

flash International Executive Alert

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FORMS FOR USE BY EXPATRIATING INDIVIDUALS RELEASED BY U.S. IRS

by KPMG LLP's Washington
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The U.S. Internal Revenue Service (IRS) has released Forms 8854 *Expatriation Information Statement*¹ and W-8CE *Notice of Expatriation and Waiver of Treaty Benefits*.² The purpose of these forms is to enable individuals who are covered expatriates under the mark-to-market expatriation tax rules of Internal Revenue Code (I.R.C.) section 877A to provide certain required certifications and notifications, to calculate the tax due under section 877A, and to comply with certain other aspects of the rules.

(For prior coverage on section 877A, see the following issues of *Flash International Executive Alert*: [2008-096](#) (June 2, 2008) and [2008-103](#) (June 17, 2008).)

KPMG Note

The release of these forms represents the first guidance issued by the IRS for individuals subject to the expatriation mark-to-market tax rules under section 877A, which have been in effect since June 17, 2008.

Background

I.R.C. section 877A imposes a mark-to-market expatriation tax on covered expatriates. A covered expatriate is any U.S. citizen who relinquishes U.S. citizenship and any long-term resident (i.e., an individual who has held a greencard in eight of the prior 15 years) who terminates U.S. residency if:

- his or her average annual net income tax liability for the five preceding years ending before the date of relinquishment of U.S. citizenship or termination of residency exceeded \$139,000 in 2008 or \$145,000 in 2009 (this amount is adjusted annually for inflation);
- his or her net worth is \$2 million or more on that date; or
- he or she fails to certify compliance with all U.S. federal tax obligations for the preceding five years, or fails to submit such evidence of compliance as the U.S. IRS may require.

Narrow exceptions to these rules apply for certain dual citizens and minors, subject to conditions.

Covered expatriates are generally subject to a mark-to-market tax whereby they are treated as having sold all their property for its fair market value on the day before they relinquish U.S. citizenship or terminate U.S. residency. The tax is imposed on amounts of gain recognized in excess of \$600,000 for individuals who expatriated in 2008 or \$626,000 for individuals who expatriate in 2009 (this amount is adjusted annually for inflation).

Form 8854

The Form 8854 is to be used both by persons who expatriated after June 3, 2004, and before June 17, 2008 (subject to the expatriation tax regime of section 877) and by those who expatriated after June 16, 2008 (subject to the mark-to-market tax of section 877A). For those subject to section 877A, the form is to be filed with the individual's income tax return (Form 1040 or Form 1040NR) for the year of expatriation. It should be noted that even if the expatriating individual does not meet the average net income tax or net worth tests, the form should be filed to provide certification that the individual complied with all his or her federal tax obligations for the five tax years preceding the expatriation.

Form W-8CE

As stated above, the mark-to-market expatriation tax applies to most property interests held by covered expatriates. However, special tax rules apply to certain items of income: (1) deferred compensation items, (2) specified tax-deferred accounts, and (3) distributions from nongrantor trusts. A covered expatriate who holds any of these assets must give Form W-8CE to the payer of any income covered by these special tax rules.

Deferred Compensation Items

As a result of receiving Form W-8CE from a covered expatriate, a payer of "eligible" deferred compensation (generally, a U.S. retirement plan or similar arrangement, or a foreign plan where the payer elects to be treated as a U.S. person) must withhold 30 percent on any taxable payment made to the covered expatriate. Receipt of the form also notifies the payer that the covered expatriate has irrevocably waived any right to claim a reduction in withholding under any income tax treaty.

A payer of "ineligible" deferred compensation (any deferred compensation that does not meet the definition of eligible deferred compensation), on receipt of a Form W-8CE, must advise the covered expatriate within 60 days of the individual's accrued benefit in the deferred compensation item on the day before the individual's expatriation date. A covered expatriate is treated as receiving an amount equal to the present value of the accrued benefit in such deferred compensation on the day before expatriation.

Specified Tax-Deferred Accounts

Any interest that a covered expatriate holds in a specified tax-deferred account is treated as having been distributed to the covered expatriate on the day before the individual's expatriation date. For purposes of section 877A, the term "specified tax-deferred account" means an individual retirement plan (as defined in I.R.C. section 7701(a)(37), with certain exceptions), a section 529 qualified tuition program, a section 530 Coverdell education savings account, and a section 220 Archer medical savings account.

As a result of receiving Form W-8CE from a covered expatriate, a custodian of a tax-deferred account must advise the covered expatriate within 60 days of receipt of the form of the amount of the individual's entire interest in the account on the day before the individual's expatriation date.

Nongrantor Trusts

As a result of receiving Form W-8CE from a covered expatriate, the trustee of a nongrantor trust must withhold 30 percent on any taxable payment made to the covered expatriate. Receipt of the form also notifies the trustee that the covered expatriate has irrevocably waived any right to claim a reduction in withholding under any income tax treaty.

As an alternative to the above rules, the form instructions indicate that a covered expatriate may elect to be treated as receiving the value of his or her interest in the nongrantor trust on the day before his or her expatriation date and to pay tax currently on such value. However, to make this election, the covered expatriate must first obtain a letter ruling from the IRS stating the value of his or her interest in the trust on the day before his or her expatriation date.

KPMG Note

The election by a covered expatriate to be treated as receiving the value of his or her interest in a nongrantor trust on the day before his or her expatriation date and to pay tax currently on such value, is not included in the statutory language of section 877A.

Time for Filing

A covered expatriate must give Form W-8CE to each payer of an item of income described above within 30 days of the date of his or her expatriation. For individuals who expatriated after June 16, 2008, but before the date on which Form W-8CE became available, the form must be given to the payer within 30 days of the day the form became available. The IRS has indicated to KPMG LLP (U.S.) that May 11, 2009, is considered to be the date of availability of the form.³

Footnotes:

- 1 See: <http://www.irs.gov/pub/irs-pdf/f8854.pdf>.
- 2 See: <http://www.irs.gov/pub/irs-pdf/fw8ce.pdf>.
- 3 E-mail correspondence from the IRS to KPMG LLP (U.S.), May 12, 2009.

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The information contained in this newsletter was submitted by KPMG LLP's Washington National Tax practice. The information contained herein is of a general nature and based on authorities that are subject to change. Applicability of the information to specific situations should be determined through consultation with your tax adviser.

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