

# Expatriation and the New Mark-to-Market Rules

By: Karl L. Fava, CPA, MBA

The Heroes Earnings Assistance and Relief Tax Act of 2008<sup>1</sup> (HEART) introduced Sec. 877A, which dramatically changed the rules for U.S. citizens and long-term residents who expatriate.<sup>2</sup> The new rules subject taxpayers that renounce their U.S. citizenship or abandon their U.S. residency to a mark-to-market exit tax on their assets. Under Sec. 877A, expatriating taxpayers are taxed on the gains of a deemed sale of their worldwide assets in excess of \$600,000. This mark-to-market tax replaces the 10-year alternative tax on U.S. source income under Sec. 877.

## Foreign Investors Tax Act of 1966

Congress enacted Sec. 877 as part of the Foreign Investors Tax Act of 1966<sup>3</sup> (FITA) to thwart expatriation as a method of tax avoidance.

Upon expatriation, former U.S. citizens or residents would be subject to taxation on their U.S. source income as nonresident aliens.

Under FITA, a nonresident alien's income not effectively connected with a U.S. trade or business was not subject to progressive taxation. Sec. 877 required taxpayers who expatriated in order to avoid taxation to calculate their tax under two alternative methods for 10 years after expatriating. The taxpayers would calculate their tax on U.S. source income under the graduated rates or as nonresident aliens and default to the higher of the two alternatives.<sup>4</sup>

An expatriate was subject to the rules of Sec. 877 if the individual's principal purpose of expatriation was tax avoidance. If the IRS determined that the

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1 Heroes Earnings Assistance and Relief Tax Act of 2008, P.L. 110-245.

2 The term "long-term resident" has the meaning given to it by Sec. 877(e)(2). Specifically, the term is defined as any individual (other than a

citizen of the United States) who is a lawful permanent resident of the United States in at least 8 tax years during the period of 15 tax years ending with the tax year during which expatriation took place. Sec. 7701 defines a lawful permanent resident as an individual that took steps to apply for permanent residency, i.e., a green card application. A taxpayer treated as a resident for income tax purposes under the substantial presence test of Sec. 7701(b)(3) is not considered a lawful permanent resident and therefore would not be a long-term resident under Sec. 877.

3 Foreign Investors Tax Act of 1966, P.L. 89-809.

4 Former Sec. 877(a)(1).

expatriation was for tax avoidance, the burden of proof fell to the taxpayer to substantiate that it was not.<sup>5</sup>

FITA also enacted gift and estate tax rules for expatriates. Sec. 2107 provides that an expatriate subject to Sec. 877 would also be subject to U.S. estate tax within the 10-year window after expatriation.<sup>6</sup> Under Sec. 2107, an expatriate's taxable estate would include U.S.-based property as defined in Sec. 2103. Also included is the value of the shares in a foreign corporation owned by the decedent if the decedent owned 10% or more of the total combined voting power of all classes of stock entitled to vote and is considered to have owned (by applying the ownership rules of Sec. 958(b)) 50% of the total combined voting power of all classes of stock entitled to vote of the corporation. The decedent's taxable estate would include the portion of the fair market value (FMV) of the foreign corporation's stock attributable to the United States. The U.S. portion would be based on the FMV of any assets owned by the corporation and situated in the United States at the time of death, relative to the total FMV of all assets owned by the foreign corporation.<sup>7</sup>

FITA included changes to Sec. 2501 whereby expatriates subject to Sec. 877 were also subject to gift tax on transfers of intangible property. Prior to FITA, only nonresidents engaged in a U.S. trade or business were subject to a tax on transfers of intangible property with U.S. situs. Transfers of intangible property outside the 10-year window that an expatriate was subject to Sec. 877 were now subject to a gift tax under Sec. 2501.<sup>8</sup>

### Health Insurance Portability and Accountability Act, 1996

Prior to HEART, Congress modified Sec. 877 twice. The first modification was under the Health Insurance Portability

and Accountability Act of 1996 (HIPAA).<sup>9</sup> In the early 1990s there was a concerted effort to strengthen the expatriation tax. During this period, the national press played up instances of millionaire businessmen expatriating and lamented the loss of tax revenues. Kenneth B. Dart, the president of Dart Container Corporation, was the poster child for this movement. The Clinton administration used Dart as an example of why there was a need for a stronger expatriation tax.<sup>10</sup> The Clinton proposal to implement an exit tax was not enacted, but HIPAA considerably strengthened the existing rules of Sec. 877.

HIPAA extended the reach of Sec. 877 to include long-term residents of the United States who abandoned their green card. A long-term resident was defined as a lawful permanent resident (green card holder) of the United States for 8 of the 15 years ending with the year the residency was terminated.<sup>11</sup> Under HIPAA, a taxpayer was deemed to have terminated his or her residency status for the principal purpose of tax avoidance if either of the following two tests were met:

- The taxpayer's average U.S. federal income tax liability for the five tax years ending before the termination date was greater than \$100,000 (the tax liability test).
- The taxpayer's net worth as of the date of termination was \$500,000 or more (the net worth test).<sup>12</sup>

The dollar amounts of the tax liability and the net worth tests were indexed for inflation for years after 1996. There was an allowance for a taxpayer to request a ruling substantiating that the expatriation was not for tax avoidance.<sup>13</sup>

The categories of income and gains to be treated as U.S. sourced were expanded under HIPAA. A taxpayer subject to Sec. 877 would be taxed at graduated rates on U.S. sourced income for 10 years after

## EXECUTIVE SUMMARY

- Under Sec. 877A, expatriating citizens and long-term residents of the United States are taxed on the gains of a deemed sale (on the day before the expatriation takes place) of their worldwide assets in excess of \$600,000. This mark-to-market tax replaces the 10-year alternative tax on U.S. source income under Sec. 877.
- Taxpayers may make an irrevocable election to defer the tax due on the deemed sale of specific assets under the mark-to-market rules until the due date of the tax return for the year in which the asset is sold and a realized gain occurs. Exceptions to the tax are provided for certain deferred tax items, specified tax-deferred accounts, and nongrantor trusts.
- New Sec. 2801 imposes a tax on a recipient (including a domestic trust) of a direct or indirect gift from a covered expatriate at the highest applicable gift or estate tax rates.

termination of U.S. residency. The act also provided a credit for relief of potential double taxation. U.S. income tax imposed

5 Sec. 877(f) (formerly Sec. 877(e)).

6 Former Sec. 2107(a).

7 Former Sec. 2107(b) (flush language).

8 Former Sec. 2501(a)(3).

9 Health Insurance Portability and Accountability Act of 1996, P.L. 104-191.

10 See DeWitt, "Exile's Effort to Return Puts Focus on Tax Loophole," *New York Times* 14 (October 1, 1995).

11 Sec. 877(e)(2).

12 Former Sec. 877(a).

13 Notice 97-19, 1997-1 C.B. 394. Section IV of the notice explains the procedure that an individual must use to request a private letter ruling that the individual's loss of U.S. citizenship did not have for one of its principal purposes the avoidance of U.S. taxes. Section IV also provides that certain former long-term U.S. residents may use this ruling procedure to request a ruling that cessation of long-term U.S. residency did not have for one of its principal purposes the avoidance of U.S. taxes. Notice 98-34, 1998-2 C.B. 29, modified certain portions of Notice 97-19 §IV.

solely under Sec. 877 and also subject to any foreign income, gift, estate, or similar taxes would have the benefit of any potential foreign tax credit.<sup>14</sup>

Expatriates, either citizens or long-term residents, had required information reporting under HIPAA. A U.S. citizen who lost his or her citizenship was required to provide a statement to the State Department that included the individual's Social Security number, foreign address, new country of residence, citizenship, and, in the case of individuals with a net worth of at least \$500,000, a balance sheet. A long-term citizen whose residency was terminated was required to attach a similar statement to his or her individual income tax return for the year of termination. The act provided for penalties for nondisclosure.<sup>15</sup>

## American Jobs Creation Act, 2004

The second modification to FITA was the American Jobs Creation Act of 2004<sup>16</sup> (AJCA). The AJCA attempted to strengthen the provisions of HIPAA because there was still a significant amount of public debate on the merits of expatriation and the loss of tax revenues. *Harper's Magazine* published an article in October 2004 titled "Electing to Leave: A Reader's Guide to Expatriating on November 3."<sup>17</sup> The 10-year alternative income tax was still the law, but under AJCA the law was to be easier to enforce. The act increased the tax liability test to \$124,000 and the net worth test to \$2 million. In addition, the subjective standard of tax avoidance as a principal purpose for citizenship relinquishment or residency termination was replaced with objective rules. The AJCA eliminated a taxpayer's ability to request a ruling from the IRS that the expatriation was not tax motivated.<sup>18</sup>

The act amended Sec. 2107(a) to provide that a tax would be computed on the transfer of a taxable estate, as determined in Sec. 2106, of every decedent if the date

of death occurred during the tax year for which the decedent was subject to tax under Sec. 877(b).<sup>19</sup> It also amended the gift tax rules under Sec. 2501 to conform to the estate tax rules in that transfers of foreign stock (under the same rules described above) would be subject to gift taxation for a donor that was subject to Sec. 877(b).<sup>20</sup>

## Heroes Earnings Assistance and Relief Tax Act, 2008

The HEART Act replaced the 10-year alternative income tax with an "exit tax." Taxpayers who expatriate on or after June 17, 2008, are subject to this tax.<sup>21</sup> Sec. 877A subjects a "covered expatriate" to tax on gains in excess of \$600,000 from a deemed sale of an individual's worldwide assets on the day prior to that individual's expatriation. Under the former alternative income tax rule, an expatriate could avoid income taxation on a built-in gain if the expatriate did not realize the gain within the 10-year window under Sec. 877.

Sec. 877A(g)(1) explains that a covered expatriate is an expatriate that meets the requirements of subparagraph (A), (B), or (C) of Sec. 877(a)(2). Specifically, U.S. citizens who relinquish their citizenship on or after June 17, 2008, along with long-term residents who have relinquished their residency status on or before June 17, 2008, are subject to the exit tax if they meet any of the following conditions:

1. The taxpayer has average annual net income tax greater than \$139,000 over the five-year period ending before the date of the loss of U.S. citizenship;
2. The taxpayer's net worth on the date of expatriation is \$2 million or more; or
3. The taxpayer fails to certify under penalty of perjury that he or she has filed all tax and information returns and has satisfied all tax obligations for a five-year period prior to expatriation.<sup>22</sup>

There are two exceptions to an individual's classification as a covered expatriate due to (1) and (2) above, but not (3).

The first exception applies to an individual who was born with citizenship both in the United States and in another country, provided that:

- As of the expatriation date, the individual continues to be a citizen of, and is taxed as a resident of, the other country; and
- The individual has been a U.S. resident under the substantial presence test of Sec. 7701(b)(1)(A)(ii) for not more than 10 tax years during the 15-year tax period ending with the year of expatriation.

The second exception applies to a U.S. citizen who relinquishes U.S. citizenship before reaching age 18½, provided that the individual was a resident of the United States under the substantial presence test of Sec. 7701(b)(1)(A)(ii) for no more than 10 tax years before such relinquishment.<sup>23</sup>

A U.S. citizen continues to be a U.S. citizen for tax purposes until the individual's citizenship is treated as relinquished. U.S. citizenship is relinquished on the earliest of the four following dates:

- The date the U.S. citizen renounces U.S. nationality before a diplomatic or consular officer of the United States;
- The date that the individual furnishes to the State Department a signed statement of voluntary relinquishment of U.S. nationality, confirming the performance of an expatriating act;
- The date that the State Department issues a certificate of loss of nationality; or
- The date that a U.S. court cancels a naturalized citizen's certificate of naturalization.<sup>24</sup>

The deemed-sale rules under the market-to-market regime require a taxpayer to compute gain or loss on worldwide assets on the day before the expatriation takes place. A taxpayer can use losses to offset gains but cannot report a net loss. The wash sale rules of Sec. 1091 do not apply. The first \$600,000 of net gain is excluded.

14 Former Sec. 877(b) (flush language).

15 Sec. 6039F, redesignated as Sec. 6039G by the Taxpayer Relief Act of 1997, §1602(h)(i), P.L. 105-34.

16 American Jobs Creation Act of 2004, P.L. 108-357.

17 Urstadt, "Electing to Leave: A Reader's Guide to Expatriating on November 3," *Harper's Magazine* 85 (October 2004).

18 AJCA, §804(c).

19 AJCA, §804(a)(3).

20 AJCA, §804(d)(2).

21 HEART, §301(a).

22 Sec. 877(a)(2)(A) and Rev. Proc. 2007-66, §3.29.

23 Sec. 877A(g)(1).

24 Sec. 877A(g)(4).

Taxpayers will have the benefit of a basis adjustment for the step-up attributable to the deemed sale. Therefore, on the ultimate realized disposition, a taxpayer will avoid any potential for double taxation. A taxpayer owning assets prior to becoming a U.S. citizen or long-term resident can use the FMV of the assets on the day he or she became a resident as the basis for the deemed sale. An individual may make an irrevocable election not to have this rule apply.<sup>25</sup>

Sec. 877A(b) provides for an irrevocable election to defer the tax due on the deemed sale of specific assets under the mark-to-market rules until the due date of the tax return for the year in which the asset is sold and a realized gain occurs. The covered expatriate can make the election on an asset-by-asset basis, but in no circumstance would the election be granted unless the covered expatriate provided Treasury with security.<sup>26</sup> Security could be a bond or a letter of credit that meets the requirements of Sec. 6325 or any other form of security that meets the requirements of the IRS.<sup>27</sup>

Certain types of property are excepted under Sec. 877A. Deferred compensation, specified tax-deferred accounts, and nongrantor trusts are eligible for an exception. In the case of eligible deferred compensation, the payer is required to withhold 30% from the taxable payment made to a covered expatriate. Taxable payment is defined as a payment received by the covered expatriate that would have been includible in gross income had the expatriate continued to be subject to tax as a citizen or resident of the United States.

Eligible deferred compensation is defined as any deferred compensation for which the payer is either a U.S. person or one electing to be treated as such for purposes of withholding and who meets the requirements prescribed by the IRS to ensure compliance with the withholding requirements. The covered expatriate is also required to notify the payer of his

or her status as a covered expatriate and irrevocably waives any claim of withholding reduction under any treaty with the United States.<sup>28</sup>

If a deferred-compensation item is not eligible deferred compensation and is not subject to Sec. 83, an amount equal to the present value of the covered expatriate's deferred compensation is treated as having been received on the day before the expatriation date. Deferred compensation under Sec. 83 is treated as becoming transferable and no longer subject to a substantial risk of forfeiture on the day before the expatriation date. Actual distributions will be given the benefit of an adjustment for the deemed distribution. Deemed distributions are not subject to the early distribution tax.<sup>29</sup> Specified tax-deferred accounts are provided a special rule. The term "specified tax deferred account" means an individual retirement plan (as defined in Sec. 7701(a)(37)), a qualified tuition plan (as defined in Sec. 529), a Coverdell education savings account (as defined in Sec. 530), a health savings account (as defined in Sec. 223), or an Archer MSA (as defined in Sec. 220). However, simplified employee pensions (within the meaning of Sec. 408(k)) and simplified retirement accounts (within the meaning of Sec. 408(p)) of a covered expatriate are treated as deferred-compensation items and not as specified tax-deferred accounts. A covered expatriate holding an interest in a specified tax-deferred account is treated as having received a distribution of his or her entire interest in the account on the day before the expatriation date. Actual distributions will be provided the benefit of an adjustment for the deemed distribution. Deemed distributions are not subject to the early distribution tax.<sup>30</sup>

Covered expatriates that own any portion of a grantor trust are subject to the mark-to-market tax on the assets held in the trust, based on the covered expatriate's ownership interest.<sup>31</sup>

Beneficiaries of trusts that are covered expatriates are not subject to the mark-to-market rules with respect to the portion of such trusts not treated as owned by the covered expatriate (i.e., a nongrantor trust) immediately before the expatriation date. Instead, the trustee of the trust must deduct and withhold from any direct or indirect distribution 30% of the portion of the distribution to the covered expatriate that would have been includible in gross income had the taxpayer not expatriated. The portion of the distribution subject to the 30% withholding is subject to tax under Sec. 871. The covered expatriate is treated as having waived any right to claim a reduction in withholding under any treaty with the United States. Any distributions of appreciated property to covered expatriates subject the trust to recognizing a gain as if the property were sold to the covered expatriate at its fair market value.<sup>32</sup>

The time period for acquiring a property in an involuntary conversion or a like-kind exchange is terminated on the day before the expatriation date. In addition, any extension of time for payment of tax ceases to apply on the day before the relinquishment of citizenship or termination of residency. The unpaid portion of such tax becomes due and payable at the time and in the manner prescribed by the secretary.<sup>33</sup>

Sec. 877A requires a covered expatriate to mark to market all of his or her assets on the day before the termination of U.S. citizenship or residency and treat them as being sold on that day. Given the emphasis on the day before termination, it is evident that the section requires covered expatriates to treat themselves as residents in regard to this tax. The expatriated taxpayer will not enjoy any relief via tax treaties or favorable nonresident tax provisions. However, being subject to tax as a resident may provide favorable results for some. The covered expatriate would have the benefit of using the gain exclusion on

25 Secs. 877A(a) and (h)(2).

26 Sec. 877A(b).

27 To date the Service has not issued guidance that explains what these requirements are.

28 Sec. 877A(d)(3).

29 Sec. 877A(d)(2).

30 Sec. 877A(e).

31 Joint Committee on Taxation, *Technical Explanation of H.R. 6081, the "Heroes Earnings Assistance and Relief Tax Act of 2008"* (JCX-44-08) (May 20, 2008).

32 Sec. 877A(f).

33 Sec. 877A(h)(1).

a personal residence under Sec. 121.<sup>34</sup> Additionally, as discussed above, the wash sale rules under Sec. 1091 do not apply in calculating the mark-to-market net gain.

## New Inheritance Tax: Sec. 2801

The HEART Act added chapter 15 to the Code titled Gifts and Bequests from Expatriates. Sec. 2801 of this new chapter imposes a tax, at the highest applicable gift or estate tax rates, on a U.S. person receiving a covered gift or bequest. A covered gift is defined as a direct or indirect gift from a covered expatriate within the meaning of Sec. 877A. The tax is intended to be paid by the gift recipient and not the grantor, but the tax can be reduced by the amount of any foreign gift or estate tax paid on the transfer. The section provides for an exclusion (\$13,000 in 2009) under the annual gift exclusion as defined in Sec. 2503(b). If the transferred asset was included on a gift tax return for the covered expatriate or an estate tax return for a decedent-covered expatriate, the “inheritance tax” under Sec. 2801 would not apply.<sup>35</sup>

The tax under Sec. 2801 would apply to covered gifts or bequests made to a domestic trust as if the trust were a U.S. citizen.<sup>36</sup> The trust would pay the tax imposed under this section. Sec. 2801 also applies to distributions to U.S. citizens or residents attributable to such gifts or bequests to foreign trusts in the same manner as if such distribution were a covered gift or bequest. Sec. 164 provides an income tax deduction for the tax imposed under Sec. 2801 and paid by a U.S. citizen or resident to the extent the distribution is included in gross income of the citizen or resident.<sup>37</sup>

## Compliance Requirements of Sec. 6039G

Sec. 6039G requires any U.S. citizen that has renounced U.S. citizenship or any long-term resident that has terminated

U.S. residence to provide a statement to the IRS for the tax year of expatriation that includes the following information:

- The taxpayer’s TIN;
- The mailing address of the individual’s principal foreign residence;
- The foreign country in which the individual is residing;
- The foreign country of which the individual is a citizen;
- Information detailing the individual’s income, assets, and liabilities;
- The number of days during any portion of which that individual was physically present in the United States during the tax year;
- Such other information as the secretary may prescribe.<sup>38</sup>

The IRS created Form 8854, Initial and Annual Expatriation Information Statement, to comply with Sec. 6039G. In May 2009, the IRS issued a new Form 8854 that takes into account the provisions of Sec. 877A. The new form has two sections to address persons who expatriated before June 17, 2008, or after June 16, 2008.

Individuals use Form 8854 to report their initial expatriation. The IRS will consider the expatriating individual to be subject to U.S. income tax on his or her worldwide income until Form 8854 is filed with the Service and notification is given to the State Department that the individual has ceased to be a U.S. citizen, or to the Department of Homeland Security that the individual has terminated U.S. residency.<sup>39</sup> The initial filing of Form 8854 can come immediately after informing the appropriate governmental agency. The date of expatriation must be included on the form.

In addition, Form 8854 is used to comply with the 10-year filing requirements of Sec. 6039G for individuals that are subject to Sec. 877(b). Form 8854 must be filed with the IRS in Bensalem, PA, and must be attached to Form 1040NR, U.S.

Nonresident Alien Income Tax Return, when reporting the expatriation tax.<sup>40</sup> Form 8854 must be filed annually even when there is no expatriation tax to report. The penalty for failure to file is \$10,000 unless it is determined that the failure was due to reasonable cause and not to willful neglect.<sup>41</sup>

Sec. 6039G requires the Secretary of State to provide the Secretary of Treasury a copy of each loss of American nationality certificate. In addition, the Secretary of Homeland Security is required to provide the Secretary of Treasury the name of each lawful permanent resident of the United States (within the meaning of Sec. 7701(b)(6)) whose status as such has been revoked or has been administratively or judicially determined to have been abandoned. The Code also requires the Secretary of Treasury to publish in the *Federal Register* the names of those individuals losing their U.S. citizenship or terminating lawful permanent residence within the meaning of Sec. 877(a) within 30 days after the close of each calendar quarter for the preceding quarter.<sup>42</sup>

The IRS has the names and addresses of those who have renounced their U.S. citizenship and former long-term residents. The IRS announced that it is sending notices to expatriates that have not complied with the Form 8854 requirements, including the notification of the imposition of the \$10,000 penalty, where appropriate.<sup>43</sup>

In May 2009, the IRS issued Form W-8CE, Notice of Expatriation and Waiver of Treaty Benefits, which covered expatriates are required to complete and provide to a payer if they had any of the following on the day before their expatriation date:

- Deferred compensation;
- A specified tax-deferred account;
- A nongrantor trust.

The Form W-8CE must be filed with the payer within 30 days of the expatriation

34 Sec. 121 provides a \$500,000 gain exclusion on the sale of a personal residence if the taxpayer lived in the residence in two out of the last five years. The gain exclusion is limited to \$250,000 for single and married-filing-separately taxpayers.

35 Sec. 2081.

36 Sec. 2081(e)(4).

37 Sec. 2081(c)(4)(B).

38 Secs. 6039G(a) and (b).

39 Secs. 877A(g)(4) and 7701(a)(50).

40 Form 8854 instructions (2007).

41 Sec 6039G(c).

42 Secs. 6039G(d)(2) and (d)(3).

43 IRS, “Significant Penalty Imposed for Not Filing Expatriation Form.” <http://www.irs.gov/businesses/small/international/article/0,,id=97245,00.html#significant>.

for each specified tax-deferred account, item of deferred compensation, or interest in a nongrantor trust. Individuals who expatriated after June 16, 2008, but before the availability of Form W-8CE must file the form within 30 days of the form's availability.<sup>44</sup>

### Sec. 877A vs. 877

With the enactment of HEART, Congress was finally able to pass a mark-to-market tax regime that many politicians and commentators felt was necessary given the notoriety of so many publicized expatriations. Under the alternative tax regime of Sec. 877, covered expatriates had some latitude to avoid or delay the tax on built-in gain property. Under the current rules of Secs. 877A and 2801, the opportunities to avoid or delay tax on assets with built-in gains will be limited.

Taxpayers contemplating expatriation may find the new rules under Sec. 877A easier to manage than dealing with 10 years of income tax filings under Sec. 877. The drawback is the reporting of taxable gains on deemed sales that expatriates would have been able to avoid if they did not realize the gain until more than 10 years after expatriation.

A taxpayer contemplating expatriation could benefit under the new rules given the present global economic situation. Valuations are severely depressed in almost every investment category. As such, potential gains via a deemed sale under the mark-to-market rules may be lower today than what potentially could be realized over the next 10 years.

Because the tax on an expatriate is now an asset-based tax instead of an income tax, taxpayers must provide an FMV for the assets they own. The Service might challenge values assigned to investments in closely held businesses and real estate. Assets without a ready market will most likely need a valuation or appraisal. As with other asset-based taxes (gift and estate taxes), these types of assets may provide taxpayers and practitioners some latitude on assigning an FMV through marketability and minority discounts.

Covered expatriates owning real estate located in the United States are at

a disadvantage under Sec. 877A versus 877. Under Sec. 897 (enacted as part of the Foreign Investment in Real Property Tax Act of 1980<sup>45</sup>), the United States taxes foreign persons on dispositions of U.S. real property interests. A covered expatriate that does not realize a gain on the disposition of U.S. real property within the first 10 years of expatriation will still be subject to tax on the ultimate disposition. Covered expatriates subject to Sec. 877A have to recognize a gain under the mark-to-market rules, thereby accelerating a portion of the tax that would inevitably be assessed anyway.

Sec. 877A supersedes Sec. 877 for any taxpayer treated as a covered expatriate as of June 17, 2008. Even so, Sec. 877 still applies to expatriates who relinquished their U.S. citizenship or residency prior to the enactment of HEART. Therefore,

practitioners need to understand the rules of Sec. 877 pre- and post-HEART.

The Service indicated in January 2009 that it would issue guidance on the new exit tax provisions. The IRS's May announcement made in conjunction with the issuance of the new Forms 8854 and W-8CE did not include any guidance. It has been reported that the IRS does not know when guidance will be available.<sup>46</sup>

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### EditorNotes

Karl L. Fava is a principal with Business Financial Consultants, Inc., in Dearborn, MI. For more information about this article, please contact Mr. Fava at [kfava@bfcinc.com](mailto:kfava@bfcinc.com).

<sup>44</sup> Form W-8CE instructions (April 2009), p. 2.

<sup>45</sup> Foreign Investment in Real Property Tax Act of 1980, P.L. 96-499.

<sup>46</sup> Jackson, "Expatriate Tax Forms Precede Guidance," 2009 TNT 88-27 (May 11, 2009) (re-

porting remarks of M. Grace Fleeman, branch 1 senior technical reviewer, IRS Office of Chief Counsel (International), at an ABA Tax Section meeting).