

Who is a U.S. Person? And the ramifications of being one

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Why do we care?

- Income tax
- Information reporting, including Foreign Bank Account Reports (FBARs)
- Gift and Estate tax
- Exit tax (Section 877/877A)

Trap for the unwary

- Tax law definition sometimes differs from immigration law
 - Tax law follows immigration law's definition of citizen
 - Differing rules for classification of residents

Tax law classification of U.S. persons

- Citizens
- Residents
 - Green Card (GC) holders (legal permanent residents)
 - Substantial presence test
- *Not* domiciliaries (although domicile is relevant in the estate tax context)

Who is a U.S. citizen?

- Citizenship can be acquired automatically at birth
 - Individual born in the U.S. and subject to its jurisdiction
 - Individual born abroad whose parents are both citizens of the US, and one of whom had a residence in the US prior to the birth of that individual
- Citizenship acquired derivatively
 - In some instances, parents can obtain U.S. citizenship for a child born abroad
- Citizenship acquired through naturalization
- Passports are not determinative!

Loss of U.S. citizenship

- Renounce
- Old laws stripped U.S. citizens of their citizenship under certain scenarios – and courts later held that those individuals could seek reinstatement
- *Does an individual whose citizenship is stripped away “relinquish” his citizenship within the meaning of 877A(g)(2)?*
 - 877A(g)(4) clarifies that a citizen is treated as relinquishing his citizenship on the date the U.S. Dep’t of State issues a certificate of loss of nationality
 - What if an individual’s U.S. citizenship is void *ab initio*?
- Extra step required to be “out” for tax purposes (Form 8854)

Legal Permanent Resident status

- Evidenced by a GC
- Validity for immigration purposes not necessarily clear on the face of a GC
 - Older GCs did not have an expiration date; newer ones do
 - Expiration date aside, if a GC holder lives abroad, without the intent of returning to the U.S., that individual may be denied entry
 - Denial of entry for immigration purposes has no bearing on tax status

Loss of legal permanent resident status

- Failure to maintain a residence in the U.S. jeopardizes a GC holder's status – there are other pitfalls that might result in revocation of a GC as well
- If the GC holder is a “long-term resident” of the U.S., that individual is subject to the same exit tax responsibilities as an expatriating citizen
 - A long-term resident is an individual who is a lawful permanent resident of the U.S. in at least 8 taxable years during the period of 15 taxable years ending with the taxable year that includes the expatriation date
- E.g., suppose A acquired a GC in 2002 and for the past several years has been living abroad. An immigration lawyer may tell her that she can no longer enter the U.S. on her GC. Unless she has filed a Form 8854, she is still “in” the U.S. system for tax purposes.

Substantial Presence Test

- The other half of “resident” status for income tax purposes is based on day counting
- The formula is ugly:
 - Test is met if an individual was present in the U.S. on at least 31 days of the calendar year, and the sum of the days on which that individual was present in the U.S. during the current year and the two preceding years equals or exceeds 183 days, based on a multiplier formula, where days from the current year are assigned a multiplier of 1, days of the first preceding year have a multiplier of 1/3, and days from the second preceding year have a multiplier of 1/6
 - Known as the “183 day rule”
 - Under the formula, the greatest number of days that can be spent in the U.S. in *consecutive* years without triggering resident status is 121
 - ANY PART OF ONE DAY COUNTS AS A WHOLE DAY

Substantial Presence Test, con't

- There are many exceptions and special rules, particularly for the first and last year of residence
- Medical condition exception: an individual won't be treated as being present on any day if he cannot leave the U.S. on that day because of a medical condition that arose while he was in the U.S.
 - Returning to the U.S. for treatment of a condition that arose during a previous stay *will* count
- What if a flight is delayed?

Effect of Tax Treaties

- In many cases, an individual may be treated as a resident of the U.S. under federal income tax laws and a tax resident of a foreign country under its laws
- Treaty “tie-breaker rules” resolve conflicting claims of residence
 - Common factors for resolution (varies by treaty) include an individual’s permanent home, center of vital interest, habitual abode and citizenship
 - Note that a GC holder who is located in the U.S. but is nonetheless a resident of another country may have a hard time avoiding U.S. resident status under a particular treaty’s tie-breaker rule
 - Tie-breaker rules are more likely to assist an individual who is a tax resident of the U.S. by virtue of the application of the substantial presence test

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