XI. JOINT COMMITTEE STAFF RECOMMENDATIONS

The Joint Committee staff believes that the recommendations contained in this Part of the study will improve and rationalize the present-law rules relating to the tax and immigration treatment of citizenship relinquishment and residency termination.

With respect to the present-law tax provisions, the Joint Committee staff believes that certain of the problems inherent in present law can be addressed through modifications that would provide: (1) objective standards for determining whether former citizens or former long-term residents are subject to the alternative tax regime; (2) tax-based (instead of immigration-based) rules for determining when an individual is no longer a U.S. citizen or long-term resident for U.S. Federal tax purposes; (3) a sanction for individuals who are subject to the alternative tax regime and who return to the United States for extended periods; (4) imposition of U.S. gift tax on gifts of certain closely-held stock of foreign corporations that hold U.S.-situated property; and (5) an annual return-filing requirement for individuals who are subject to the alternative tax regime, for each of the 10 years following citizenship relinquishment or residency termination.

The Joint Committee staff also believes that certain changes to the present-law immigration provisions are necessary to improve the administrability of the special immigration rule relating to tax avoidance. These changes would promote greater coordination and information-sharing between the IRS and the agencies responsible for the immigration laws and would resolve certain inconsistencies between the tax and immigration provisions of present law.

Consistent with its mandate in connection with this study, the Joint Committee staff has focused on potential improvements to the operation of the present-law rules. Thus, the staff's recommendations are designed to fit within the basic framework of the present-law alternative tax regime, and to make this regime work as well as possible. The Joint Committee staff does not take a position as to more fundamental changes that might be considered, such as replacing the present-law alternative tax regime with a mark-to-market exit-tax system, or eliminating altogether the tax regime specific to former citizens and former long-term residents.[577]

While the Joint Committee staff believes that its recommendations would improve the effectiveness and administration of the present-law rules, it should be noted that, even if the Congress were to enact the Joint Committee staff recommendations, tax incentives for citizenship relinquishment and residency termination would remain. An alternative tax regime that is limited to U.S.-source income and, in the case of the estate and gift taxes, to U.S.-situated assets (albeit with expanded definitions of such income and assets) cannot eliminate the tax incentives to relinquish citizenship or terminate residency in cases in which an individual owns significant foreign-situated property. Similarly, an alternative tax regime that applies for a 10-year period following citizenship relinquishment or residency termination will not be effective with respect to individuals who are willing to wait the 10-year period prior to disposing of assets that would be subject to tax under the alternative tax regime. Perhaps most fundamentally, any

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[577] *See* Part X, above, for a discussion of alternative approaches to the tax treatment of former citizens and former long-term residents.

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tax regime applicable to individuals who are no longer physically present in the country, and whose assets may no longer be situated in the country or under the control of any U.S. person, inevitably faces serious challenges of enforcement as a practical matter. This enforcement effort requires significant resources to be devoted to the few individuals who are subject to the alternative tax regime. Accordingly, the Joint Committee staff believes that careful consideration should be given as to whether the alternative tax regime and related immigration rules, even as modified by the recommendations set forth below, can fully achieve the goals that the Congress intends to accomplish.[578]

The Joint Committee staff recommendations are discussed in detail below.

A. Recommendations Relating to the Tax Treatment of Citizenship Relinquishment and Residency Termination

1. Provide objective rules for the alternative tax regime

The Joint Committee staff recommends that objective rules replace the subjective determination of tax avoidance as a principal purpose for citizenship relinquishment or residency termination under present law. Under the proposed objective rules, a former citizen or former long-term resident would be subject to the alternative tax regime for a 10-year period following citizenship relinquishment or residency termination, unless the former citizen or former long-term resident:

(a) establishes that his or her average annual net income tax liability for the five preceding years does not exceed $122,000 (adjusted for inflation after 2003) and his or her net worth does not exceed $2 million, or alternatively satisfies limited exceptions for dual citizens and minors who have had no substantial contact with the United States, and

(b) certifies under penalties of perjury that he or she has complied with all U.S. Federal tax obligations for the five preceding years and provides such evidence of compliance as the Secretary of the Treasury may require.

Background

One of the major difficulties in administering the present-law alternative tax regime is that the IRS is required to determine the subjective intent of taxpayers who relinquish citizenship or terminate residency. The present-law presumption of tax-avoidance purpose in cases in which objective income tax liability or net worth thresholds are exceeded mitigates this problem to some extent. However, the present-law rules still require the IRS to make subjective determinations of intent in cases involving taxpayers who fall below these thresholds, as well for

[578] *See* Part VI, above, for background on the purposes of a special tax regime for former citizens and former long-term residents.

certain taxpayers who exceed these thresholds but are nevertheless allowed to seek a ruling from the IRS to the effect that they did not have a principal purpose of tax avoidance.[579]

Joint Committee staff recommendation

The Joint Committee staff recommends that objective rules replace entirely the subjective determination of tax avoidance as a principal purpose for citizenship relinquishment or residency termination under present law. Under the Joint Committee staff recommendation, a former citizen or former long-term resident would be subject to the alternative tax regime for a 10-year period following citizenship relinquishment or residency termination, unless the former citizen or former long-term resident: (1) establishes that his or her average annual net income tax liability for the five preceding years does not exceed $122,000 (adjusted for inflation after 2003) and his or her net worth does not exceed $2 million, or alternatively satisfies limited, objective exceptions for dual citizens and minors who have had no substantial contact with the United States; and (2) certifies under penalties of perjury that he or she has complied with all U.S. Federal tax obligations for the preceding five years and provides such evidence of compliance as the Secretary of the Treasury may require.

Objective monetary thresholds for determination of tax-motivation

This recommendation, like present law, retains an income tax liability test and a net worth test, but it departs from the present-law approach in two significant respects. First, the objective monetary thresholds would become the general rule for conclusively determining whether a former citizen or former long-term resident would be subject to the alternative tax regime. The monetary thresholds would serve as a proxy for tax motivation and, unlike present law, no subsequent inquiry into the taxpayer's intent would be required or permitted. The ruling process of present law would be eliminated.

Second, because this objective monetary standard would be less flexible than present law, the present-law amount for the net-worth threshold would be increased. Raising the net-worth threshold would mitigate concerns about subjecting non-tax-motivated individuals to the alternative tax regime, since tax savings generally are more significant, and hence tax motivation more likely, in cases involving high net-worth individuals. Because estate and gift taxes are often the principal motivating factors for persons who relinquish citizenship or terminate residency for tax-avoidance purposes, the net-worth threshold would be set at a level at which substantial liability may arise under the estate and gift tax rules. The recommended net worth threshold of $2 million is twice the unified credit exclusion-equivalent amount for gift tax purposes, a level above which the transfer tax can be significant enough to be a motivating factor for relinquishing citizenship or terminating residency.[580] The Joint Committee staff believes that

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[579] Sec. 877(a), (c).

[580] Under present law, the unified credit exclusion equivalent amount for gift tax purposes is $1 million, even for years in which the amount increases for estate tax purposes, for the year in which the estate tax is repealed, and for the years following the sunset of EGTRRA. If changes are made to the estate and gift tax rules in this regard, it may be appropriate to consider correlative adjustments to the net worth threshold.

the income tax liability threshold under present law is set at an appropriate level to target income tax avoidance as a motivating factor, and thus the recommended level of $122,000 simply reflects the inflation-adjusted present-law amount.[581]

The net worth test also would serve as a backstop to the income tax liability test in cases in which income tax avoidance may be the motivating factor, regardless of whether transfer tax avoidance is also an important factor. For example, an individual with a large, highly appreciated securities portfolio might be motivated by income tax avoidance to relinquish citizenship, but such an individual would not necessarily be paying high levels of current income tax, and thus might not exceed the income tax liability threshold. The individual's large amounts of unrealized appreciation would, however, cause the individual to exceed the net worth threshold. For this reason, a net worth test may be desirable even if estate tax repeal were made permanent, or if the estate and gift taxes were both permanently repealed.[582]

Exceptions for certain dual citizens and minors with no substantial contact with the United States

The Joint Committee staff recommends that the alternative tax regime not apply to a former citizen who is a dual citizen or a minor with no substantial contacts with the United States prior to relinquishing citizenship. These exceptions for dual citizens and minors would use the present-law definitions of such individuals,[583] but the exceptions would operate differently from the present-law rules, which require an inquiry into intent. Under the recommendation, even if a former citizen or former long-term resident exceeded the monetary thresholds, that person would be excluded from the alternative tax regime if he or she fell within one of the specified exceptions (provided that the requirement of certification and proof of compliance with Federal tax obligations is met, as described below). Thus, narrow, objective exceptions for cases particularly likely to involve significant non-tax motivation would replace the intent-based inquiry applicable to these cases under present law. These exceptions are described below.

Certain dual citizens.–The Joint Committee staff recommends an exception from the alternative tax regime for an individual who has been a dual citizen of the United States and a foreign country since birth, and who has had no substantial contacts with the United States. A person would be treated as having no substantial contacts with the United States only if the person: (1) was never a resident of the United States (within the meaning of section 7701(b), as modified by any applicable treaty); (2) has never held a United States passport; and (3) was not present in the United States for more than 30 days during any one of the 10 calendar years preceding relinquishment of citizenship.

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[581] Sec. 877(a)(2)(A); Rev. Proc. 2002-70, 2002-46 I.R.B. 845.

[582] Alternatively, a test based on unrealized appreciation may be appropriate in that scenario, since such a test would target a characteristic more directly relevant to income tax avoidance.

[583] Secs. 877(c)(2)(A) and 877(c)(2)(C), respectively.

Certain minors.–The Joint Committee staff recommends an exception from the alternative tax regime for an individual who: (1) was born to parents who were not U.S. citizens (and thus who became a U.S. citizen solely by virtue of being born in the United States); (2) relinquished U.S. citizenship prior to age 18½; and (3) was not present in the United States for more than 30 days during any one of the 10 calendar years preceding relinquishment of citizenship.

Certification and proof of compliance with U.S. Federal tax obligations

In order to be excepted from the application of the alternative tax regime under the Joint Committee staff recommendation, whether by reason of falling below the net worth and income tax liability thresholds or qualifying for the dual-citizen or minor exceptions, the former citizen or former long-term resident also would be required to certify, under penalties of perjury, that he or she has complied with all U.S. Federal tax obligations for the five years preceding the relinquishment of citizenship or termination of residency and to provide such documentation as the Secretary of the Treasury may require evidencing such compliance (e.g., tax returns, proof of tax payments).[584] If such a certification could not be made, the individual would be required to take the necessary steps in consultation with the IRS to come into compliance with his or her U.S. Federal tax obligations in order to qualify for exception from the alternative tax regime. Until such time, the individual would remain subject to the alternative tax regime. The IRS would continue to have the right to verify that the information submitted was accurate, and it would be expected that the IRS would randomly audit such persons to assess compliance.

2. Provide tax-based rules for determining when an individual is no longer a U.S. citizen or long-term resident for U.S. Federal tax purposes

The Joint Committee staff recommends that an individual should continue to be treated as a U.S. citizen or long-term resident for U.S. Federal tax purposes until the individual:

(a) gives notice of an expatriating act or termination of residency (with the requisite intent to relinquish citizenship or terminate residency) to the Department of State or the INS, respectively, and

(b) files a complete and accurate IRS Form 8854 (i.e., files a tax information statement in accordance with the requirements of section 6039G).

In addition, the Joint Committee staff recommends that the Department of State (including U.S. consular offices) should be required to provide a uniform tax information statement (i.e., IRS Form 8854) to all individuals who seek to terminate their U.S. citizenship.

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[584] The recommendation is limited to five prior years in order to make the rule administrable from both the taxpayer's and the IRS's perspectives.

Background

Under present law, the Immigration and Nationality Act governs the determination of when a U.S. citizen is treated for U.S. Federal tax purposes as having relinquished citizenship.[585] Similarly, an individual's U.S. residency is considered terminated for U.S Federal tax purposes when the individual ceases to be a lawful permanent resident under the immigration law (or is treated as a resident of another country under a tax treaty and does not waive the benefits of such treaty). In view of this reliance on immigration-law status, it is possible in many instances for a U.S. citizen or resident to convert his or her Federal tax status to that of a nonresident noncitizen without notifying the IRS.

Although individuals who relinquish their citizenship or terminate their residency are required to provide tax information statements (e.g., on Form 8854), difficulties have been encountered in enforcing this requirement, and in many cases the IRS does not receive timely information that it needs to administer the alternative tax regime.[586] In these cases, an individual may become a non-resident non-citizen of the United States for Federal tax purposes -- and enjoy reductions in U.S. taxes from such tax status -- despite failing to provide the tax information statements necessary for the IRS to monitor and enforce compliance with the alternative tax regime.

Joint Committee staff recommendation

The Joint Committee staff recommends that an individual should continue to be treated as a U.S. citizen or long-term resident for U.S. Federal tax purposes[587] until the individual: (1) gives notice of an expatriating act or termination of residency (with the requisite intent to relinquish citizenship or terminate residency) to the Department of State or the INS, respectively;[588] and (2) files a complete and accurate tax information statement with the IRS (using Form 8854).

In addition, in order to enforce the alternative tax regime effectively, the IRS must obtain the required information as completely and consistently as possible. Accordingly, the Joint Committee staff recommends that the Department of State (including U.S. consular offices) be required to provide a uniform tax information statement (i.e., IRS Form 8854) to all individuals who seek to terminate their U.S. citizenship. The consular offices would be instructed to have

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[585] 8 U.S.C. section 1481. See Treas. Reg. sec. 1.1-1(c).

[586] *See* Part VII.B.3, above.

[587] Treatment as a U.S. citizen or long-term resident should be for all purposes of the Code, including section 7701(b)(10).

[588] As discussed in Part V, above, the Homeland Security Act transfers the functions of the INS and the immigration functions of both the Attorney General and the Secretary of State to the Department of Homeland Security. For clarity of exposition, the discussion in this Part XI continues to refer to the separate agency functions, since the mechanical aspects of these transfers of responsibility remain to be resolved.

the individual accurately and completely fill out the form, provide a social security number, if any, and sign the form under penalties for not answering truthfully. A similar requirement would apply to the INS in connection with individuals who give notice to the INS of their intent to terminate residency.

This recommendation would improve the present-law rules by denying the tax benefits of citizenship relinquishment or residency termination unless and until the information necessary for the IRS to enforce the alternative tax regime is provided.

3. Provide a sanction for individuals subject to the alternative tax regime who return to the United States for extended periods

> **The Joint Committee staff recommends that a former citizen or former long-term resident who is subject to the alternative tax regime and who is present in the United States for more than 30 days in any calendar year during the 10-year period after citizenship relinquishment or residency termination be treated as a U.S. resident for that calendar year and be subject to U.S. Federal tax on a worldwide basis.**

Background

Under present law, resident noncitizens generally are subject to U.S. tax on a worldwide basis for U.S. Federal income, estate, and gift tax purposes. For U.S. Federal income tax purposes, a noncitizen generally is considered to be a resident if the individual is a lawful permanent resident (i.e., a green card holder), or the individual spends a significant amount of time in the United States under a "substantial presence" test. The "substantial presence" test treats an individual as a resident if he or she is present in the United States for 31 or more days during the current calendar year and was present in the United States for a substantial period of time -- 183 or more weighted days during a three-year period weighted toward the current year.[589] In general, for purposes of determining residency for income tax purposes, an individual is treated as being present in the United States on any day if the individual is physically present in the United States at any time during such day, although several exceptions apply.[590] Special residency rules apply for estate and gift purposes. In general, an individual is considered to be a

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[589] An individual meets the 183-day part of the test if the sum of: (1) the days present during the current calendar year; (2) one-third of the days present during the preceding calendar year; and (3) one-sixth of the days present during the second preceding calendar year, equals or exceeds 183 days. Presence for 122 days (or more) per year over the three-year period would be sufficient to trigger the test.

[590] For example, certain days of physical presence are excluded in the case of certain foreign government-related individuals, teachers, trainees, students, professional athletes temporarily present to compete in charitable events, and individuals who are physically unable to leave due to a medical condition that arose while present in the United States. Secs. 7701(b)(3)(D), 7701(b)(5).

resident of the United States for estate and gift tax purposes if the individual is "domiciled" in the United States.[591]

Individuals who relinquish citizenship or terminate residency for tax reasons often do not want to fully sever their ties with the United States. In other words, they hope to retain some of the benefits of citizenship or residency without being subject to the U.S. tax system as a citizen or resident. Under present law, these individuals generally may continue to spend significant amounts of time in the United States following citizenship relinquishment or residency termination -- approximately four months every year -- without being treated as a U.S. resident.

Joint Committee staff recommendation

The Joint Committee staff believes that present law provides insufficient deterrent to citizenship relinquishment or residency termination for individuals who desire to maintain significant ties with the United States. Accordingly, the Joint Committee staff recommends that a former citizen or former long-term resident who is subject to the alternative tax regime and who is present in the United States for more than 30 days in any calendar year during the 10-year period following citizenship relinquishment or residency termination be treated as a U.S. resident for that calendar year and thus be subject to U.S. Federal income tax on a worldwide basis.[592]

Similarly, if an individual subject to the alternative tax regime is present in the United States for more than 30 days in any year during the 10-year period following citizenship relinquishment or residency termination, and the individual dies during that year, he or she would be considered to be a U.S. resident, and the individual's worldwide estate would be subject to U.S. estate tax. Likewise, if an individual subject to the alternative tax regime is present in the United States for more than 30 days in any year during the 10-year period following citizenship relinquishment or residency termination, the individual would be subject to U.S. gift tax on any transfer of his or her worldwide assets by gift during that year.

For purposes of these rules, an individual should be treated as present in the United States on any day if such individual was physically present in the United States at any time during that day, with no exceptions. The present-law exceptions from being treated as present in the United States for residency purposes would not apply in this context.[593]

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[591] An individual is domiciled in the United States if the individual (1) is living in the United States and has the intention to remain in the United States indefinitely; or (2) has lived in the United States with such an intention and has not formed the intention to remain indefinitely in another country.

[592] Consistent with this approach, consideration also could be given to taxing a former citizen or former long-term resident who is subject to the alternative tax regime on a worldwide basis for the entire year of citizenship relinquishment or residency termination if he or she is present in the United States in the year of citizenship relinquishment or residency termination for more than 30 days. Cf. Treas. Reg. sec. 1.871-13.

[593] *See*, e.g., secs. 7701(b)(3)(D), 7701(b)(5) and 7701(b)(7)(B)-(D).

The Joint Committee staff believes that this recommendation would substantially reduce the incentives to relinquish citizenship or terminate residency for individuals who desire to maintain significant ties to the United States. At the same time, the proposal would not interfere unduly with non-tax-motivated individuals who may desire to relinquish citizenship or terminate residency precisely for the purpose of severing their ties with the United States in favor of another country to which they are more strongly connected.

4. Impose gift tax with respect to certain closely held foreign stock

The Joint Committee staff recommends that gifts of certain closely held stock of a foreign corporation by an individual subject to the alternative tax regime be subject to U.S. gift tax to the extent that the foreign corporation holds U.S.-situated assets.

Background

Under present law, estates of nonresident noncitizens are subject to U.S. estate tax on U.S.-situated property. For these purposes, stock in a foreign corporation generally is not treated as U.S.-situated property, even if the foreign corporation itself owns U.S.-situated property. However, a special estate tax rule applies to former citizens and former long-term residents who are subject to the alternative tax regime. Under this rule, certain closely-held foreign stock owned by the former citizen or former long-term resident is includible in his or her gross estate to the extent that the foreign corporation owns U.S.-situated assets, if the former citizen or former long-term resident dies within 10 years of citizenship relinquishment or residency termination. This rule prevents former citizens and former long-term residents who are subject to the alternative tax regime from avoiding U.S. estate tax through the expedient of transferring U.S.-situated assets to a foreign corporation (subject to income tax on any appreciation under section 367).

The special estate tax rule applies if the former citizen or former long-term resident who is subject to the alternative tax regime owns directly, at death, 10 percent or more of the total combined voting power of all classes of stock entitled to vote in the foreign corporation, and, directly or indirectly, more than 50 percent of (1) the total combined voting power of all classes of stock entitled to vote in the foreign corporation, or (2) the total value of the stock of such corporation. If this stock ownership test is met, then the estate of the former citizen or former long-term resident includes that proportion of the fair market value of the foreign stock owned by the decedent at death, which the fair market value of any assets owned by such foreign corporation and situated in the United States (at death) bears to the total fair market value of all assets owned by such foreign corporation (at death).[594]

No analogous rule applies for gift tax purposes, despite the fact that the concerns relating to the transfer of U.S.-situated assets to foreign corporations are equally present in this context. Thus, under present law, former citizens and former long-term residents who are subject to the alternative tax regime and who wish to make a gift of U.S.-situated property can transfer such

[594] Sec. 2107(b).

property to a foreign corporation (subject to income tax on any appreciation under section 367), and then make a gift of stock in the corporation free of gift tax. In this manner, a higher-rate transfer tax based on the total value of the property generally may be avoided at the cost of paying a lower-rate income tax based only on the appreciation of the property.

Joint Committee staff recommendation

The Joint Committee staff recommends that gifts of certain closely-held foreign stock by a former citizen or former long-term resident who is subject to the alternative tax regime be subject to gift tax if made within the 10-year period after citizenship relinquishment or residency termination. The terms of this special gift tax rule would be similar to those of the special estate tax rule. This proposal would create parity between the estate tax and the gift tax in this regard and would combat a well-known method of gift tax avoidance.

The gift tax rule would apply if the former citizen or former long-term resident owns directly, before making the gift, 10 percent or more of the total combined voting power of all classes of stock entitled to vote in the foreign corporation, and, directly or indirectly, more than 50 percent of (1) the total combined voting power of all classes of stock entitled to vote in the foreign corporation, or (2) the total value of the stock of such corporation. If this stock ownership test is met, then taxable gifts of the former citizen or former long-term resident would include that proportion of the fair market value of the foreign stock transferred by the individual, at the time of the gift, which the fair market value of any assets owned by such foreign corporation and situated in the United States (at the time of gift) bears to the total fair market value of all assets owned by such foreign corporation (at the time of gift).

This special gift tax rule would apply to a former citizen or former long-term resident who is subject to the alternative tax regime and who owns stock in a foreign corporation at the time of the gift, regardless of how such stock was acquired (e.g., whether issued originally to the donor, purchased, or received as a gift or bequest).

5. Impose annual return requirement

Require former citizens and former long-term residents who are subject to the alternative tax regime to file an annual return for each of the 10 years following citizenship relinquishment or residency termination

Background

Under present law, U.S. citizens who relinquish citizenship and long-term residents who terminate residency generally are required to provide information about their assets held at the time of their citizenship relinquishment or residency termination. If the collective fair market value of the former citizen's or former long-term resident's assets exceeds $500,000, then detailed information about the individual's and assets must be provided. However, this information generally is required to be provided only once.

Former citizens and former long-term residents who are subject to the alternative tax regime also are required to file annual income tax returns, but only in the event that they owe

U.S. Federal income tax. If a tax return is required, the former citizen or former long-term resident is required to provide the IRS with a statement setting forth (generally by category) all items of U.S.-source and foreign-source gross income, but no detailed information with respect to all assets held by the individual.

The Joint Committee staff believes that these information-reporting and return-filing provisions fail to provide the IRS sufficient information to enable it to monitor effectively the compliance of former citizens and former long-term residents with the alternative tax regime.

Joint Committee staff recommendation

The Joint Committee staff recommends that former citizens and former long-term residents be required to file an annual return for each year following citizenship relinquishment or residency termination in which they are subject to the alternative tax regime. The annual return would be required even if no U.S. Federal income tax is due. The annual return would require certain information, including information on the permanent home of the individual, the individual's country of residency, the number of days the individual was present in the United States for the year, and detailed information about the individual's income and assets that are subject to the alternative tax regime.

In general, former citizens and former long-term residents who are subject to the alternative tax regime would be required to provide annual income and balance sheet information on their U.S. assets, as well as foreign assets that are subject to U.S. tax under the alternative tax regime. This requirement would include information relating to foreign stock potentially subject to the special estate tax rule of section 2107(b) (and the analogous gift tax rule recommended above by the Joint Committee staff).

Obtaining annual information on the income and assets of former citizens and former long-term residents who are subject to the alternative tax regime would permit the IRS to monitor more effectively both the income generated by assets as well as any dispositions of assets that may be subject to U.S. tax. In addition, an annual filing would provide the IRS with up-to-date address and residency information.

6. Transition issues

The Joint Committee staff recognizes that transition issues would have to be addressed in connection with implementing the above recommendations. First, any Joint Committee staff recommendations that are adopted should apply on a prospective basis. Second, any Joint Committee staff recommendations that would override any conflicting treaty provisions should be given the same treatment as present-law section 877 (i.e., such conflicting treaty provisions would be overridden until the tenth anniversary of the enactment of the 1996 tax legislation applicable to former citizens and former long-term residents).

Third, the Joint Committee staff recommends an immediate moratorium on the issuance by the IRS of the "fully submit" category of rulings under IRS Notice 98-34. Under this category of rulings, the IRS loses a statutory presumption in its favor, but declines to reach an

opinion as to the central determination it is required to make in lieu of that presumption (i.e., the determination of taxpayer purpose).[595]

[595] As discussed in Part VII.B, above, "fully submit" rulings accounted for approximately half the rulings issued by the IRS under Notice 98-34 through July 1, 2002.

B. Recommendations Relating to the Immigration Treatment of Citizenship Relinquishment and Residency Termination

1. Conform present-law immigration provision to tax rules

(a) If the alternative tax regime recommendations set forth in Part A, above, are adopted, the Joint Committee staff recommends that the immigration law be modified to provide that a former citizen or former long-term resident who is subject to the alternative tax regime be barred from reentry into the United States unless such individual provides evidence of full compliance with his or her obligations under the alternative tax regime, as determined by the IRS.

(b) If the alternative tax regime recommendations are not adopted, the Joint Committee staff recommends that the immigration law be modified to provide that a former citizen or former long-term resident who is subject to the present-law alternative tax regime, as determined by the IRS, be barred from reentry into the United States.

Background

Under the immigration law, any former citizen of the United States who renounces U.S. citizenship and who is determined by the Attorney General to have done so for the purpose of avoiding U.S. tax is barred from reentering the United States.[596] The Attorney General is charged with the sole responsibility for making these determinations, based on information received from the Department of State and the IRS (subject to the disclosure restrictions imposed by section 6103).[597]

The special tax rules and the special immigration rules applicable to individuals who relinquish citizenship or terminate residency differ in three fundamental respects. First, the present-law immigration provision applies only to former citizens who relinquish citizenship for tax-motivated reasons. Former long-term residents are not subject to the immigration provision, even though such individuals are covered by the present-law alternative tax regime. Second, the present-law immigration provision applies only if tax avoidance is found to be the principal purpose for relinquishing citizenship, whereas the present-law tax provision applies if tax avoidance is found to be a principal purpose for relinquishing citizenship (or terminating residency). Third, under the present-law immigration provision, the Attorney General (as opposed to the IRS) makes the determination of whether a former citizen's relinquishment of

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[596] *See also*, the discussion in 2., below, concerning waivers of grounds of inadmissibility.

[597] As discussed in Part V, above, the Homeland Security Act transfers the functions of the INS and the immigration functions of both the Attorney General and the Secretary of State to the Department of Homeland Security. For clarity of exposition, the discussion in this Part XI continues to refer to the separate agency functions, since the mechanical aspects of these transfers of responsibility remain to be resolved.

citizenship was tax-motivated and is not given any objective standards to guide this determination.

Joint Committee staff recommendation

In general

The Joint Committee staff believes that the present-law tax and immigration provisions should be coordinated in terms of both coverage and administration. Accordingly, the substantive standards governing whether a former citizen or former long-term resident is eligible for reentry into the United States should be tied to the tax law provisions, and the IRS should be primarily responsible for applying these standards, due to its privileged access to the necessary taxpayer information.

Coordination with the Joint Committee staff's tax recommendations

If the alternative tax regime recommendations described in Part A, above, are adopted, the Joint Committee staff recommends that former citizens and former long-term residents who provide evidence of full compliance with U.S. Federal tax obligations under the alternative tax regime be allowed to reenter the United States. However, under the third Joint Committee staff recommendation in Part A, above, if such an individual remains in the United States for more than 30 days in a calendar year, he or she would be treated as a U.S. resident for Federal tax purposes for that year. The Joint Committee staff believes that this is a sufficient sanction for maintaining significant ties to the United States following citizenship relinquishment or residency termination. Under this approach, the present-law immigration provision would be amended by removing the requirement that the relinquishment of citizenship be tax-motivated, and instead would deny a former citizen or former long-term resident reentry into the United States if the individual fails to establish to the IRS's satisfaction full compliance with all obligations under the alternative tax regime.[598]

In satisfying the standard of full compliance, former citizens and former long-term residents would be required to establish that they have provided all necessary tax documentation, including the filing of all required returns and schedules, and have paid any U.S. Federal tax due. The IRS would review all relevant information collected to determine those individuals who are subject to the alternative tax regime and are not compliant with their U.S. Federal tax obligations. The IRS would forward those names and other identifying information to the Department of State (including U.S. consular offices). Upon a later finding of full compliance with all U.S. Federal tax obligations under the alternative tax regime, such individuals would be permitted to reenter under immigration law.

[598] If an individual is treated as a U.S. resident under the 30-day rule recommended by the Joint Committee staff, then, in later years, the necessary compliance with U.S. Federal tax obligations for purposes of the immigration rule would include compliance with the individual's tax obligations as a U.S. resident for any year in which the 30-day rule applies.

Coordination with the present-law tax provisions

If the alternative tax regime recommendations described in Part A, above, are not adopted, the Joint Committee staff recommends that former citizens and former long-term residents subject to the present-law alternative tax regime be subject to the immigration provision denying certain individuals reentry into the United States. Thus, the alternative tax regime and related immigration provision would have uniform applicability and would apply with the same force to both former citizens and former long-term residents.

2. Eliminate discretionary exception from immigration provision

The Joint Committee staff recommends eliminating the discretion of the Attorney General to waive substantive grounds of inadmissibility with respect to former citizens and former long-term residents who would otherwise be inadmissible under the entry ban relating to tax avoidance.

Background

Under the present-law immigration rules, former U.S. citizens who renounce their citizenship for purposes of tax avoidance, as determined by the Attorney General, are inadmissible to the United States.[599] Under the immigration law, no waiver of inadmissibility is available for persons seeking immigrant status, but nonimmigrants can seek a waiver of inadmissibility.

If a nonimmigrant visa, such as a tourist visa, is sought, the Attorney General may waive grounds of substantive inadmissibility, except on certain security and related grounds. The waiver is purely discretionary and the law provides no criteria for the exercise of this discretion. In practice, the Government considers the risk of harm in admitting the applicant, the seriousness of the acts that cause inadmissibility, and the importance of the applicant's reason for seeking entry, which need not be compelling. Thus, even if a person is found to have relinquished citizenship for purposes of tax avoidance, such person may still be permitted to enter the United States if the Attorney General issues a waiver.

Joint Committee staff recommendation

The Joint Committee staff recommends that no waivers of substantive inadmissibility be available for former citizens and former long-term residents who are inadmissible by reason of the special immigration rules relating to tax avoidance. The Joint Committee staff believes that this proposal would bolster the deterrent effect of the special immigration rules.

[599] 8 U.S.C. sec. 1182(a)(10)(E).

3. Promote interagency information sharing

The Joint Committee staff recommends that the INS's databases be made accessible to the IRS and other appropriate Federal agencies for purposes of administering the entry ban relating to tax avoidance. These databases also should be modified to include social security numbers, if available, and in the case of non-criminal inadmissibility waivers, the type of waiver granted.

Background

One difficulty in administering the present-law immigration provision is that INS databases are not adequately interconnected with the databases of the IRS, the Department of Justice, the Department of State, and the Department of Treasury. Indeed, the majority of the information in the INS databases is not accessible to the other agencies. A related problem is that, unlike IRS databases, the INS databases are organized by alien registration number, and thus often do not contain social security numbers. Also, INS databases do not include the type of waiver granted in cases of non-criminal admissibility waivers.

Joint Committee staff recommendation

The Joint Committee staff recommends that the INS's databases be modified to facilitate and improve the sharing of information among the INS, the IRS, the Department of Justice, the Department of State, and the Department of Treasury. These databases should include social security numbers, if available, and in the case of non-criminal inadmissibility waivers, the type of waiver granted. The INS and Department of State databases should be available to the IRS for the purpose of monitoring former citizens and former long-term residents both at the port of entry and as they request visas. This proposal would enable the IRS to work in tandem with the INS and the Department of State to identify persons who are inadmissible under the immigration provision, and thereby enforce such provision.

4. Amend Code section 6103

The Joint Committee staff recommends that Code section 6103 be modified to enable the IRS to share with the appropriate agencies the minimum tax information necessary to implement the immigration provision.

Background

To effectively administer the present-law immigration provision, as well as the Joint Committee staff recommendations, the Department of State, the INS, and the IRS need to work together to identify and track individuals who are subject to the alternative tax regime. Under present law, this effort requires the Department of State and the INS to have access to certain tax return information from the IRS. Under present law, the IRS is prohibited from disclosing tax returns or return information unless specifically authorized. No explicit exception to the disclosure rules applies to facilitate the implementation of the present-law immigration provision. As a result, the present-law immigration provision cannot be fully implemented.

Joint Committee staff recommendation

The Joint Committee staff recommends that the provisions relating to the confidentiality of tax returns and return information be modified to enable the IRS to share with the appropriate agencies the minimum information necessary to implement the immigration provision.[600] The information would be disclosed pursuant to Treasury regulations.[601]

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[600] If primary responsibility for determining excludability under the special immigration provision were transferred to the IRS (in accordance with the first Joint Committee staff immigration recommendation above), then less return information would need to be shared than would be necessary if another agency remained primarily responsible for such determinations.

[601] Recordkeeping requirements, safeguards, and civil and criminal penalties for unauthorized disclosure or inspection would apply to return information disclosed under this provision. Sec. 6103(p).