

**2013 KACPAAGNY CPE Seminar**  
**Wednesday, June 26, 2013**  
**Dae Dong Manor, Flushing, NY**

**Greetings**

Bong Jang  
Seminar coordinator

AJ Jin  
SVP, Flushing Bank

Calvin Kong  
Financial Advisor, Merrill Lynch

**Returning Home-U.S. Tax Rules Concerning Giving Up U.S. Green Card or U.S. Citizenship, Choice of Entity-What is the Best Choice For Korean Citizens(foreigners) Investing in U.S. Business or Real Estate, Update of Selected FBAR and FATCA Issues, and Korea U.S. Tax Treaties-----(2:30 p.m. -4:10 p.m.)**

**Paul Wigg Maxwell, JD, LLM**  
**Own account, Chatham NJ, international tax expert**  
**Counsel-Richarson and Patel**  
**Former chair of NJ State Bar Association's international law and organization section**  
**JD from Columbia University School of Law and LLM in taxation New York University School of Law**

**Break time -----(4:10 p.m. - 4:20 p.m.)**

**Use of Various Types of Trusts in Middle Class Medicaid Elder Law Planning-----(4:20 p.m. - 5:20 p.m.)**

**Tae Ethan Choi, JD, CPA**  
**Michael L. Pfeifer, P.C. elder law & long term care planning lawyer**  
**Korea Times(NY) Column contributor - elder law & long term care planning**  
**Former Coopers & Lybrand, LLP accountant**  
**Graduate of Stuyvesant HS and NYU**

**Break time -----(5:20 p.m. - 5:30 p.m.)**

**Market Update & 1035 Exchange-----(5:30 p.m. - 6:30 p.m.)**

**Noel Connelly**  
**Merrill Lynch Investment Management Consultant**  
**BS in Marketing University of Notre Dame**

**Greg Moody**  
**Lincoln Financial Internal Wholesaler on the estate and insurance planning team**  
**BA in Economics University of Connecticut**

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## Foreign Account Tax Compliance Act FATCA

Hiring Incentives to Restore Employment (HIRE) Act of 2010  
Internal Revenue Code of 1986, ("Code") Sections 1471-1474

Effective Date January 1, 2014.  
IRS. Notice 2011-53.

### § 1471. Withholdable Payments to Foreign Financial Institutions.

(a) Withholding at 30 percent rate applies to "withholdable payment" to a foreign financial institution which does not meet certain reporting requirements.

### § 1472 Withholdable Payments to other Foreign Entities.

(a) Withholding at 30 percent rate applies to "withholdable payment" to a non-foreign financial institution which does not meet certain reporting requirements.

(d) Non-Financial Foreign Entity – everyone but financial foreign entity or the following:

- (A) Publicly traded corporation;
- (B) Expanded Affiliate Group Member of Foreign Financial Institution;
- (C) Resident U.S. Possession's Entities
- (D) Foreign Government Entity
- (E) International Organization or Entity
- (F) Foreign Central Bank
- (G) Low Risk Class Member

### (b) Waiver of Withholding

- (1) Certification by beneficial owner;
- (2) No reason to doubt; and
- (3) Reports to Treasury as required.

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§ 1473. Definitions

- (1) Withholdable Payment.
  - (a) U.S. Source FDAP
  - (b) Gross Proceeds of sale of property of a type which can produce U.S. source dividends or interest.
- (2) US Effectively Connected Business Income ECI and Real Estate Elected Income Excluded from Withholdable Payment. Note Special Rule of 861(a)(1)(B) for Foreign Partnership Interest Sourcing does not apply.
- (3) Substantial United States Owner. Generally a more than 10% owner.
- (4) Specified United States Person. – Similar to exemptions from Non Foreign Financial Institution status.

Further Details

(b) Institution Reporting Agreements – Treasury and Foreign Financial Institution.

(1) Six Basic Requirements of Institutional Reporting Agreement

- (A) Be Able to Identify U.S. Accounts.
- (B) Comply with Verification and Due Diligence Procedures
- (C) Report on U.S. Accounts Annually.
- (D) Deduct and withhold a tax equal to 30 percent of—
  - (i) Passthru Payment to - Recalcitrant Account Holder or Non Compliant Foreign Financial Institution, and
  - (ii) Passthru Payment to an Electing Foreign Financial Institution
- (E) Comply with requests by the Secretary for additional U.S. Account information, and
- (F) Get waivers of foreign laws that prevent compliance or close accounts on non-waiving account holders.

(2) Deemed Compliant Foreign Financial Institutions

- (A) No U.S. Account Holders
  - (i) Verifies as provided in Regulations, and
  - (ii) Handles accounts of other Foreign Financial Institutions as required by Regulations; or

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(B) Treasury Exempts the Financial Institution Class to which institution is a member from complying.

(3) Elects to be Withheld Upon. Only on accounts are held by Recalcitrant Account Holders or Non Complying Foreign Financial Institutions. Must elect out of any Treaty provision with respect to amount withheld.

(4) Country Agreements – Major Growth Area

Treasury reports as of June 11, 2013:

**The following jurisdictions are treated as having an intergovernmental agreement in effect:**

Model 1 IGA

- Denmark (11-19-2012)
- Germany (5-31-2013)
- Ireland (1-23-2013)
- Mexico (11-19-2012)
- Norway (4-15-2013)
- Spain (5-14-2013)
- United Kingdom (9-12-2012)

Model 2 IGA

- Japan (6-11-2013)
- Switzerland (2-14-2013)

**This is a complete list of joint FATCA statements between the United States and other countries:**

- Joint Communiqué on the Occasion of the Publication of the Model Agreement (7-25-2012)
- Japan (6-21-2012)
- Switzerland (6-21-2012)
- France, Germany, Italy, Spain, UK (2-7-2012)

(c) Information required to be reported on United States accounts.

(1) In general.

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- (A) The name, address, and TIN of each account holder which is a specified United States person and of each substantial United States owner of any United States owned foreign entity.
- (B) The account number.
- (C) The account balance or value
- (D) the gross receipts and gross withdrawals or payments from the account

(2) May elect instead to be subject to U.S. reporting requirements for each account as if the institution were a United States person, and each holder of such account were a natural person and citizen of the United States see, Sections 6041 (Information at Source – Payments of \$600 or more), 6042 (Dividends and Corporate E&P), 6045 (Returns of Brokers), and 6049 (Payments of Interest).

(3) Separate requirements for qualified intermediaries. These rules are in addition to any other requirements imposed on Qualified Intermediaries.

(d) Definitions. For purposes of this section—

(1) United States account.

(A) In general. Any financial account which is held by one or more specified United States persons or United States owned foreign entities.

(B) \$50,000 Threshold. If,

- (i) each holder of such account is a natural person, and
- (ii) with respect to each holder, the aggregate value of all depository accounts held by such holder and maintained by the same financial institution does not exceed \$ 50,000.  
Treat affiliates as same financial institution for purpose of \$50,000 limit.

(2) Financial account.

- (A) any depository account,
- (B) any custodial account, and
- (C) any (non publicly traded) equity or debt interest in such financial institution.

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(3) United States owned foreign entity.

Any foreign entity which has one or more substantial United States owners.

(4) Foreign financial institution.

Any financial institution which is a foreign entity. (But, generally not U.S. possessions entities.)

(5) Financial institution.

(A) accepts deposits in the ordinary course of a banking or similar business,

(B) as a substantial portion of its business, holds financial assets for the account of others, or

(C) is engaged primarily in the business of investing, reinvesting, or trading in securities, partnership interests, commodities, or any interest in such securities, partnership interests, or commodities.

(6) Recalcitrant account holder.

(A) fails to comply with reasonable requests for the information referred to, or

(B) fails to provide a waiver upon request.

(7) Passthru payment.

Any withholdable payment or other payment to the extent attributable to a withholdable payment.

(e) Affiliated groups.

(1) Members of Expanded Affiliated Group subject to the same ruled.

(2) Expanded affiliated group.

The affiliated group as defined in section 1504(a) (Consolidated Groups), determined—

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- (A) by substituting "more than 50 percent" for "at least 80 percent" each place it appears, and
- (B) without regard to paragraphs (2) and (3) of section 1504(b) (which would otherwise exclude foreign entities from the group).

A partnership or any other entity (other than a corporation) shall be treated as a member of an expanded affiliated group if such entity is controlled (within the meaning of section 954(d)(3) by members of such group).

(f) Exception for certain payments.

- (1) any foreign government, political subdivision or wholly owned agency or instrumentality thereof,
- (2) any international organization or any wholly owned agency or instrumentality thereof,
- (3) any foreign central bank of issue, or
- (4) any other class of persons identified by the Secretary for purposes of this subsection as posing a low risk of tax evasion.

**Final Regulations**

1. Grandfather Obligations Outstanding on January 1, 2014.
2. Passive Entities that are Not Professionally Managed - Treat as Non Financial Foreign Entity
3. Expand Deemed Compliant Foreign Financial Entities.
4. Exempt Accounts from Review

Pre-Existing Account Threshold lifted from \$50,000 to \$250,000  
Pre-Existing Accounts with \$1,000,000 may be electronically searched, without further due-diligence.

5. Additional Time to Comply

All accounts maintained prior to 1/1/2014 are preexisting accounts  
2013 and 2014 reporting delayed until March 31, 2015.  
Passthru withholding exempt until January 1, 2017.

6. Intergovernmental Agreements

- a. Report to Local Government – Model 1

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b. Report to United States – Model 2

7. Online Secure Electronic Portal for Registration.



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**What is the Best Choice of Entity for Korean NRAs to Invest in U.S. Real Estate?**

This issue comes up regularly in a U.S. tax practice with foreign clients.

The usual choices are:

**1. Direct Investment**

Real Estate is owned directly by individual with foreign citizenship and no other business or ties to the United States.

**2. U.S. Partnership or Limited Liability Company**

Real Estate is owned by U.S. partnership or Limited Liability Company (LLC).  
Interest in partnership or LLC is owned by individual with foreign citizenship and no other business or ties to the United States.

**3. U.S. Corporation**

Real Estate is owned by U.S. corporation.  
Shares are owned by individual with foreign citizenship and no other business or ties to the United States.

**4. Foreign Corporation/Entity**

Real Estate is owned by Korean entity.  
Korean entity is owned by individual with foreign citizenship and no other business or ties to the United States.

**5. Offshore Corporation/Entity**

Real Estate is owned by Tax Haven entity.  
Tax Haven entity is owned by individual with foreign citizenship and no other business or ties to the United States.

**6. Combination Strategy**

Use of U.S. corporation or LLC in combination with one of the above.

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**Structuring Issues**

- A. Personal Liability to US Law Suits**
- B. Effect on Operating Income**
- C. Effect on Exit Strategy**
- D. Administration Costs and Reporting Requirements**
- E. Effect of Death of Owner(s) on Structure**

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Expatriation to Avoid Tax

Code Section 877A

Applies After 6-17-2008

Heroes Earnings Assistance and Relief Tax Act of 2008 (the "Act")

1. Applies to Citizens and to Lawful Permanent Residents "Covered Expatriates"  
Does 10 year rule limit apply to definition of "Covered Expatriate" under Section 877A?
2. Citizens [Code §877 (a), (b) and (c)]
  - a. Average net income tax of such individual for the period of 5 taxable years ending before the date of loss of U.S. citizenship is greater than \$124,000\*.  
(The "5 year Tax Liability Test")
  - b. The net worth of the individual as of such date is \$2 million or more.  
(The "\$2 million Net Worth Test")
  - c. The individual fails to certify and provide evidence that neither a, or b applies.  
(The "Non Compliance Test")
  - d. \*Note:\$124,000 is inflation adjusted – 2013 it is \$155,000.
3. Green Card Holders [ Code Section 877A(g)]
  - a. Long-Term Residents. Any noncitizen 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 before losing such status.
    - i. Sixth Year Notice. Client Advisory Opportunity. Track the Green Card Date of your clients. Invite them in for consultation at the start of the Sixth Year of their permanent residency status. Start them thinking about whether they want to repatriate before the end of their eighth year!
  - b. Loss of Status as Permanent Resident – Code Section 7701(b)(6).
    - i. Revoked or
    - ii. Administratively or Judicially abandoned or
    - iii. The individual commences to be treated as a resident of a foreign country

under the provisions of a tax treaty between the United States and the foreign country, does not waive the benefits of such treaty applicable to residents of the foreign country, and notifies the Secretary of the commencement of such treatment.

c. Must also “fail” the Tax Liability, Net Worth or Non Compliance Tests

d. What can cause a loss of Permanent Resident Status?

**i. Abandoning Permanent Resident Status**

- Move to another country intending to live there permanently
- Remain outside of the United States for more than 1 year without obtaining a reentry permit or returning resident visa. However, in determining whether your status has been abandoned, any length of absence from the United States may be considered, even if less than 1 year
- Remain outside of the United States for more than 2 years after issuance of a reentry permit without obtaining a returning resident visa. However, in determining whether your status has been abandoned any length of absence from the United States may be considered, even if less than 1 year.
- Fail to file income tax returns while living outside of the United States for any period.
- Declare yourself a “nonimmigrant” on your tax returns”

**Does travel outside the United States affect my permanent resident status?**

Permanent residents are free to travel outside the United States, and temporary or brief travel usually does not affect your permanent resident status. If it is determined, however, that you did not intend to make the United States your permanent home, you will be found to have abandoned your permanent resident status. A general guide used is whether you have been absent from the United States for more than a year. Abandonment may be found to occur in trips of less than a year where it is believed you did not intend to make the United States your permanent residence. While brief trips abroad generally are not problematic, the officer may consider criteria such as whether your intention was to visit abroad only temporarily, whether you maintained U.S. family and community ties, maintained U.S. employment, filed U.S. income taxes as a resident, or otherwise established your intention to return to the United States as your permanent home. Other factors that may be considered include whether you maintained a U.S.

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mailing address, kept U.S. bank accounts and a valid U.S. driver's license, own property or run a business in the United States, or any other evidence that supports the temporary nature of your absence.

**What if my trip abroad will last longer than 1 year?**

If you plan on being absent from the United States for longer than a year, it is advisable to first apply for a reentry permit on Form I-131. Obtaining a reentry permit prior to leaving the United States allows a permanent or conditional permanent resident to apply for admission into the United States during the permit's validity without the need to obtain a returning resident visa from a U.S. Embassy or Consulate abroad. Please note that it does not guarantee entry into the United States upon your return as you must first be determined to be admissible; however, it will assist you in establishing your intention to permanently reside in the United States.

If you remain outside of the United States for more than 2 years, any reentry permit granted before your departure from the United States will have expired. In this case, it is advisable to consider applying for a returning resident visa (SB-1) at the nearest U.S. Embassy or Consulate. An SB-1 applicant will be required to establish eligibility for an immigrant visa and will need a medical exam.

**ii. Criminal Activity**

According to Department of Homeland Security,

“You may lose your permanent resident status (green card) if you commit an act that makes you removable from the United States under the law, as described in Section 237 or 212 of the Immigration and Nationality Act (INA). If you commit such an act, you may be brought before an immigration court to determine your right to remain a permanent resident.”

What are these Crimes?

**(A) General crimes.-**

- a. Crimes of moral turpitude
  - i. for which a sentence of one year or longer may be imposed
  - ii. Multiple criminal convictions.- two or more crimes involving moral turpitude regardless of whether confined therefor.
- b. Aggravated felony.

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- c. High Speed Flight.
- d. Failure to Register as a Sex Offender

(B) Controlled substances.-

(i) Conviction.- any law or regulation of a State, the United States, or a foreign country relating to a controlled substance other than a single offense involving possession for one's own use of 30 grams or less of marijuana.

(ii) Drug abusers and addicts.-Any alien who is, or at any time after admission has been, a drug abuser or addict.

(C) Certain firearm offenses.

Purchasing, selling, offering for sale, exchanging, using, owning, possessing, or carrying, or of attempting or conspiring to purchase, sell, offer for sale, exchange, use, own, possess, or carry, any weapon, part, or accessory which is a firearm or destructive device in violation of any law.

(D) Miscellaneous crimes.

(i) treason and sedition for which a term of imprisonment of five or more years may be imposed;

(ii) any offense under section 871 or 960 of title 18, United States Code;

(iii) a violation of the Military Selective Service Act

(iv) a violation of the Trading With the Enemy Act ; or

(v) a violation of the Immigration and Naturalization Act

(E) Crimes of Domestic violence

Stalking, or violation of protection order, crimes against children

(i) Domestic violence, stalking, and child abuse.-

(ii) Violators of protection orders.-

WAIVER FOR VICTIMS OF DOMESTIC VIOLENCE

(F) TRAFFICKING-

participating in trafficking.

4. Exceptions -- Fairly Useless

a. Dual Citizen Exception

i. Must have acquired dual citizenship at birth

ii. Must still be citizen of the other country as well as US and taxed as resident of the other country on date of loss of citizenship.

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- iii. Must not have been a resident of the United States for more than 10 of last 15 years.
  - b. Certain Minors
    - i. Must have acquired dual citizenship at birth
    - ii. Loss of citizenship occurs before 18.5 years old
    - iii. Minor not a resident of the US for 10 years or more prior to loss of citizenship.
5. Tax Regime Applicable to Expatriates
- a. Marked to Market. All Property Owned by Expatriate Treated as Marked to Market on Expatriation Date.
  - b. Deferral Election.
  - c. Trust Withholding Provisions
  - d. Special Step Up in Basis Rule
6. How Do We Determine What Property is Owned by the Expatriate on the Expatriation Date?
- a. The “Expatriate’s Estate”. Any interest in property that would be taxable as part of the covered expatriate’s gross estate for Federal estate tax purposes. (the “Expatriate Estate”) Notice 2009-85
    - i. The Expatriate Estate is determined without regard to the Unified Credit and other Credits against the Estate – Section 2010 through 2016.  
(The unified credit and other credits against the estate tax.)
      - 1. 2010 Unified Credit
      - 2. 2011 Credit for State Death taxes.
      - 3. 2012 Credit for Gift Tax.
      - 4. 2013 Credit for tax on prior transfers.
      - 5. 2014 Credit for foreign death taxes.
      - 6. Credit for death taxes on remainders.
      - 7. Recovery of taxes claimed as credit.  
[Why aren’t Credits allowed? -- The tax is a mark-to-market tax. Not an actual estate tax. The amount of the tax is the capital gains tax on the built-in gain in the assets held.  
The Unified Credit disallowance makes sense – if the spouse is a non citizen of the U.S. the unified credit would not be allowed anyway.  
State Death Credit – None is due now, so no credit would be

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available in any event.

Gift Taxes paid. The asset on which the gift tax is paid is not included in the Expatriate Estate, so no credit would be appropriate.

Tax on prior transfers. Same.

- ii. The Expatriate Estate includes any beneficial interest in a trust that would not be part of his estate! Use the Special Rules set forth in section III of Notice 97-19, 1997-19, 1997-1 C.B. 394.

Why is this an issue? Trusts could be an important tool for tax avoidance. Give assets to a trust, retain the possibility of the assets coming back to you at a future date. The "String Provisions" would draw such a trust funded by the Expatriate back into the Expatriate's estate. But an indirectly funded trust created by a relative could be used to reduce the Expatriate's estate. He could gift \$2 million to a NRA relative. The relative could create a trust for the Expatriate's benefit holding \$2 million in assets. Set the trust up so the Expatriate is not considered to own the assets on the expatriation date. Remove the restrictions in the future so the asset belongs to the Expatriate again. Could this be done without the trust? Yes. Some risk of Step Transaction. Could be perceived as fraud. But now the Expatriate must report the trust and take into account the beneficial value without any restrictions on obtaining the benefit.

- iii. Use Valuation Rules used for Estate Tax purposes with modifications.
  - 1. No Alternative Date Valuation
  - 2. No Farm Land Special Valuation
  - 3. Special Valuation Rules for Corporations and Partnerships are applied as § marital deduction, and the family owned business will not apply.
  - 4. For determining the value of NonGrantor trust interest not includible in the Expatriate's estate, use the gift tax rules without any prohibitions or restrictions on such interest.
  - 5. An interest in a life insurance policy is valued as if gifted the day before the expatriation date (Treas. Regs. § 25.2512-6).
- iv. Example
  - 1. Real Estate
  - 2. Vehicles
  - 3. Artwork
  - 4. Heirlooms



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- 5. Stocks and Bonds
- 6. Annuities
- 7. Retirement Plans
- 8. Intangibles – Business Intangibles
- 9. Cause of Action

7. Marked to Market Rules Applicable to Expatriates

- a. All assets sold on day before expatriation date.
- b. Gain to be recognized.
- c. Loss recognized. Wash sale rule (Section 1091) does not prevent loss from being recognized.
- d. Basis Adjustments made to prevent future double recognition of gain or loss.
- e. Gain Recognition Exclusions
  - i. Allowed to exempt \$600,000 of gain recognition. Inflation adjust 2013 (\$668,000)

8. Basis Adjustments.

Section 877A requires proper adjustments to be made in the amount of any gain or loss subsequently realized with respect to an asset for the amount of gain or loss taken into account under Section 877A(a)(2).

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Notice Example 3

Bob is a covered expatriate, he relinquishes his citizenship on November 1, 2009.

Bob owns 3 assets,

Asset	Adjusted Basis	FMV	Built-in Gain ("BIG)	Ratio BIG for Asset to Total BIG
Office Building	\$200,000	\$2,000,000	\$1,800,000	90%
Residence	\$800,000	\$1,000,000	\$200,000	10%
Vacation Home	\$800,000	\$500,000	(\$300,000)	0
		Total BIG On Gain Assets Only	\$2,000,000	

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Office Building Ratio (90%) \* Exclusion Amount (\$668,000) = \$601,200  
Residence Ratio (10%) \* Exclusion Amount (\$668,000) = \$ 66,800

Bob's recognition under 877A:

Office Building \$1,800,000 – Exclusion amount \$601,200 = \$1,198,800  
Residence \$200,000 – Exclusion amount \$66,800 = \$133,200  
Vacation Home Loss Taken -\$300,000

Bob's new basis in his assets

Office Building \$200,000 + \$1,198,800 = \$1,398,800  
Residence \$800,000 + \$133,200 = \$933,200  
Vacation Home \$800,000 - \$300,000 = \$500,000

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## 9. In-bound Step-Up in Basis

Section 877A(h)(2) provides that, solely for purposes of determining the tax imposed by reason of Section 877A, property that was held by a nonresident alien on the day that individual first became a resident of the United States will be treated as having a basis on such date of not less than the fair market value of such property on such date.

The IRS intends to exclude from such step up any United States Real Property Interests and property held by the nonresident alien in connection with the conduct of a trade or business in the United States (under statutory rules or in the case of a treaty resident through a permanent establishment).

## 10. Allocation of the Gain Recognition Exclusion Amount. \$668,000 Exclusion for 2013

- a. Allocate the exclusion amount among all built-in gain property subject to the mark to market regime without reference to the election to defer. Allocate the amount first pro-rata to each item of built-in gain property ("gain asset") by multiplying the exclusion amount by the ratio of the built-in gain with respect to each gain asset over the total built-in gain of all gain assets. The exclusion amount allocated to each gain asset may not exceed the amount of that asset's built in gain.
- b. Only one lifetime exclusion amount per individual.

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TIP: Sell Assets with a low tax rate before Expatriation

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Example -- Sell Low Tax Rate Assets Before Expatriation Date.  
If Desired, buy new replacement asset at FMV Basis.

Expatriate Owns Two Assets

A	B
noncapital asset, no basis	long-term capital asset, no basis
FMV \$668,000	FMV \$668,000
Tax Rate 35%	Tax Rate 15%

Advice, sell B before date of expatriation. Expatriate pays tax on capital gain on B at 15% = \$100,200 of tax. On the expatriation date, Expatriate is allowed to use the entire exclusion amount of \$668,000 to avoid tax on asset A. Total Tax = \$100,200

Compare. Expatriate has both assets on Expatriation Date. Expatriation exclusion amount of \$668,300 is allocated by multiplying the exclusion amount by the ratio of the built-in gain with respect to each gain asset over the total built-in gain of all gain assets. The exclusion amount allocated to each gain asset may not exceed the amount of that asset's built-in gain.

Built-in gain for A = \$668,000

Built-in gain for B= \$668,000

Total built-in gain for all gain assets = \$1,336,000

Ratio for A = \$668,000/\$1,336,000 = .5

Ratio for B = \$668,000/\$1,336,000=.5

Gain Exclusion Amount Allocated to A = \$668,000 \* .5 = \$334,000

Gain Exclusion Amount Allocated to B = \$668,000\* .5 = \$334,000

Gain on A = \$668,000

Exclusion= \$336,000

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Taxable Gain = \$336,000  
Rate = 35% -- Ordinary income  
Tax = \$117,600

Gain on B = \$668,000  
Exclusion= \$336,000  
Taxable Gain = \$336,000  
Rate = 15% Capital Gain  
Tax = \$50,400

Total Tax = Tax on A \$117,600 + Tax on B \$50,400 = \$168,000

Compare to tax of \$100,200 if low rate asset sold first, difference is \$67,800

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#### 11. Deferral Election.

- a. Deferral election may be made on property by property basis. Election is irrevocable.
- b. Deferred until due date of return that reports taxable sale or other taxable disposition.
- c. The amount of the deferral is determined by ratio. (Spreads allocation of losses across all property including deferred property.)
- d. Can't defer past death, failure of security.
- e. Must provide adequate security. Must waive certain treaty rights not to pay tax.
- f. Statutory interest runs during the period of deferral.

#### 12. Exceptions to Marked to Market Rule.

- a. Deferred Compensation Items
- b. Specified Tax Deferred Accounts
- c. Interests in a Non Grantor Trust

#### 13. Deferred Compensation Items

- a. Definition
  - i. Deferred Compensation -- Any interest in a plan or arrangement defined in section 219(g)(5). Such plans and arrangements are:
    1. A plan described in section 401(a) which includes a trust exempt

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- form tax under section 501(a).
  - 2. Annuities.
    - a. An annuity plan described in section 403(a).
    - b. An annuity contract described in section 403(b).
  - 3. Government Plans. A plan established for its employees by the United States, by a State or political subdivision thereof, or by an agency or instrumentality of the foregoing.
  - 4. SEPs
  - 5. Simplified Retirement Accounts 408(p)
  - 6. Trusts described in 501(c)(18).
  - 7. A foreign pension plan or similar retirement arrangement and
  - 8. Section 83 deferred property or right to property received in connection with services performed.
- ii. Eligible Deferred Compensation Items
- 1. Any of the above for which
    - a. The payer is a U.S. or non-U.S. person who elects to be treated as a U.S. person for purposes of withholding as provided in Section 877A(d)(1).and
    - b. The covered expatriate notifies the payer of his status as a covered expatriate and irrevocably waives any right to claim a withholding reduction under a treaty with the U.S.
  - b. Tax Treatment of Eligible Deferred Compensation Items
    - i. No tax on expatriation date
    - ii. 30% withholding on any eventual taxable payment to the expatriate.
  - c. Tax Treatment of Ineligible Deferred Compensation Item.
    - i. Present value of the covered expatriate' accrued benefit is treated as having been received on day before expatriation date.
    - ii. No early distribution tax (penalty) is imposed.
    - iii. Procedure
      - 1. Covered Expatriate gives each payer an IRS-approved Form W-8CE.
      - 2. Within 60 days of receipt the payer must provide the Expatriate with the present value of his accrued benefit.
      - 3. For a defined contribution plan this is the account balance.
      - 4. For a defined benefit plan, use the method in Section 4.02 of Rev. Proc. 2004-37.
  - d. Exception to Treatment of Deferred Compensation Items

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- i. Deferred Compensation Items are not subject to these rules to the extent attributable to services performed outside the United States while the covered expatriate was not a citizen or resident of the United States.

14. Treatment of Specified Tax Deferred Accounts.

- a. Specified Tax Deferred Account
  - i. IRAs (Not SEPs or Simples)
  - ii. 529 plans
  - iii. Coverdell education savings account Section 530
  - iv. Health Savings Account
  - v. Archer MSA account
- b. Distribution of entire account the day before the expatriation date
- c. No early distribution tax
- d. Adjustments to subsequent distributions.

15. Non Grantor Trusts

- a. Trustee shall deduct and withhold from such distribution an amount equal to 30 percent of the taxable portion of such distribution.
- b. If FMV of property exceeds its adjusted basis in the hands of the trust, gain shall be recognized to the trust as if such property were sold to the expatriate at its fair market value.
- c. Taxable portion – that portion which would be includible in the gross income of the covered expatriate if such expatriate continued to be a citizen or resident of the United States.
- d. No treaty exclusions.

16. Special Rules

- a. Coordination with Foreign Trust Rules – Apply recognition rule of 688 on transfer of appreciated property to foreign trust first, then apply 877A.

17. Gifts and Covered Bequests by Covered Expatriates – Section 2801

- a. Gift or Bequest Received from Covered Expatriate Taxed to Recipient.
- b. Tax rate is the greater of:
  - i. Tax Rate under section 2001(c) (estate tax rate)
  - ii. Tax Rate under section 25021(a) (gift tax rate)
- c. Allowed annual exclusion amount before tax applies.  
(Note the annual exclusion amount appears to be allowed regardless of whether

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the gift meets the other requirements for an annual gift, that is, even if not a gift of a present interest.)

- d. A credit is allowed for foreign tax paid on the gift.  
(It appears the U.S. recipient gets a credit against the U.S. tax for payment of a gift tax by the foreign Covered Expatriate).

#### Accelerate Estate Tax and Charitable Giving Plans

In particular consider charitable gift of highly appreciated corporate stock or other asset.

Taxable Gifts Below \$5,250,000 do not result in Gift Tax liability.

#### State Tax Issues

Foreign Resident, may not be subject to State Taxes – move abroad before December 31 of the year of your expatriation date.

New York – Basis State Income on Federal Income –

New York Adjusted Gross Income is federal adjusted gross income with certain modifications. Tax Law Section 612. Therefore income included by way of Section 877A for federal tax purposes will be included in New York income.

New Jersey – Basis State Income on its own definition,

One item of income for NJ is Gains and Losses from Dispositions of Property. In this regard, the method of accounting must be the same as for federal income tax purposes.

Gain or income from transactions not recognized for the federal tax may be excluded from the state tax computation.

Does this mean that deem sale income from Section 877A must be realized for New Jersey purposes?

#### U.S. Taxation After Expatriation

1. No longer taxed on WorldWide Income
2. Subject to 30% withholding on U.S. source FDAP
3. U.S. sourced Real Property Gains
4. Subject to U.S. income tax rates on effectively connected income.
5. Certain reporting requirements may be eliminated such as 5471, 8858, 8865 and FBAR Forms.
6. Treatment of transfer between U.S. spouse and expatriate subject to non citizen limitations instead of unlimited U.S. marital deduction. No change if expatriate is not a U.S. citizen, same rules applied when a green card holder.
7. Succession Planning where children remain in the U.S. is complicated by new

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Inheritance tax provision on gift from Covered Expatriate (is this limited to 10 years after expatriation?).

8. Receipt of distributions from Non Grantor Trust subject to 30% U.S. withholding tax.

Foreign Tax Problems After Expatriation

1. Will Foreign Country allow step up in basis on capital gain assets for U.S. deemed tax under 877A. Certain treaties do. Korea does not. (It might be better to sell asset to establish new basis and claim credit for U.S. tax paid before expatriation. Treaty should prevent foreign jurisdiction from taxing twice.)
2. No longer qualify for U.S. Treaty reduction on withholding payments of dividends or interest from other countries. Compare Korea reduction on withholding payments vs U.S.

Non Tax Problems

Visiting the U.S. may become limited.

IRS Pronouncements

Notice 2009-85, Guidance for Expatriates under Section 877A, 2009-C.B. 598; October 15, 2009.

Ann 2009-57, Guidance on Gifts and Bequests From Certain Expatriates, 2009-2 C.B. 158.

Articles

Glunt, G. Paul, Practical Tax Planning for Individual Expatriation; 2012 TNT 99-4, 5/22/2012.

Mooney, Michael E.; Leaving on a Jet Plane: The U.S. Tax Consequences of Expatriation; 2013 TNT 29-5, 2/12/2013.