



INTERNATIONAL TAX ISSUES/FOREIGN ASSET DISCLOSURE

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SUBSTANTIAL PRESENCE TEST

- ▶ US taxes worldwide income for 1) US Citizens, 2) Legal Permanent Residents (i.e. Green Card Holders), and 3) US visa holders meeting Substantial Presence Test (so long as they continue to meet the Substantial Presence Test on an annual basis).
- ▶ US nonresident aliens are taxed in the US only on US source income.

- ▶ “You will be considered a U.S. resident for tax purposes if you meet the substantial presence test for the calendar year. To meet this test, you must be physically present in the United States on at least:
 - ▶ 1 31 days during the current year, and
 - ▶ 2 183 days during the 3-year period that includes the current year and the 2 years immediately before that, counting:
 - ▶ ◦ All the days you were present in the current year, and
 - ▶ ◦ 1/3 of the days you were present in the first year before the current year, and
 - ▶ ◦ 1/6 of the days you were present in the second year before the current year.”
- ▶ Review Publication 519, U.S. Tax Guide for Aliens, for how days are counted and for exemptions and exceptions.
- ▶ For the substantial presence test, one second of any US day equal one full US day.

- ▶ Since there is worldwide taxation, when U.S. citizens/residents have income from abroad, they must file the applicable tax returns/FBAR.
- ▶ There are methods for avoiding double taxation: foreign earned income exclusion, the foreign housing exclusion (if employed), the foreign housing deduction (if self-employed), and the foreign tax credit.
- ▶ See IRS Publication 54 - Tax Guide for US Citizens and Resident Aliens Abroad.
- ▶ Be sure to check on treaties and Totalization/Social Security Agreements.
- ▶ See www.ssa.gov/international regarding totalization/Social Security Agreements.

- ▶ Non-resident individuals & corporations subject to U.S. federal tax for income "effectively connected with the conduct of a trade or business within the United States".
- ▶ Gains or losses from disposition of U.S. real property (including shares of a U.S. real property holding company) are ECI even if the nonresident is not considered to be engaged in a U.S. trade or business.
- ▶ FIRPTA: Foreign Interest in Real Property Tax Act: Form 8288 (Withholding Tax) and Form 8288-B (Withholding Certificate)

FBAR AND FATCA

- ▶ A United States Person must file FINCEN 114 (i.e. the FBAR) if that person has:
 - ▶ A financial interest in;
 - ▶ A signature authority;
 - ▶ Or any other authority over any financial account(s) in a foreign country and the **AGGREGATE VALUE** of these account(s) exceeds \$10,000.00 at any time during the calendar year.

- ▶ United States Person includes: U.S. Citizens, U.S. residents, and entities.
- ▶ Even if there is no taxable income there still may be a reporting requirement.
- ▶ Not filed with tax return, so granting of an extension on the tax return DOES NOT extend the FBAR deadline.
- ▶ Due on or before June 30th of the year following the year being reported.

- ▶ FBAR exceptions

- ▶ Must file the FBAR and check the appropriate block on FBAR related federal tax return or information return questions.

- ▶ “The Foreign Account Tax Compliance Act, enacted in 2010, created new IRC Section 6038D and requires individuals to file a statement with their income tax returns to report interests in specified foreign financial assets if the aggregate value of those assets exceeds certain thresholds.”
- ▶ “Under the regulations, specified individuals (U.S. citizens, residents and certain non-resident aliens) are required to complete and attach Form 8938, Statement of Specified Foreign Financial Assets, to their income tax returns. This is effective for tax years starting after March 18, 2010, which for most people will be their 2011 tax returns filed during the 2012 filing season.”

- ▶ “Specified foreign financial assets include the following assets:
 - ▶ Financial accounts maintained by a foreign financial institution.
 - ▶ Stock or securities issued by someone that is not a U.S. person and held for investment.
 - ▶ Any interest in a foreign entity held for investment.
 - ▶ Any financial instrument or contract that has an issuer or counterparty that is not a U.S. person and held for investment.”

- ▶ “Examples of other specified foreign financial assets include the following, if they are held for investment and not held in a financial account.
 - ▶ • Stock issued by a foreign corporation.
 - ▶ • A capital or profits interest in a foreign partnership.
 - ▶ • A note, bond, debenture, or other form of indebtedness issued by a foreign person.
 - ▶ • An interest in a foreign trust or foreign estate.
 - ▶ • An interest rate swap, currency swap, basis swap, interest rate cap, interest rate floor, commodity swap, equity swap, equity index swap, credit default swap, or similar agreement with a foreign counterparty.
 - ▶ • An option or other derivative instrument with respect to any of these examples or with respect to any currency or commodity that is entered into with a foreign counterparty or issuer.”

- ▶ The 8938 form is IN ADDITION to the FBAR requirement, even if the information being reported is duplicative.
- ▶ IRS offers a useful comparison chart at: <http://www.irs.gov/Businesses/Comparison-of-Form-8938-and-FBAR-Requirements>

- ▶ For taxpayers living in the US, 8938 reporting threshold::
 - ▶ “If you are not married, you satisfy the reporting threshold only if the total value of your specified foreign financial assets is more than \$50,000 on the last day of the tax year or more than \$75,000 at any time during the tax year.”
 - ▶ “If you are married and you and your spouse file a joint income tax return, you satisfy the reporting threshold only if the total value of your specified foreign financial assets is more than \$100,000 on the last day of the tax year or more than \$150,000 at any time during the tax year.”
 - ▶ If you are married and file a separate income tax return from your spouse, you satisfy the reporting threshold only if the total value of your specified foreign financial assets is more than \$50,000 on the last day of the tax year or more than \$75,000 at any time during the tax year.

- ▶ For taxpayers living outside the United States, 8938 reporting threshold:
 - ▶ “If you are not married, you satisfy the reporting threshold only if the total value of your specified foreign financial assets is more than \$200,000 on the last day of the tax year or more than \$300,000 at any time during the tax year.”
 - ▶ “If you are married and you and your spouse file a joint income tax return, you satisfy the reporting threshold only if the total value of your specified foreign financial assets is more than \$400,000 on the last day of the tax year or more than \$600,000 at any time during the tax year.”
 - ▶ “If you are married and file a separate income tax return from your spouse, you satisfy the reporting threshold only if the total value of your specified foreign financial assets is more than \$200,000 on the last day of the tax year or more than \$300,000 at any time during the tax year.”

- ▶ FBAR does not have extension, but 8938 is part of the tax return and the deadline for filing is extended by the extension of the tax return.

- ▶ Penalties for non-filing of FBAR: if non-willful up to \$10,000.00. If willful, up to the greater of \$100,000.00 or 50% of account balances as well as criminal penalties.
- ▶ Penalties for non-filing of 8938: Up to \$10,000.00 for failure to disclose. After IRS notice: additional 10k per each 30 days of nonfiling. Maximum penalty is \$60,000.00, but criminal penalties may also apply.

- ▶ What to do for a client that failed to file:
 - ▶ Offshore Voluntary Disclosure Program
 - ▶ Streamlined Offshore Voluntary Disclosure Program
 - ▶ Under certain circumstances filing the FBAR late with a 750 word explanation of reasonable cause (but beware of the risk of quiet disclosures).
- ▶ Remember: Many foreign financial institutions have already begun disclosure of U.S. clients' names to the IRS/USDOJ.

OTHER FILINGS

- ▶ Form 1040: U.S. Individual Income Tax Return/1040NR:U.S. Nonresident Alien Income Tax Return
- ▶ Form 2555: Foreign Earned Income
- ▶ Form 5471: Information Return of US person with respect to Certain Foreign Corporations
- ▶ Form 8865: Return of US persons with respect to Certain Foreign Corporations
- ▶ Form 8858: Information Return of US Persons with Respect to Certain Foreign Disregarded Entities

- ▶ Form 926: Return of a US Transferor of Property to a Foreign Corporation
- ▶ Form 1116: Foreign Tax Credit
- ▶ W-7 ITIN
- ▶ Form 8840 - Closer Connection Exception Statement for Aliens - claiming tax home and closer connection to a foreign country.
- ▶ Form 8843: Statement for Exempt Individuals and Individuals with a Medical Condition - Regards individuals exempt from substantial presence test.

- ▶ Form 1120-F, U.S. Income Tax Return of a Foreign Corporation (filed to disclose U.S. source income)
- ▶ Form 8833 Treaty-Based Return Position Disclosure Under Section 6114 or 7701(b) (claim relief under the treaty from U.S. federal taxation on income from U.S. activities.)
- ▶ SS-4
- ▶ Form 5471: Information Return of U.S. Persons with Respect To Certain Foreign Corporations.

- ▶ US Withholding Tax: To determine withholding status: W-9 (for US persons), or W-8.

- ▶ Form 8891: U.S. Information Return for Beneficiaries of Certain Canadian Registered Retirement Plans
- ▶ Form 3520-A: Annual Information Return of Foreign Trust With a U.S. Owner
- ▶ Form 3520: Annual Return to Report Transactions with Foreign Trusts and Receipt of Certain Foreign Gifts.

- ▶ Beware of foreign mutual funds: Form 8621 - Information Return by a Shareholder of a Passive Foreign Investment Company or Qualified Electing Fund

EXPATRIATION

- ▶ IRC Sections 877/877A Renunciation or Abandonment
- ▶ Income/Asset/Filing tests met, then there is a mark to market tax on all net unrealized gains exceeding a specified amount.
- ▶ No lapse rule, Resumption of Residency Within Three Years Rule, and Sailing Permits.

- ▶ Sailing Permits
- ▶ IRC Form 1040C US Departing Alien Tax Return
- ▶ 2063 US Department Alien Income Tax Statement Short Form

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