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# **Green Cards and Expatriation**

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# Introduction

- Non-U.S. Persons often consider acquiring a “Green Card” as a means to facilitate living or working in the U.S.
- As this presentation will reflect, acquisition of a Green Card needs to be carefully considered, since absent knowledge of the U.S. tax consequences resulting from the acquisition of a Green Card, a non-U.S. Person may find himself or herself subject to extremely adverse U.S. tax consequences.
- This presentation reviews some of these potentially adverse U.S. tax consequences.

# Background “Green” Cards”

# What is a “Green Card”?

- A “Green Card” is a colloquial reference to the status (evidenced through an identification card attesting to the status) of a non-U.S. individual (legally known as an “alien”) as a Lawful Permanent Resident of the United States.

# Who is a Lawful Permanent Resident?

- A Lawful Permanent Resident is an individual who has been lawfully granted the privilege of residing permanently in the United States as an immigrant in accordance with the U.S. immigration law.
- A Lawful Permanent Resident is a resident of the U.S. for Federal income tax purposes.
- A non-U.S. person is a resident alien for U.S. income tax purposes with respect to a calendar year if the individual is a Lawful Permanent Resident **at any time** during the calendar year.
  - Under the above test, a Green Card holder who is issued a Green Card abroad but does not enter the U.S. is **not** a Lawful Permanent Resident.

# What are the Rights and Obligations of a Lawful Permanent Resident?

- A Green Card Holder obtains certain rights and is subject to certain responsibilities.
- Rights include:
  - To live permanently in the U.S.
  - To work in the U.S.
- Obligations include:
  - Report and pay tax on **worldwide income** as a U.S. resident, including the requirement to file information reporting with respect to worldwide assets.
  - Potential U.S. estate and gift tax obligations.
- **Warning.** Obtaining a Green Card imposes serious U.S. tax obligations on the holder that must be carefully considered.

# Validity of a Green Card for Immigration and Tax Purposes

- The immigration law initially accords an individual with Lawful Permanent Resident status.
- However, the immigration and the tax laws diverge to determine the continuing validity of a Green Card.
- It is this divergence that has created confusion with potentially detrimental U.S. income tax consequences.

# Green Card Validity

## Immigration Test

- Abandonment of Lawful Permanent Resident status occurs:
  - when a Lawful Permanent Resident moves abroad with the intent of living abroad permanently and of giving up the right to live in the United States, or
  - when the individual forms the intent to abandon after he or she has already left the U.S.
- A lawful permanent resident who leaves the U.S. today with the intent to live abroad and to relinquish the right to reside permanently in the U.S. abandons Lawful Permanent Resident status immediately upon departure from the U.S.
  - The purpose for filing Form I-407 is for the individual to formally record that he or she has abandoned lawful permanent resident status.

# Green Card Validity Immigration Test

- A formal adjudication for immigration purposes that an individual has abandoned lawful permanent resident status is normally made if and when the individual seeks to return to the United States, based on the relevant facts, including the existence of a previously executed Form I-407 in the individual's immigration records.

# Green Card Validity

## Tax Purposes

- Under U.S. tax law, an individual continues to be a Lawful Permanent Resident of the United States for U.S. tax purposes until any of the following events occurs:
  - Green Card status is rescinded;
  - Green Card status is administratively or judicially determined to have been abandoned; or
  - the Green Card holder commences to be treated as a resident of another country under a tax treaty (and the individual does not elect to waive the benefits of such treaty) (“Treaty Tie-Breaker Status”).

# Justification for U.S. Tax Rule

The legislative history to the Deficit Reduction Act of 1984 provides the following explanation for the rule:

*The Committee believes that the aliens who have entered the United States as permanent residents and who have not officially lost or surrendered the right to permanent U.S. residence should be taxable as U.S. residents. These persons have rights that are similar to those afforded citizens (including the right to enter the United States at will); equity demands that they contribute to the cost of running the government as much as citizens.*

H.R. Rep. No. 432 (Part 2), 98th Cong., 2d Sess. 1524 (1984).

# Revocation of Green Card Status

- Resident status is rescinded when a final administrative or judicial order of exclusion or deportation is issued.
  - The term “final judicial order” means an order that is no longer subject to appeal to a higher court of competent jurisdiction.

# Abandonment of Green Card Status

- May be initiated by:
  - The Green Card holder.
  - The Immigration Service.
  - A consular officer.

# Abandonment of Green Card Status By Individual

- If the individual initiates the determination, resident status is abandoned when the individual *files*:
  - an application for abandonment (INS Form 1-407), *or*
  - a letter with the INS or a consular officer stating the individual's intent to abandon his or her resident status, with the Alien Registration Receipt Card (INS Form 1-151 or Form 1-551) enclosed.
- An individual is considered to have filed a letter stating the intent to abandon resident status with the INS or a consular office if such letter is sent by certified mail, return receipt requested (or a foreign country's equivalent thereof).
- A copy of the letter, along with proof that the letter was mailed and received, should be retained by the alien individual.

# Abandonment by INS or Consular Office

- If the INS or a consular officer initiates the determination, resident status will be considered to be abandoned upon the issuance of a final administrative order of abandonment.
- If an individual is granted an appeal to a federal court of competent jurisdiction, a final judicial order is required.
  - The term “final judicial order” means an order that is no longer subject to appeal to a higher court of competent jurisdiction.

# Treaty Tie-Breaker Status

- The individual is a dual resident of the U.S. and a treaty country.
- The applicable bilateral income tax treaty provides for the determination of the treaty residence of a dual resident.
  - Determination generally based on (i) permanent home; (ii) “centre of vital interests”; (iii) habitual abode; and, (iv) nationality.
- Treaty tie-breaker requirements:
  - The individual is a treaty resident.
  - The individual does not waive treaty benefits.
  - The individual files IRS Forms 1040NR and 8833
- Note, an individual who is a treaty tie-breaker still is required to file U.S. information returns, including FBARs and other IRS forms.
- **Caveat:** Treaty tie-breaker status can detrimentally impact on individual's Green Card status.

# Green Card Holder Prior Law

- The current U.S. tax rules relating to Green Card holders are effective for taxable years beginning after December 31, 1984.
- What are the rules if a Green Card holder obtained a Green Card prior to that date and:
  - did not use the Green Card after that date but did not “officially” abandon status?
  - Continued to use Green Card after that date?

# Green Card Status Comments

- Resident tax status through a Green Card is totally divorced from the length of physical presence in the U.S.
- Green Card status is not terminated for tax purposes simply by moving abroad or by letting the Green Card expire.
- A Green Card holder may be classified as a resident alien for tax purposes even though he or she spends little or no time in the U.S. during the calendar and may no longer be eligible to enter the U.S. with his or her Green Card.

# A Further U.S. Tax Trap

## Green Cards and Expatriation

A Green Card holder who becomes a “Long Term Resident” may become subject to the draconian U.S. expatriation rules applicable to U.S. citizens if the Green Card holder becomes a Lawful Permanent Resident and thereafter

- ceases to be a Lawful Permanent Resident *or*
- has Treaty Tie-Breaker Status.

# Planning: Avoid or Defer Getting Lawful Permanent Resident (Green Card) Status

- Avoid Green Card status (if possible) so as not to become a U.S. income tax resident.
- Stay below the Substantial Presence threshold for U.S. income tax residency.
- Even where this is not possible:
  - Avoiding Green Card status will eliminate exposure to “exit tax” if individual later leaves U.S.
  - Deferring Green Card status will delay time when client becomes subject to exit tax
  - Avoiding Lawful Permanent Resident status may also be helpful in preserving foreign domicile for U.S. estate tax purposes.

# Green Cards and Expatriation Four Immigration Options to Avoid Exit Tax Upon Departure from U.S.

# Green Cards and Expatriation

- A Green Card Holder who is a Long-Term Resident is subject to the U.S. expatriation rules.
- The term “Long-Term Resident” means any individual (other than a citizen of the United States) who is a lawful permanent resident of the United States in at least 8 taxable years during the period of 15 taxable years ending with the taxable year during which the expatriation occurs.
- An expatriation occurs when an individual who is a Long-Term Resident ceased to be a Lawful Permanent Resident *or* commenced to be treated as a resident of a foreign country under the provisions of a U.S. bilateral income tax treaty and does not waive the benefits of such a treaty – Treaty Tie Breaker Status.
  - Note, an individual is not be treated as a Lawful Permanent Resident for any taxable year if such individual is treated as a resident of a foreign country for the taxable year under the provisions of a bilateral U.S. income tax treaty and does not waive the benefits of such treaty applicable to residents of the foreign country.

# Green Card Can Be Revoked for Abandonment of U.S. Residence

- Unlike a U.S. citizen, a Long-Term Resident can expatriate involuntarily, by having Green Card revoked for abandonment, criminal conviction or other deportable offense
- Long-Term Permanent Residents who take up residence abroad risk revocation for abandonment if individual is absent from U.S. continuously for over one year, or absent extensively (more than 50%) with only short visits to U.S.
- Visiting U.S. once or twice per year does **not** protect against abandonment, nor does owning real property or bank/retirement accounts in U.S.

# Green Card Planning

- **HOLD:** Re-Entry Permit Preserves Permanent Resident Status While Residing Abroad.
- **FOLD:** Leave U.S. and Surrender Permanent Resident Status Before First Day of Eighth Year.
- **DOWNGRADE:** To Non-Immigrant Visa Status Before Becoming Long-Term Resident.
- **UPGRADE:** To U.S. Citizenship to Avoid Abandonment of Permanent Resident Status.

# **HOLD – Re-Entry Permit Preserves Permanent Resident Status While Residing Abroad**

- Must intend to return to U.S. to be eligible.
- Must be physically present in U.S. to apply.
- Must remain in U.S. for four to six weeks or return within four months for “biometrics” – can not do biometrics abroad.
- Must not have filed federal income tax return as nonresident, or failed to file because non-resident.
- Multiple renewals are common but not guaranteed.

# **FOLD** – Leave U.S. and Surrender Permanent Resident Status Before First Day of Eighth Year

- Sign Form I-407 upon departure from U.S. or after departure.
- Have Form I-407 endorsed by U.S. immigration or consular officer.
- Get copy of endorsed Form I-407 – better to file in person than by mail.
- Do not file Form I-407 by mail while remaining in U.S.
- Plan ahead for U.S. visitor visa if needed.
- Consider retroactive expatriation by claiming treaty tie-breaker benefits for calendar year preceding eighth year as Permanent Resident.

# **DOWNGRADE - To Non-Immigrant Visa Status Before Becoming Long-Term Resident**

- Permanent Resident can voluntarily surrender Green Card and immediately apply for nonimmigrant visa that permits full-time or part-time work and residence in U.S.
- No change of status within U.S. – must surrender Green Card then apply for visa abroad.
- Some work visas require petition that can be pre-approved before surrendering Green Card.
- Some work visas require present intent to depart the U.S. eventually; others do not.
- Background checks can delay visa issuance for weeks or months.

# **UPGRADE** - To U.S. Citizenship To Avoid Abandonment Of Permanent Resident Status

- Out of the frying pan into the fire?
- May make sense for Long-Term Resident intending to reside abroad indefinitely and concerned about maintaining Re-entry Permit.
- U.S. citizen can reside abroad forever without losing citizenship.
- Naturalization takes six to nine months, and applicant must maintain U.S. residence until citizenship is granted.
- Permanent Resident married to U.S. citizen who is working abroad may be exempt from residence and physical presence requirements.

# Expatriation U.S. Tax Consequences

# Expatriation Tax Consequences

- **Income Tax.** Makes *exiting* the U. S. tax system *a taxable event* for “*covered expatriate.*”
  - A deemed sale of all worldwide property.
  - Broad definition of property.
- **Estate and Gift Tax.** Estate and gift tax on gratuitous testamentary and *inter vivos* and transfers to U.S. persons (other than spouse or U.S. charity).

# Expatriation – Who

- “Covered Expatriates” include
  - “Long-Term-Term Residents = 8 out of prior 15 years.
  - *E.g.*: December 31 + 6 years + January 1 = 8 years.
- Who is a “covered expatriate” - when either:
  - Average annual U. S. income tax liability for the prior 5 years over \$157k (for ‘14 indexed for inflation) **OR**
  - “Net Worth” was  $\geq$  \$2M (NOT inflation indexed) **OR**
  - Fail to certify complied with tax code for prior 5 years.

# Expatriation - What

- Mark to market on day before expatriation for fair market value, with the first \$600K of income excluded (\$680K for 2014 inflation indexed).
- Generally, may elect to defer payment until actually sell the property or die but costs & procedures to consider.
- U.S. transferees of a covered expatriate subject to gift/estate taxes when beneficiary is a U.S. person (other than U.S. spouse or charity).

# Expatriation - Conclusions

- The Long-Term Resident test is mechanical.
- Can plan how to avoid becoming a Long Term Resident (Fold or Downgrade).
- Once subject to expatriation tax, all is not lost,
  - Project cost of tax versus Holding or Upgrading immigration status.
    - One time cost of expatriation tax may vs. lifetime annual income taxes and potential estate tax at death.
  - Plan to reduce income & assets below “covered expatriate” levels.
  - Consider multiple generations.
  - Plan to reduce cost of expatriation tax.

# Thank You

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