. 6-year SOL if taxpayer omits or fails to report > \$5,000 of income attributable to specified foreign financial asset.
 2. SOL is extended even if taxpayer was not required to file Form 8938 or FBAR because filing thresholds not exceeded.
- F. Amended Returns.
1. No affirmative statutory or regulatory duty to file amended return.
 2. Regulations provide that taxpayer “should” file amended return to correct errors if within the SOL period.
 3. Filing amended return generally does not extend SOL unless filed within 60 days of expiration of SOL, in which case IRS has additional 60 days.
 4. Filing nonfraudulent amended return after original fraudulent return was filed does not trigger 3-year SOL, unless amended return filed prior to due date of original return (with consideration to extensions).
- G. Title 31 – FBAR SOL Rules.
1. 6-year SOL (from date form due) on FBAR penalties even if forms not filed.
 2. Taxpayer may waive FBAR SOL, which is treated as waiver of affirmative defense and is effective.
 3. Title 26 deficiency procedures for collection do not apply. IRS generally must obtain and collect on judgment.

XX. Consequences of Nonresident Failing to File U.S. Returns

- A. Foreign Corporations.
1. Deductions and credits only allowed if U.S. return is filed.
 2. Return must be filed within 18 months of due date or deductions lost and corporation taxed at graduated rates on gross income.
- B. Foreign Individuals.
1. Deductions and credits only allowed if U.S. return is filed.
 2. Return must be filed within 16 months of due date or deductions lost and individual taxed on graduated rates on gross income.

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