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Surviving a Heart Attack: Expatriation and the Tax Policy Implications of the New Exit Tax

Steven J. Arsenault

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SURVIVING A HEART ATTACK: EXPATRIATION AND THE TAX POLICY IMPLICATIONS OF THE NEW EXIT TAX

*Steven J. Arsenault**

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I. INTRODUCTION

On June 17, 2008, President Bush signed into law the Heroes Earnings Assistance and Relief Tax Act of 2008.¹ Among the HEART Act’s many provisions is a significant change in the tax system applicable to those who voluntarily give up their U.S. citizenship or

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1. Heroes Earnings Assistance and Relief Tax Act of 2008, Pub. L. No. 110-245, 122 Stat. 1624 (codified in scattered sections of 26 U.S.C.) (West 2008) [hereinafter “HEART Act”].

status as permanent residents of the U.S. The new system imposes a so-called exit tax on expatriates, treating most assets held by the expatriate as being sold the day before the date of expatriation.² The effect of the new system is to accelerate the tax due on the built-in gain on such assets, even though no actual sale or other disposition of the asset has taken place.

The view among tax practitioners advising such clients is understandably negative. As one law firm publication describes it, “[g]iving up a U.S. passport will soon carry a steep price tag . . . the U.S. Congress repeatedly threatened to enact legislation aimed at U.S. citizens who expatriate . . . [and] Congress finally made good on those threats”³ Some commentators have likewise viewed the new law as negative, calling it America’s “Berlin Wall”⁴ and referring to the expatriates as “tax hostages.”⁵ While the change in the law is new, the concept of an exit tax system is not; indeed, it was first proposed in 1995 under the Clinton Administration.⁶ An analysis of the policy considerations underlying the new exit tax system certainly seems appropriate.

Part II of this article provides an overview of the U.S. tax system applicable to citizens, permanent residents, and nonresidents. Part III discusses the prior law applicable to expatriates and the history behind that law. Part IV discusses the provisions of the HEART Act and the changes the new system makes to the exit tax regime. Finally, Part V considers the policy implications of the new exit tax system.

II. OVERVIEW OF THE U.S. TAX SYSTEM

The current U.S. tax system distinguishes U.S. citizens and permanent residents, on the one hand, from nonresident aliens on the other. The system also has different rules for income tax and estate and gift tax purposes. This portion of the article discusses these significant distinctions.

2. See *infra* notes 110-114 and accompanying text.

3. Kurt Rademacher et al., *Exit Tax for U.S. Expatriates to Become Law*, WITHERS WORLDWIDE, May 28, 2008, <http://www.withersworldwide.com/news-publications/324/exit-tax-us-expatriates-to-become-law.aspx>.

4. *America's Berlin Wall*, THE ECONOMIST, June 14, 2008, at 39 (describing the new exit tax as a “ransom expats must pay to escape the tax man”).

5. Richard W. Rahn, *Tax Hostages?*, WASH. TIMES, June 12, 2008, at A15.

6. For a detailed history of the public exposure of the expatriation issue and the legislative efforts to address it beginning with the Clinton Administration, see Alice G. Abreu, *Taxing Exits*, 29 U.C. DAVIS L. REV. 1087, 1088 n.3 (1996).

A. The U.S. Income Tax System

The U.S. income tax system treats U.S. citizens or permanent residents of the U.S. differently from nonresident aliens. A U.S. citizen or permanent resident of the U.S. is subject to income tax on their worldwide income, regardless of the source of that income or the taxpayer's physical location at the time the income is earned.⁷ In contrast, nonresident aliens are generally subject to U.S. income tax at a flat rate of 30% on U.S.-source income that is not effectively connected with a U.S. trade or business,⁸ and at graduated rates on income that is effectively connected with a U.S. trade or business,⁹ including the gain on the sale of real property interests in the U.S.¹⁰ Net capital gains are not taxable to the nonresident alien unless they fall within the category of "fixed or determinable annual periodic . . . income"¹¹ or are effectively connected with a U.S. trade or business.¹² They may also become taxable under special rules if the nonresident alien is present in the U.S. for 183 days during the tax year.¹³

A nonresident alien is defined as an individual who does not qualify as a U.S. resident alien based on residency rules under the Internal Revenue Code.¹⁴ A non-U.S. citizen is classified as a resident alien (i.e., a permanent resident of the U.S.) for tax purposes if he meets one of three tests described below.¹⁵

1. U.S. Permanent Residence

First, a non-U.S. citizen will be considered a U.S. resident alien for income tax purposes if he has been lawfully admitted to the U.S. for permanent residence for U.S. immigration purposes.¹⁶ This test is often referred to as the "green card test."¹⁷

7. See I.R.C. § 61(a) (West 2008) ("gross income means all income from whatever source derived").

8. I.R.C. § 871(a)(1).

9. I.R.C. § 871(b). For a discussion of some of the issues and problems that arise in determining when income is "effectively connected with a U.S. trade or business," see Anthony P. Polito, *Trade Or Business Within The United States As An Interpretive Problem Under The Internal Revenue Code: Five Propositions*, 4 HASTINGS BUS. L.J. 251 (2008).

10. I.R.C. § 897(a)(1)(A).

11. I.R.C. § 871(a)(1)(A).

12. I.R.C. § 871(b) (West 2008).

13. I.R.C. § 871(a)(2); Treas. Reg. § 1.871-7(d)(2)(ii) (2008).

14. I.R.C. § 7701(b).

15. I.R.C. § 7701(b)(1)(A).

16. I.R.C. § 7701(b)(1)(A)(i).

17. Treas. Reg. § 301.7701(b)(1).

2. Substantial Presence Test

A non-U.S. citizen will also be considered a U.S. resident alien for income tax purposes if he has sufficient physical connection to the U.S. to justify taxation in the same manner as a U.S. citizen or permanent resident.¹⁸ Under the substantial presence test, the non-U.S. citizen must be physically present in the U.S. for at least thirty-one days during the current calendar year¹⁹ and for at least 183 days during the three year testing period, including the current year.²⁰ The three year computation is weighted, with each day in the current year treated as a full day, each day in the immediately preceding year treated as one-third of a day, and each day in the second preceding year treated as one-sixth of a day.²¹ Generally, an individual is considered to be present in the U.S. if he is present during any part of the day, subject to certain exceptions.²²

An individual who meets the requirements of the substantial presence test may still be able to avoid U.S. resident status for income tax purposes if he can establish that he was present in the U.S. for less than 183 days in the current year and has a tax home in a country to which he has a closer connection than to the U.S.²³ A tax home is the individual's regular or principal place of business or regular place of abode.²⁴ The closer connection to that tax home is demonstrated by maintaining more significant contacts with that country, including the location of a permanent home, family, personal belongings, and personal

18. I.R.C. § 7701(b)(1)(A)(ii) (2008).

19. This thirty-one day requirement is a prerequisite to resident alien status under the Substantial Presence Test; if the individual does not meet this requirement, he will not be treated as a resident alien for tax purposes even if he meets the 183-day requirement of the second part of the test. I.R.C. § 7701(b)(3)(A)(i).

20. I.R.C. § 7701(b)(3)(A)(ii).

21. I.R.C. § 7701(b)(3)(A)(ii).

22. I.R.C. § 7701(b)(7)(A). For example, days in which an individual is present in the U.S. as a result of a medical condition that arose while present in the U.S. will not count. Treas. Reg. § 301.7701(b)-3(c) (2008). Days present by Canadian or Mexican residents as regular commuters will not count, nor will days in which a nonresident alien is present for less than twenty-four hours due to travel between two foreign points. I.R.C. § 7701(b)(7)(B)-(C); Treas. Reg. § 301.7701(b)-3(d) and -3(e). Certain individuals are also exempt, including employees of foreign governments and international organizations, students, and crewmembers of foreign vessels who do not conduct any trade or business in the U.S. during their presence. I.R.C. § 7701(b)(7)(D); Treas. Reg. § 301.7701(b)-3(b).

23. I.R.C. § 7701(b)(3)(B); Treas. Reg. § 301.7701(b)-2(c) and -2(d).

24. See Treas. Reg. § 1.911-2(b) ("[A]n individual's tax home is considered to be located at his regular or principal (if more than one regular) place of business or, if the individual has no regular or principal place of business because of the nature of the business, then at his regular place of abode in a real and substantial sense.").

bank accounts.²⁵ This closer connection exception is requested by attaching Form 8840 to the individual's Form 1040NR tax return for the year.²⁶

The individual may also be able to avoid U.S. resident status under an applicable income tax treaty if the individual is considered a tax resident of another country under that country's internal laws and the U.S. has an income tax treaty with that country.²⁷ Under these income tax treaties, an individual's residence for income tax purposes is generally determined by determining the permanent home of the individual.²⁸ If the individual has a permanent home in both countries, then the individual's "center of vital interests" generally determines residency status.²⁹ "Center of vital interests" considers the individual's family, employment, friends, personal possessions, and other similar criteria.³⁰ If the center of vital interests cannot be determined, then the country in which the individual has a habitual abode, meaning the place where the individual stays more frequently, will determine residence.³¹ If habitual abode cannot be determined, then citizenship determines residence.³² If that fails, then the authorities of both countries make a mutual determination as to residence.³³

3. Election to be Treated as a U.S. Resident

Finally, a non-U.S. citizen may elect to be treated as a resident alien for U.S. tax purposes if the individual is a nonresident alien in the current and preceding year but is a resident alien under the substantial presence test in the following year.³⁴ In order to be eligible for this election, the individual must be present in the U.S. for at least thirty-one consecutive days in the year for which the election is made and must be present in the U.S. for a period that includes seventy-five or more days, starting

25. Treas. Reg. § 301.7701(b)-2(d).

26. Treas. Reg. § 301.7701(b)-8.

27. I.R.C. § 894(a)(1) (West 2008). See U.S. DEPT. OF TREASURY, UNITED STATES MODEL INCOME TAX CONVENTION OF NOVEMBER 15, 2006 at Art. 4 (2006), available at <http://www.ustreas.gov/offices/tax-policy/library/model006.pdf> [hereinafter "MODEL INCOME TAX CONVENTION"].

28. MODEL INCOME TAX CONVENTION, Art. 4(3)(a).

29. *Id.*

30. The Model Income Tax Convention refers to the individual's "personal and economic relations." *Id.*

31. *Id.* at Art. 4(3)(b).

32. *Id.* at Art. 4 (3)(c).

33. *Id.* at Art. 4(3)(d).

34. I.R.C. § 7701(b)(4) (West 2008).

with the first of the thirty-one day period and ending with the last day of the year.³⁵ This election allows an individual who will be a U.S. resident for income tax purposes in the following year to elect such status earlier,³⁶ allowing him to take advantage of applicable deductions or credits that would otherwise not be available if taxed as a nonresident alien.

B. The U.S. Estate and Gift Tax System

As with the income tax system, the U.S. estate and gift tax system makes significant distinctions between U.S. citizens and resident aliens, on the one hand, and non-residents of the U.S. on the other. U.S. citizens and resident aliens are subject to U.S. estate tax³⁷ on the value of their taxable estate at the time of their death, regardless of where the property in that estate is located.³⁸ Likewise, transfers of property by gift made by U.S. citizens and resident aliens are subject to U.S. gift tax³⁹ regardless of where the property is physically located.⁴⁰ For purposes of the estate and gift tax, an individual will be considered a U.S. resident alien if, at the time of his death (for purposes of the estate tax) or at the time of the gift (for purposes of the gift tax), he had his domicile in the U.S.⁴¹ Domicile is defined as the place where an individual lives with no present intention of later moving from such

35. I.R.C. § 7701(b)(4)(A)(iv).

36. Treas. Reg. § 301.7701(b)-4 (West 2008).

37. I.R.C. § 2001(a) (West 2008). Prior to 2001, the federal estate and gift taxes were part of unified system that taxed transfers on a cumulative basis for both lifetime gifts and transfers at death. The transfer tax rates ranged from eighteen percent to a maximum rate of fifty-five percent. § 2001(c). A unified credit against the estate and gift taxes allowed the transfer of \$1,000,000 in combined gift and estate tax transfers per individual. § 2010; § 2505. The Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, 115 Stat 38 [hereinafter "2001 Act"], made significant changes to this system. Under the 2001 Act, the top marginal tax rates for the estate and gift tax were reduced incrementally to forty-five percent in 2007 and the amount sheltered by the unified credit for estate tax (but not gift tax) purposes was increased incrementally to \$3,500,000 in 2009. I.R.C. § 2001(c)(2); § 2010(c). The unified credit against the gift tax is capped at \$1,000,000. § 2505(a)(1). In 2010, the estate tax is repealed. 2001 Act § 501. However, to comply with budgeting laws, the changes made by the 2001 Act will not apply after December 31, 2010. Thus, unless Congress makes some change, the estate and gift taxes will revert to their 2001 status beginning in 2011. 2001 Act § 901. The Obama Administration and the Democratic-controlled Congress have indicated an intent to make such changes before the end of 2009. See Jonathan Weisman, *Obama Plans to Keep Estate Tax*, Wall St. J., Jan. 12, 2009, at A1.

38. I.R.C. § 2001(a), § 2031 (West 2008).

39. I.R.C. § 2501(a)(1).

40. I.R.C. § 2501(a).

41. Treas. Reg. § 20.0-1(b)(1); § 25.2501-1(b).

location.⁴² Mere residence without the intention to remain indefinitely is insufficient to create domicile for estate and gift tax purposes.⁴³ As with the income tax system, estate and gift tax treaties may apply to change the tax for a particular estate or gift transfer.⁴⁴

In contrast, a nonresident alien decedent is subject to estate tax only on property located within the United States.⁴⁵ For purposes of this rule, stock of domestic corporations and obligations of domestic obligors (other than debt where the interest qualifies for the portfolio interest exemption, certain bank deposits, and insurance policies) are treated as property located within the U.S.⁴⁶ Shares of a foreign corporation, however, are not treated as property located within the U.S.⁴⁷ Thus, a nonresident alien may avoid U.S. estate tax relatively easily by purchasing and holding U.S. assets through a foreign corporation.⁴⁸

Likewise, the gift tax only applies to transfers of property by a nonresident alien to the extent the property is tangible personal property or real property located in the U.S.⁴⁹ Intangible assets held by a nonresident alien, including stocks and other securities, are generally not subject to the gift tax.⁵⁰

C. The Incentive To Expatriate

Given the tax structure above, there has historically been a strong incentive for wealthy U.S. citizens and resident aliens to expatriate. Consider, for example, Bill Fences, a U.S. citizen who holds a significant portfolio of U.S. securities valued at \$10,000,000 with a tax

42. Treas. Reg. § 25.2501-1(b).

43. *Id.*

44. See, e.g., Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Estates, Inheritances and Gifts, U.S.-Fr., Nov. 24, 1978, 32 U.S.T. 1935; Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes of Deceased Persons and on Gifts, U.S.-Gr. Brit., Oct. 19, 1978, 30 U.S.T. 7223; Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Estates, Inheritances and Gifts, U.S.-Japan, April 16, 1954, 6 U.S.T. 113.

45. I.R.C. § 2103 (West 2008). The nonresident estate tax uses the same rates as the general estate tax, with appropriate adjustments to reflect the unified credit applicable to nonresidents. § 2101.

46. I.R.C. § 2104(a) and (c); Treas. Reg. § 20.2104-1(a)(5) and -1(a)(7).

47. I.R.C. § 2104(a); Treas. Reg. § 20.2104-1(a)(5).

48. There is some risk with this strategy, however. If the courts determine that the foreign corporation is merely a foreign holding company for the non-resident alien's U.S. assets, the underlying assets may be included in the non-resident alien's gross estate for U.S. estate tax purposes. See *Fillman v. United States*, 355 F.2d 632 (Ct. Cl. 1966).

49. I.R.C. § 2501(a).

50. I.R.C. § 2501(a)(2).

basis of \$2,000,000 and paying annual dividends of \$300,000. Because Bill is a U.S. citizen, the dividends he receives are taxed at a maximum rate of 15 percent.⁵¹ If Bill sells the securities, he will realize a gain of \$8,000,000, which is taxed as a capital gain at a maximum marginal rate of 15 percent.⁵² If Bill dies during 2008 or 2009, the securities, as well as any other assets he holds, are included in his gross estate and subject to the estate tax at a maximum marginal rate of 45 percent.⁵³ If assets are passed on to Bill's spouse, the payment of the estate tax can be deferred until her death,⁵⁴ but the estate taxes will eventually have to be paid.

On the other hand, if Bill is neither a U.S. citizen nor a permanent resident of the U.S., his tax situation is significantly different. For income tax purposes, the dividends would be taxable to Bill because they are considered U.S.-source income.⁵⁵ If the payment of dividends were effectively connected with a U.S. trade or business, they would be taxed at graduated income tax rates.⁵⁶ Where they are part of investment income (as is the case in this example), they would be subject to a flat 30% withholding rate or a lesser rate provided under an applicable income tax treaty.⁵⁷ The U.S. model income tax treaty and most income tax treaties entered into by the U.S. provide for a much lower 15% withholding rate for dividends.⁵⁸ More importantly, if Bill sells the assets, because the gain resulting from the sale is not "fixed or determinable, annual or periodic income"⁵⁹ and not effectively connected with a U.S. trade or business,⁶⁰ the gain would generally not be subject to U.S. income tax.⁶¹

For estate tax purposes, a nonresident alien decedent is generally subject to estate tax only on property located within the United States.⁶²

51. I.R.C. § 1(h)(11) (West 2008).

52. I.R.C. § 1(h)(1).

53. I.R.C. § 2001(c)(2)(B).

54. I.R.C. § 2056(a). If Bill's spouse is not a U.S. citizen, the marital deduction is not allowed unless the property is transferred to a qualified domestic trust meeting specific requirements designed to make sure that the estate tax is eventually paid. § 2056(d)(2)(A)-(B); § 2056(a).

55. I.R.C. § 871(a)(1)(A) (West 2008); § 861(a)(2)(A).

56. I.R.C. § 871(b).

57. I.R.C. § 871(a)(1)(A).

58. MODEL INCOME TAX CONVENTION, *supra* note 27, at Art. 10(2).

59. I.R.C. § 871(a)(1)(A) (West 2008).

60. I.R.C. § 871(b).

61. An exception to this exemption rule makes net capital gains taxable at a flat 30% tax rate if the non-resident alien is present in the U.S. for at least 183 days during the tax year. I.R.C. § 871(a)(2); Treas. Reg. § 1.871-7(d)(2)(ii).

62. I.R.C. § 2103.

Because Bill's stock is issued by U.S. corporations, it would be treated as property located within the U.S.⁶³ However, Bill could probably avoid U.S. estate tax by holding his U.S. assets through a foreign corporation, which is not treated as U.S. property for estate tax purposes.⁶⁴ Thus, through relatively easy planning, the U.S. estate tax could likely be avoided altogether.⁶⁵

This ability to avoid both the capital gains tax and the estate tax produce an environment where a wealthy U.S. citizen or permanent resident has a strong financial incentive to become a non-resident – that is, to expatriate. Indeed, it was the high-profile expatriation for tax purposes of certain wealthy Americans that first appeared in the media in the early 1990s and eventually captured the attention of both President Clinton and Congress,⁶⁶ leading to the proposals and debate about the appropriate nature and extent of the tax on expatriates.

III. EXISTING U.S. LAW APPLICABLE TO EXPATRIATES

A. Pre-2004

Since 1966, the U.S. tax law has included provisions applicable to expatriates, focusing primarily on the income tax system.⁶⁷ Substantial changes occurred in 2004 with the passage of the American Jobs Creation Act of 2004.⁶⁸

1. Income Tax Law Applicable to Expatriates

Prior to the 2004 AJCA amendments, Internal Revenue Code Section 877 governed the income tax treatment of expatriates. Under that provision, an individual who lost U.S. citizenship or permanent residence within a ten year period preceding the close of the taxable year was subject to tax on income realized during such period, unless the loss

63. I.R.C. § 2104(a); Treas. Reg. § 20.2104-1(a)(5).

64. *Id.*

65. See *supra* notes 45-48 and accompanying text.

66. See Laurie P. Cohen, *Kenneth Dart Forsakes U.S. for Belize*, WALL ST. J., Mar. 28, 1994, at C; Karen De Witt, *Some of the Rich Find a Passport Lost is a Fortune Gained*, N.Y. TIMES, April 12, 1995, at A22; Jennifer Lin, *Campbell Soup Heir Escapes Taxes – In Ireland*, BUFF. NEWS, July 16, 1995, at A8; Robert Lenzner and Philippe Mao, *The New Refugees*, FORBES, Nov. 21, 1994, at 131; Brigid McMenamin, *Flight Capital*, FORBES, Feb. 28, 1994, at 55; James W. Michaels, *You Can't Take It (All) With You*, FORBES, March 13, 1995, at 10.

67. See Foreign Investors Tax Act of 1966, Pub. L. No. 89-809, 80 Stat. 1539.

68. American Jobs Creation Act of 2004, Pub. L. No. 108-357, § 804, 118 Stat. 1418, 1569 [hereinafter "AJCA"].

of citizenship or permanent residence did not have as one of its principal purposes the avoidance of taxes.⁶⁹ Expatriation for tax avoidance purposes has been referred to by some commentators as “tax motivated expatriation.”⁷⁰ During this ten year period, tax motivated expatriates were subject to income tax on income from sources within the U.S. or effectively connected to a U.S. trade or business to the extent such tax exceeded any U.S. income or withholding tax that would otherwise apply to such income.⁷¹ For purposes of this tax, certain items that were normally treated as foreign sourced were treated as income from sources within the U.S., including gains from property (other than stock or debt) located within the U.S., gains from the sale or exchange of stock or debt obligations of U.S. issuers, and income from stock of certain controlled foreign corporations to the extent of the expatriate’s proportionate interest in untaxed earnings and profits accumulated by the foreign corporation before the taxpayer’s expatriation.⁷² Otherwise nontaxable exchanges of property were also taxable if the exchange effectively converted U.S. source income into foreign source income,⁷³ and properties that generated U.S. source income that were transferred on a tax-free basis to a controlled foreign corporation would continue to be taxed directly to the tax motivated expatriate.⁷⁴

Because it was subjective, determining whether expatriation was tax motivated was often very difficult. Under the statute, a former citizen was presumed to have expatriated with a principal purpose of avoiding tax if either the individual’s average annual U.S. income for the five taxable years before expatriation was greater than \$100,000, or the individual’s net worth on the date of expatriation was \$500,000 or more.⁷⁵ This presumption could be overcome by submitting a request for a ruling to the Internal Revenue Service within one year following

69. I.R.C. § 877(a) (2000); I.R.C. § 877(e) (2000).

70. See Andrew Walker, *The Tax Regime for Individual Expatriates: Whom to Impress?*, 58 TAX LAW. 555, 562 (2005). I will use the same terminology in this article.

71. I.R.C. § 877(b) (West 2008).

72. I.R.C. § 877(d).

73. I.R.C. § 877(d)(2). This result could be avoided if the expatriate entered into a gain recognition agreement to treat the future gain as U.S. source.

74. I.R.C. § 877(d)(4).

75. I.R.C. § 877(a)(2)(A) & (B) (2000), amended by AJCA, Pub. L. No. 108-357, § 804(a)(1) (2004). Both the \$100,000 income amount and the \$500,000 net worth amount were indexed for inflation. I.R.C. § 877(a)(2) (2000), amended by AJCA, Pub. L. No. 108-357, § 804(a)(1) (2004).

the loss of citizenship and demonstrating the absence of a principal tax avoidance purpose for expatriating.⁷⁶

2. Estate and Gift Tax Law Applicable to Expatriates

With regard to the estate and gift tax law, Code § 2107 was the primary provision affecting expatriates. Under that provision, a former citizen who lost his U.S. citizenship or a former permanent resident who lost his green-card status within the ten year period preceding death was subject to a special estate tax system, unless the loss of citizenship did not have as one of its principal purposes avoidance of tax.⁷⁷ Expatriation was presumed to be tax motivated if treated as tax motivated under the income tax rules of Code § 877(a)(2).⁷⁸

This special estate tax system provided that the U.S. estate tax applied only to U.S.-situs assets generally included in the gross estate of a nonresident, with some exceptions. The most significant exception affecting expatriates provided that where a controlled foreign corporation⁷⁹ in which the expatriate owned more than ten percent of the voting power at death⁸⁰ held U.S.-situs assets, a portion of the value of the decedent's shares in the corporation were included in the decedent's gross estate based on the proportion of the corporation's U.S.-situs assets compared to the value of all the corporation's assets.⁸¹

Similar rules applied for gift tax purposes. While gifts of intangible property by a nonresident alien are not generally subject to the gift tax,⁸² § 2501 made gifts of intangible property subject to gift tax when made by a donor who lost U.S. citizenship within the 10-year period ending with the date of the transfer, unless the loss of citizenship did not have as one of its principal purposes avoidance of either transfer taxes or income

76. I.R.C. §877(c) (2000), amended by AJCA, Pub. L. No. 108-357, § 804(a)(2) (2004). To be eligible to request a ruling, the individual had to fall within one of the following categories: (1) became at birth a citizen of the U.S. and another country and continued to be a citizen of the other country; (2) became, within a reasonable period after expatriation, a citizen of the country in which the individual, a parent or a spouse was born; (3) was present in the U.S. for no more than 30 days during each year of the 10 years preceding expatriation; (4) lost U.S. citizenship before reaching age 18 ½; or (5) was otherwise in a category specified by the regulations. *Id.*

77. I.R.C. § 2107(a)(1) (2000), amended by AJCA, Pub. L. No. 108-357, § 804(a)(3) (2004).

78. I.R.C. § 2107(a)(2)(A) (2000), amended by AJCA, Pub. L. No. 108-357, § 804(a)(3) (2004).

79. I.R.C. § 2107(b)(2) (West 2008).

80. I.R.C. § 2107(b)(1).

81. I.R.C. § 2107(b).

82. See *supra* notes 49-50 and accompanying text.

taxes.⁸³ As with the estate tax, expatriation was presumed to be tax motivated if it were treated as tax motivated under the income tax rules of Code § 877(a)(2).⁸⁴

B. After 2004 Amendments

In 2004, the AJCA made four significant changes to the tax system governing expatriates. Each of these four significant changes is discussed below.

1. Elimination of the Subjective Tax-Motivation Standard

Perhaps the single most important change to expatriate taxation under the 2004 AJCA was the elimination of the subjective tax-motivation standard as a condition for taxing expatriates. The subjective standard had proved difficult to implement and enforce. Thus, a former U.S. citizen or permanent resident of the U.S. became subject to taxation under Section 877 for a period of ten years if his average annual net income tax liability for the five taxable years preceding expatriation exceeded \$124,000, his net worth was \$2,000,000 or more on the date of expatriation, or he failed to certify under penalties of perjury that he had complied with all of his U.S. tax obligations for the five preceding years.⁸⁵ The change from a subjective tax-motivation standard to an objective standard based on income and net worth made determining whether an individual expatriate was taxable significantly easier.

Even if a former U.S. citizen met the above tests, he could avoid being taxed under U.S. law if he fell within certain specified categories, which some commentators have referred to as “accidental U.S. citizens” because they did not seek out a close connection to the U.S.⁸⁶ Taxation would be avoided under the first of these exceptions, the exception for dual citizens, if the individual was born a U.S. citizen and a citizen of another country, remained a citizen of that other country, and had no “substantial contacts” with the U.S.⁸⁷ A person had no substantial

83. I.R.C. § 2501(a)(3)(A) (2000), amended by AJCA, Pub. L. No. 108-357, § 804(d)(1) (2004).

84. I.R.C. § 2501(a)(3)(B) (2000), amended by AJCA, Pub. L. No. 108-357, § 804(d)(1) (2004).

85. I.R.C. § 877(a)(2)(A)-(C) (West 2008). The \$124,000 and \$2,000,000 figures were indexed for inflation after 2004.

86. Eva Farkas-DiNardo, *Is the Nation of Immigrants Punishing Its Emigrants: A Critical Review of the Expatriation Rules Revised by the Jobs Creation Act of 2004*, 7 FLA. TAX REV. 1, 33 (2005).

87. I.R.C. § 877(c)(2)(A) (West 2008).

contacts with the U.S. if he was never a resident of the U.S., never held a passport, and was not present in the U.S. for more than 30 days during any calendar year in the ten years preceding loss of U.S. citizenship.⁸⁸ Alternatively, U.S. taxation could be avoided under another exception applicable to certain minors if the individual was born a U.S. citizen, neither of the individual's parents was a U.S. citizen at the time of his birth, the individual lost his U.S. citizenship before reaching age 18 ½, and he was not present in the U.S. for more than 30 days during any calendar year in the ten years preceding loss of U.S. citizenship.⁸⁹ For either exception to apply, the expatriate was required to certify under penalties of perjury that he had complied with all U.S. tax obligations for the five-year period preceding expatriation.⁹⁰

2. Specifying Rules for Determining the Date of Expatriation

The 2004 AJCA also added Section 7701(n) to establish specific rules for determining when an individual ceases to be a U.S. citizen or permanent resident for tax purposes. Under this provision, an individual who wished to be treated as a nonresident alien would continue to be treated as a citizen or resident of the U.S. until he gave notice of an expatriating act⁹¹ or termination of residency to the Secretary of State or the Secretary of Homeland Security, and provided an information statement in accordance with Code § 6039G.⁹²

3. Expanding the Scope of U.S. Taxation for Expatriates Maintaining Significant Contacts with the U.S.

The 2004 AJCA also expanded the scope of U.S. taxation for certain expatriates maintaining significant contacts with the U.S. Specifically, an expatriate was subject to full U.S. taxation on his

88. I.R.C. § 877(c)(2)(B)(i)-(iii).

89. I.R.C. § 877(c)(3).

90. I.R.C. § 877(a)(2)(C). I.R.C. § 877(c)(1) provides exceptions to I.R.C. § 877(a)(2)(A) and (B) for dual citizens and certain minors, but provides no exception to I.R.C. § 877(a)(2)(C).

91. Under the Immigration and Nationality Act, in order to renounce U.S. citizenship, an individual must: naturalize in a foreign state; formally declare allegiance by oath or affirmation to a foreign nation; enlist in the military service of another country, either as an officer or in any capacity serving a state that is engaged in hostilities against the United States; renounce citizenship before a U.S. diplomatic or consular office of the United States in a foreign state; provide renunciation in writing to the Attorney General when the United States is engaged in war; or commit treason. 8 U.S.C. § 1481(a)(1)-(7).

92. I.R.C. § 7701(n)(1)-(2), *repealed by the HEART Act*, Pub. L. No. 110-245, § 301(c)(2)(C) (2008).

worldwide income as if he were a U.S. citizen or permanent resident if he was physically present in the U.S. for more than 30 days during any taxable year of the ten year period following expatriation.⁹³ In making this determination, an individual was allowed to disregard up to 30 days of physical presence in the U.S. to perform services for their employer where the individual either had ties to another country or had minimal physical presence in the U.S.⁹⁴

4. Amendment of Annual Information Return Filing Requirement

Prior to the 2004 AJCA, Code Section 6039G required an annual information filing⁹⁵ that includes the expatriate's taxpayer identification number, mailing address in foreign country, foreign country in which the expatriate is residing and of which he is a citizen, as well as information regarding his assets and liabilities, and any other information the Secretary required.⁹⁶ The 2004 AJCA amended Code Section 6039G to include disclosure of information concerning the expatriate's annual income⁹⁷ and the number of days physically present in the U.S. for each taxable year.⁹⁸ Unlike prior law, these reporting requirements would apply even where the expatriate owed no U.S. tax liability during the year.⁹⁹

IV. RECENT CHANGES TO U.S. LAW – THE HEART ACT

On June 17, 2008, President Bush signed the HEART Act into law.¹⁰⁰ Among the provisions included in the HEART Act is the adoption of a new system of taxation applicable to expatriates affecting both the income and estate and gift tax systems.¹⁰¹ The new expatriate tax system under the HEART Act is the realization of a series of

93. I.R.C. § 877(g)(1) (West 2008).

94. I.R.C. § 877(g)(2). This exception would not apply, however, if the individual was related to the employer or failed to meet requirements determined by the Secretary to prevent avoidance of U.S. tax liability. § 877(g)(2)(A)(i)-(ii).

95. I.R.C. § 6039G(a).

96. I.R.C. § 6039G(b)(1)-(6) (2000), *amended by* AJCA, Pub. L. No. 108-357, § 804(e)(2) (2004).

97. I.R.C. § 6039G(b)(5).

98. I.R.C. § 6039G(b)(6).

99. H. COMM. ON WAYS AND MEANS, AMERICAN JOBS CREATION ACT OF 2004, H.R. Rep. No. 108-548, pt.1 at § 604 (2004).

100. *See supra* note 1.

101. *See* I.R.C. § 877A (West 2008).

proposals that began in the mid-1990s to replace the existing system of taxation for expatriates with a mark-to-market exit tax.¹⁰²

A. Who is Covered?

As under the 2004 AJCA, the new expatriate tax rules under the HEART Act apply to a U.S. citizen who relinquishes citizenship or a U.S. permanent resident who terminates U.S. residency if such individual either (i) has an average annual net income tax liability for the five preceding years ending before the date of the loss of U.S. citizenship or residency that exceeds \$124,000 (as adjusted for inflation after 2004), (ii) has a net worth of \$2 million or more on the date of expatriation, or (iii) fails to certify under penalties of perjury that he has complied with all U.S. federal tax obligations for the preceding five years.¹⁰³ Those who are covered by the act are referred to as “covered expatriates.”¹⁰⁴

Exceptions to classification as a covered expatriate under the income or net worth tests above apply in two situations. The first exception applies to an individual who was born with citizenship both in the U.S. and in another country, who continues to be a citizen of and taxed as a resident of such other country as of the expiration date, and who has been a resident of the U.S. for not more than 10 taxable years during the 15 taxable-year period ending with the taxable year of expatriation.¹⁰⁵ The second exception applies to a U.S. citizen who relinquishes U.S. citizenship before reaching age 18 ½, provided he was a resident of the U.S. for no more than 10 taxable years before such relinquishment.¹⁰⁶

The new system also replaces the prior rules that provided that an individual continued to be treated as a U.S. citizen or resident for U.S. federal tax purposes until he gave notice of an expatriating act or

102. The exit tax concept was first proposed by the Clinton Administration in 1995. *See* U.S. DEPT. OF TREASURY, GENERAL EXPLANATION OF REVENUE PROPOSALS IN CLINTON ADMINISTRATION'S FY 1996 BUDGET REQUEST (Feb. 1995). A version of the exit tax was introduced in Congress the following year by Senator Moynihan. To Amend the Internal Revenue Code of 1986 to Revise the Tax Rules on Expatriation, to Modify the Basis Rules for Nonresident Aliens Becoming Citizens or Residents, and for Other Purposes, S. 700, 104th Cong. (1995).

103. I.R.C. § 877A(g)(1)(A) (West 2008), which defines the term “covered expatriate” as an expatriate who meets the requirements of I.R.C. § 877(a)(2)(A), (B), or (C). The term “expatriate” is defined as any U.S. citizen who relinquishes U.S. citizenship or any long term resident of the U.S. who ceases to be a lawful permanent resident of the U.S. within the meaning of I.R.C. § 7701(b)(6). § 877A(g)(2)(A)-(B).

104. I.R.C. § 877A(g)(1)(A) (West 2008).

105. I.R.C. § 877A(g)(1)(B)(i).

106. I.R.C. § 877A(g)(1)(B)(ii).

termination of residency.¹⁰⁷ Under the new rules, a U.S. citizen is treated as having relinquished U.S. citizenship on the earliest of four possible dates: (i) the date the individual renounces U.S. nationality before a diplomatic or consular officer of the United States (provided the voluntary relinquishment is later confirmed by the issuance of a certificate of loss of nationality); (ii) the date that the individual furnishes a signed statement of voluntary relinquishment of U.S. nationality confirming the performance of an expatriating act to the State Department (again provided it is later confirmed by issuance of a certificate of loss of nationality); (iii) the date that the State Department issues a certificate of loss of nationality; or (iv) the date that a U.S. court cancels a naturalized citizen's certificate of naturalization.¹⁰⁸ Relinquishment may also occur earlier under Treasury regulations with respect to an individual who became at birth a citizen of the U.S. and of another country.¹⁰⁹

B. The Mark-to-Market Exit Income Tax

Under the new provisions, covered expatriates are subject to a new mark-to-market exit income tax. The tax applies to the net unrealized gain in the expatriate's property as if the property had been sold for its fair market value on the day before expatriation.¹¹⁰ Any net gain on this deemed sale is recognized¹¹¹ to the extent it exceeds \$600,000 (indexed for inflation for calendar years after 2008).¹¹² A net loss is likewise recognized.¹¹³ A gain or loss recognized under these provisions is then taken into account as an adjustment to any gain or loss subsequently recognized on the same assets.¹¹⁴

A covered expatriate may elect to defer payment of the new exit tax,¹¹⁵ subject to accrual of interest at the rate normally applicable to underpayments of taxation,¹¹⁶ furnishing of a bond or other form of

107. See *supra* notes 91- 92 and accompanying text.

108. I.R.C. § 877A(g)(4)(A)-(D).

109. STAFF OF JOINT COMMITTEE ON TAXATION, 110TH CONG., TECHNICAL EXPLANATION OF H.R. 6081, THE "HEROES EARNINGS ASSISTANCE AND RELIEF TAX ACT OF 2008," AS SCHEDULED FOR CONSIDERATION BY THE HOUSE OF REPRESENTATIVES ON MAY 20, 2008 at 41 (Comm. Print 2008) [hereinafter, the "JCT Report 2008"].

110. I.R.C. § 877A(a)(1) (West 2008).

111. I.R.C. § 877A(a)(2)(A).

112. I.R.C. § 877A(a)(3)(A)-(B).

113. I.R.C. § 877A(a)(2)(B).

114. I.R.C. § 877A(a)(2).

115. I.R.C. § 877A(b)(1).

116. I.R.C. § 877A(b)(7) (West 2008).

security for payment accepted by the Secretary of the Treasury,¹¹⁷ and furnishing of consent to a waiver of any treaty rights that would preclude assessment or collection of the tax.¹¹⁸ The election is irrevocable and is made on a property-by-property basis.¹¹⁹ The deferred tax on a particular property is due when the return is due for the taxable year in which the property is disposed of.¹²⁰ The deferral may not extend beyond the due date of the return for the taxable year which includes the individual's death.¹²¹

The new exit tax applies to most types of property interests held by the covered expatriate on the date of expatriation, with certain exceptions for deferred compensation items and certain tax deferred accounts, as well as interests in trusts,¹²² as discussed below.

1. Deferred Compensation and Specified Tax Deferred Accounts

The first exception applies to certain items of deferred compensation. Under the new exit tax, the term "deferred compensation item" includes most commonly recognized retirement plans,¹²³ any interest in a foreign pension plan or similar retirement arrangement or program,¹²⁴ any item of deferred compensation,¹²⁵ and any property the individual is entitled to receive in connection with the performance of services to the extent not previously taken into account under or in accordance with I.R.C. § 83.¹²⁶ These deferred compensation items are treated as "eligible deferred compensation items" if (i) the payor is either a U.S. person or a non-U.S. person who elects to be treated as a U.S. person for purposes of withholding and who meets requirements specified by the Secretary of the Treasury to ensure compliance with withholding requirements and (ii) the covered expatriate notifies the

117. I.R.C. § 877A(b)(4).

118. I.R.C. § 877A(b)(5).

119. I.R.C. § 877A(b)(6).

120. I.R.C. § 877A(b)(1).

121. I.R.C. § 877A(b)(3) (West 2008).

122. See I.R.C. § 877A(c)(1)-(3).

123. I.R.C. § 877A(d)(4)(A). The provision refers to "a plan or arrangement described in I.R.C. § 219(g)(5)" which includes qualified retirement plans under I.R.C. § 401(a), annuity plans described under I.R.C. § 403(a), governmental plans under I.R.C. § 457(b), annuity contracts under I.R.C. § 403(b), simplified employee pensions under I.R.C. § 408(k), simplified retirement accounts under I.R.C. § 408(p), and a trust described in I.R.C. § 518(c)(18).

124. I.R.C. § 877A(d)(4)(B).

125. I.R.C. § 877A(d)(4)(C).

126. I.R.C. § 877A(d)(4)(D).

payor of his status as a covered expatriate and irrevocably waives any claim of withholding reduction under any treaty with the U.S.¹²⁷

If the deferred compensation item is an eligible deferred compensation item, the payor must withhold a 30 percent tax from each taxable payment to the covered expatriate,¹²⁸ and the item is subject to tax under I.R.C. § 871.¹²⁹ A taxable payment is subject to this withholding requirement to the extent it would be included in gross income of the covered expatriate if he were subject to tax as a citizen or permanent resident of the U.S.¹³⁰

On the other hand, if the deferred compensation item is not an eligible deferred compensation item, an amount equal to the present value of the covered expatriate's deferred compensation item is treated as having been received on the day before the expatriation date.¹³¹ Thus, there is a deemed distribution that accelerates the realization of these deferred compensation items. However, these deemed distributions are not subject to any early distribution tax.¹³²

Special rules also apply to certain specified tax deferred accounts,¹³³ including individual retirement plans,¹³⁴ qualified tuition plans,¹³⁵ Coverdell education savings accounts,¹³⁶ health savings accounts,¹³⁷ and Archer MSAs.¹³⁸ A covered expatriate is treated as receiving a distribution of his entire interest under any of these accounts on the day before the expatriation date.¹³⁹ As with deferred contribution items, these deemed distributions accelerate the realization of these items, but they are not subject to any early distribution tax.¹⁴⁰

127. I.R.C. § 877A(d)(3)(A)-(B) (West 2008).

128. I.R.C. § 877A(d)(1)(A).

129. I.R.C. § 877A(d)(6)(B).

130. I.R.C. § 877A(d)(1)(B).

131. I.R.C. § 877A(d)(2)(A).

132. I.R.C. § 877A(d)(2)(B). Early distribution tax includes any increase in tax imposed under I.R.C. §§ 72(t), 220(e)(4), 223(f)(4), 409A(a)(1)(B), 529(c)(6), or 530(d)(4). I.R.C. § 877A(g)(6).

133. I.R.C. § 877A(e)(2) (West 2008).

134. I.R.C. § 7701(a)(37).

135. I.R.C. § 529.

136. I.R.C. § 530 (West 2008).

137. I.R.C. § 223.

138. I.R.C. § 220.

139. I.R.C. § 877A(e)(1)(A).

140. I.R.C. § 877A(e)(1)(B). Early distribution tax includes any increase in tax imposed under I.R.C. §§ 72(t), 220(e)(4), 223(f)(4), 409A(a)(1)(B), 529(c)(6), or 530(d)(4). I.R.C. § 877A(g)(6).

2. Interests in Trusts

Interests in trusts held by a covered expatriate receive different treatment depending on whether the trust is a grantor trust or non-grantor trust. Where a trust for which the covered expatriate is treated as the owner of the trust under the grantor trust provisions¹⁴¹ immediately before the expatriation date,¹⁴² the assets held by the trust are subject to the mark-to market exit tax.¹⁴³ Because the determination of grantor trust status is made immediately before the expatriation date, it is likely that a grantor trust will remain so for purposes of the exit tax even if the trust were to later become a non-grantor trust.¹⁴⁴

One of the arguments against the adoption of a mark-to-market exit tax system in the mid-1990s was the difficulty in applying the coverage to an expatriate's beneficial interest in a trust.¹⁴⁵ The HEART Act provisions address these concerns directly: the mark-to-market exit tax does not apply to a non-grantor trust for which the covered expatriate is a beneficiary.¹⁴⁶ Rather, for any distribution from a non-grantor trust to a covered expatriate, the trustee must withhold an amount equal to 30 percent of the portion of the distribution that would be includible in the gross income of the covered expatriate if he were subject to tax as a citizen or permanent resident of the U.S.¹⁴⁷ The portion that would be includible is subject to tax under I.R.C. § 871,¹⁴⁸ and the covered expatriate is deemed to have waived any right to claim any reduction in withholding under any treaty with the U.S.¹⁴⁹ In addition, if a non-grantor trust distributes appreciated property to a covered expatriate, the trust must recognize gain as if the property were sold to the covered

141. A grantor trust is a trust in which the person creating the trust (the "grantor") retains certain rights or interests in the trust, such as the right to amend or terminate the trust at will. Grantor trusts are ignored for federal income and estate tax purposes, and the income and deductions generated by a grantor trust are taxed entirely to the owner of the trust. See I.R.C. § 671 (West 2004); §677 (2000); Treas. Reg. § 1.671-1 (as amended in 1980); Treas. Reg. § 1.671-3(a)(1) (as amended in 1969); Treas. Reg. §1.677(a)-1(d) (as amended in 2006).

142. I.R.C. § 877A(f)(3) (West 2008).

143. JCT Report 2008, *supra* note 109, at 43.

144. See I.R.C. § 877A(f)(3).

145. See Jeffrey M. Colón, *Changing U.S. Tax Jurisdiction: Expatriates, Immigrants, and the Need for a Coherent Tax Policy*, 34 SAN DIEGO L. REV. 1, 39-41 (1997); STAFF OF JOINT COMMITTEE ON TAXATION, 104TH CONG., ISSUES PRESENTED BY PROPOSALS TO MODIFY THE TAX TREATMENT OF EXPATRIATION 122-37 (Comm. Print 1995) [hereinafter, the "JCT Report 1995"].

146. See I.R.C. § 877A(f) (West 2008).

147. I.R.C. § 877A(f)(1)(A); § 877A(f)(2).

148. I.R.C. § 877A(f)(4)(A); § 877A(d)(6)(B).

149. I.R.C. § 877A(f)(4)(B).

expatriate at its fair market value.¹⁵⁰ Finally, if a non-grantor trust subsequently becomes a grantor trust with the covered expatriate treated as the owner, the conversion is treated as a distribution of assets held by the trust to the covered expatriate,¹⁵¹ with the above withholding requirements imposed.¹⁵²

C. The Expatriate Transfer Tax

The new provisions also apply new estate and gift tax rules for covered expatriates. Under these rules, a special transfer tax applies to “covered gifts or bequests” received by a U.S. citizen or resident.¹⁵³ A covered gift or bequest is any property acquired (i) by gift directly or indirectly from an individual who was a covered expatriate at the time of acquisition, or (ii) directly or indirectly by reason of the death of an individual who was a covered expatriate immediately before death.¹⁵⁴ It does not include any property shown as a taxable gift on a timely filed gift tax return by the covered expatriate,¹⁵⁵ any property included in the gross estate of the covered expatriate and shown on a timely filed estate tax return of his estate,¹⁵⁶ or any property for which a charitable or marital deduction would be allowed¹⁵⁷ for purposes of determining estate and gift taxes.¹⁵⁸

This special transfer tax is imposed at the greater of the highest marginal rate of tax for the estate tax and the gift tax,¹⁵⁹ both in effect as of the date of receipt of the covered gift or bequest.¹⁶⁰ The tax is imposed on the recipient of the covered gift or bequest,¹⁶¹ but only to the extent that the total value of all gifts and bequests received by the recipient during a calendar year exceeds the gift tax annual exclusion amount in effect under I.R.C. § 2503(b) for that calendar year.¹⁶² The

150. I.R.C. § 877A(f)(1)(B).

151. JCT Report 2008, *supra* note 109, at 44.

152. *See supra* notes 147-148 and accompanying text.

153. I.R.C. § 2801(a) (West 2008).

154. I.R.C. § 2801(e)(1)(A)-(B).

155. I.R.C. § 2801(e)(2)(A).

156. I.R.C. § 2801(e)(2)(B).

157. I.R.C. § 2801(e)(3); *see* I.R.C. §§ 2055, 2056, 2522, and 2523.

158. I.R.C. § 2801(e)(3) (West 2008).

159. The marginal tax rates for estate taxes are determined under I.R.C. § 2001(c), and the marginal tax rates for gift taxes are determined under I.R.C. § 2502(a).

160. I.R.C. § 2801(a)(1).

161. I.R.C. § 2801(b).

162. I.R.C. § 2801(c) (West 2008). The gift tax annual exclusion under § 2503(b) was \$12,000 for 2008. *See* Rev. Proc. 2007-66, 2007-45 I.R.B. 970 at § 3.32(1).

tax is also reduced by the amount of any estate or gift tax paid to a foreign country with respect to the covered gift or bequest.¹⁶³

Where the transfer is made not to an individual but to a domestic trust, the transfer tax applies as if the trust is a U.S. citizen and the trust is required to pay the tax.¹⁶⁴ Where the transfer is made to a foreign trust, the transfer tax applies to any distribution (whether from income or corpus) from the trust attributable to such covered gift or bequest to a U.S. citizen or resident, in the same manner as if such distribution were a direct covered gift or bequest.¹⁶⁵ The foreign trust may elect to be treated as a domestic trust for purposes of the special transfer tax.¹⁶⁶

It is worth noting that this special transfer tax appears to be in addition to the existing estate and gift tax provisions applicable to non-resident aliens generally. Thus, the covered expatriate, as a non-resident alien, would be subject to estate and gift taxes on transfers of property located within the U.S.,¹⁶⁷ and, in addition, on transfers of property located (or treated as located¹⁶⁸) outside the U.S. where they are covered gifts or bequests received by a U.S. citizen or resident.¹⁶⁹ This provision therefore represents a very real expansion of U.S. estate and gift taxes to reach previously untaxed assets.

VI. POLICY IMPLICATIONS OF THE HEART ACT EXIT TAX

A. Purposes and Justifications for the Exit Tax

A consideration of the policy implications of the HEART Act exit tax should begin with a consideration of the purposes of the adoption of such a system. While the legislative history of the HEART Act does not directly address the reasons for the adoption of the exit tax regime for covered expatriates, the history behind both the prior law and the

163. I.R.C. § 2801(d).

164. I.R.C. § 2801(e)(4)(A)(i)-(ii).

165. I.R.C. § 2801(e)(4)(B)(i).

166. I.R.C. § 2801(e)(4)(B)(iii).

167. See *supra* notes 45-50 and accompanying text.

168. Intangible assets, for example, are generally treated as located outside the U.S. for purposes of the estate and gift taxes generally applicable to non-residents. See *supra* note 50 and accompanying text.

169. The same transfer would not, however, be taxed twice, since the special transfer tax imposed on gifts or bequests by covered expatriates under I.R.C. § 2801 does not include any property shown on a timely filed gift tax return or included in the gross estate of the covered expatriate. I.R.C. § 2801(e)(2)(A) and (B).

Congressional attempts to adopt an exit tax system in prior years give some insights into the purposes of adopting such a system.

In its 2003 report¹⁷⁰ examining the then-current status of the law concerning the treatment of expatriates for both tax and immigration purposes, the Staff of the Joint Committee on Taxation considered the potential purposes intended to be served by the adoption of a special tax system applicable to expatriates.¹⁷¹ The report provides the following explanation:

A regime could be designed to serve one or more of a variety of purposes, including: (1) expressing official disapproval of tax motivated citizenship relinquishment or residency termination; (2) deterring or punishing tax motivated citizenship relinquishment or residency termination; (3) removing unintended tax incentives for relinquishing citizenship or terminating residency, thereby achieving tax neutrality in the decision to take such actions; (4) taxing appreciation and asset value that accrues while a person is a U.S. citizen or resident; (5) ensuring that individuals cannot enjoy any tax benefits that may arise from relinquishing citizenship or terminating residency while still maintaining significant ties to the country; and (6) combinations of and variations on these purposes.¹⁷²

While the 2003 JCT report was focused on an examination of the law as it existed at that time, these purposes are equally appropriate as a possible explanation of Congressional intent today.

The 2003 JCT report also notes that the legislative history of the prior law, including the 1996 HIPAA amendments, indicate that Congress primarily intended to eliminate unintended tax consequences for relinquishment of citizenship or termination of residency.¹⁷³

Assuming that eliminating unintended tax consequences was in fact the Congressional purpose behind the prior law, it seems logical to conclude that adopting a drastic change such as the exit tax regime is in fact based upon different policy considerations. Indeed, the exit tax would seem to equally satisfy several of these potential purposes, including expressing official disapproval of tax motivated expatriation,

170. STAFF OF JOINT COMMITTEE ON TAXATION, 108TH CONG., REVIEW OF THE PRESENT-LAW TAX AND IMMIGRATION TREATMENT OF RELINQUISHMENT OF CITIZENSHIP AND TERMINATION OF LONG-TERM RESIDENCY, (Comm. Print 2003) [hereinafter, the "JCT Report 2003"].

171. *Id.* at 75.

172. *Id.*

173. *Id.* at 75-81.

detering or punishing tax motivated expatriation,¹⁷⁴ and taxing appreciation that accrues while a person is a U.S. citizen or resident. It is also possible, as some commentators have suggested,¹⁷⁵ that the rationale behind an expatriate tax system is more a symbolic function of promoting a perception among taxpayers that obedience to and punishment for violating tax laws is enforced equitably.¹⁷⁶

Regardless of the actual intent of Congress in adopting the exit tax provisions, numerous justifications exist for the adoption of an exit tax system. For example, the 2003 JCT report suggests that it is appropriate to collect tax from individuals who have expatriated because they have benefited from U.S. citizenship or residence, either by their personal presence in the U.S. or by the presence of their assets in the U.S.¹⁷⁷ Likewise, it would be appropriate to tax unrealized gains that accrue during a period that an individual was subject to U.S. taxation on a worldwide basis due to either citizenship or residency.¹⁷⁸ Adoption of the exit tax will also facilitate collection of taxes making the administration of the expatriate system easier to administer than a tax based on ten years of post-expatriation monitoring.¹⁷⁹ This perceived improvement in administration is based on the fact that under an exit tax, there is a one-time accounting of the assets involved rather than a ten-year-long period of having to follow the activities of the expatriate.¹⁸⁰ Finally, the adoption of the exit tax could be justified on the basis of fairness, in that an expatriate's tax liability will no longer be determined on the basis of whether or not the expatriate has the financial ability to hold the assets for the 10-year period after expatriation and thereby avoid taxation.¹⁸¹ This change also significantly improves horizontal equity¹⁸² in that it treats all expatriates the same for tax purposes regardless of their financial condition following expatriation.¹⁸³

174. Some commentators have argued that deterring expatriation, whether tax motivated or not, is not a legitimate goal of an expatriate tax system. See, e.g., Walker, *supra* note 70.

175. See Walker, *supra* note 70; Abreu, *supra* note 6, at 1103-04.

176. Walker, *supra* note 70.

177. JCT Report 2003, *supra* note 170, at 195.

178. *Id.*, at 196; Farkas-DiNardo, *supra* note 86, at 39.

179. JCT Report 2003, *supra* note 170, at 197; Colón, *supra* note 145, at 10-11.

180. See Farkas-DiNardo, *supra* note 86, at 41.

181. *Id.*; Colón, *supra* note 145, at 10-11.

182. In tax policy discussions, horizontal equity is the idea that similarly situated taxpayers should be taxed similarly, and it is considered a significant criteria of a "good" tax. See David Elkins, *Horizontal Equity as a Principle of Tax Theory*, 24 YALE L. & POL'Y REV. 43, 43-44 (2006).

183. See Farkas-DiNardo, *supra* note 86, at 41; Colón, *supra* note 145, at 10-11.

The adoption of the exit tax system also addresses the issue of the incentive for taxpayers to expatriate. Under the old system, a U.S. citizen or resident who either held substantial foreign assets or who was willing and able to wait for the 10-year period to expire to liquidate their holdings of non-real estate U.S. capital assets continued to have an incentive to expatriate.¹⁸⁴ The income from foreign assets would not be taxable for any non-resident alien,¹⁸⁵ and the sale of non-real estate U.S. capital assets would likewise not be taxable for an expatriate after the expiration of the 10-year holding period.¹⁸⁶

The effect of these incentives was to encourage expatriates to invest in certain ways – specifically, in foreign and other non-U.S. source assets, or to hold U.S. assets longer than might otherwise be economically desirable.¹⁸⁷ Making investment decisions purely on the basis of tax considerations is inefficient and inconsistent with logical economic practice.¹⁸⁸ The exit tax system removes this incentive to expatriate, since all covered expatriates will be subject to the exit tax upon expatriation regardless of the sourcing of the assets and the income from them.¹⁸⁹ Likewise, the exit tax system reduces the economic inefficiency associated with the old system by allowing expatriates to invest in assets based upon investment strategy rather than tax consequences.¹⁹⁰ The covered expatriate will be subject to tax on an ongoing basis only on U.S.-source income in the same manner as any other non-resident alien.¹⁹¹ Specifically, capital gains on U.S. assets will not be subject to U.S. tax in most cases,¹⁹² making future investments in U.S. securities a viable investment option for the expatriate.

B. Issues and Problems Remaining with the Exit Tax

A number of issues and problems still remain with the exit tax system. As with prior proposals to modify the tax on expatriates, there are potential constitutional and international law issues to consider. On a

184. Abreu, *supra* note 6, at 1103-04; Farkas-DiNardo, *supra* note 86, at 40; Elise Tang, *Solving Taxpatriation: "Realizing" it Takes More than Amending the Alternative Tax*, 31 BROOK. J. INT'L L. 615, 639 (2006).

185. I.R.C. § 862(a) (West 2008).

186. *See supra* notes 11-13 and accompanying text.

187. *See Farkas-DiNardo, supra* note 86, at 40-41; Colón, *supra* note 145, at 10-11.

188. *See Farkas-DiNardo, supra* note 86, at 40-41; Colón, *supra* note 145, at 10-11.

189. Farkas-DiNardo, *supra* note 86, at 40-41.

190. *Id.*

191. *See supra* notes 8-10 and accompanying text.

192. *See supra* notes 11-13 and accompanying text.

more practical level, problems with enforcement still exist with the exit tax. Moreover, the exit tax raises significant liquidity and valuation issues, timing issues, and the potential for double taxation. Each of these issues is discussed below.

1. Constitutional and International Law Issues

In examining both the prior law covering taxation of expatriates and prior exit tax proposals, commentators have examined both constitutional and international law issues that should be considered in the context of the HEART Act.¹⁹³

Several commentators have suggested that the U.S. Constitution may limit the government's right to impose a special tax on expatriates.¹⁹⁴ As Mr. Walker notes in his article, while there is some legislative support for the contention that expatriation is a fundamental right,¹⁹⁵ such a right is not found in the Constitution itself.¹⁹⁶ Assuming that is the case, Mr. Walker's analysis is probably correct that "a tax imposed in connection with expatriation should not, as a general matter, violate the Constitution even if it significantly burdens expatriation, because it is very doubtful that the right to expatriate itself enjoys any specific constitutional protection."¹⁹⁷

A more plausible argument is that the exit tax violates international law. The right to emigrate¹⁹⁸ is recognized as a basic human right under Article 12 of the International Covenant on Civil and Political Rights.¹⁹⁹ Both the right to emigrate and to expatriate are protected under Articles

193. See, e.g., Walker, *supra* note 70.

194. See, e.g., *id.* at 576 (citing CHARLES M. BRUCE, AMERICAN BAR ASSOCIATION, COMMENTS CONCERNING TITLE II OF THE TAX COMPLIANCE ACT OF 1995 (H.R. 981 & S. 453) (Mar. 10, 1995), reprinted in 95 TAX NOTES INT'L (TA) 59-12 (Mar. 28, 1995)). There are also arguments that might be made on the grounds of the Sixteenth Amendment, the Due Process Clause, and the Equal Protection clause. However, the Staff of the Joint Committee on Taxation analyzed these arguments in detail and concluded that they are not likely to render an exit tax system unconstitutional. Because I agree with their analyses, I have omitted a detailed discussion of these topics. For a detailed explanation of these issues, see JCT Report 1995, *supra* note 145, at 71-89.

195. Walker, *supra* note 70, at 576 (citing the Expatriation Act of 1868, ch. 249, 15 Stat. 223 (codified as amended at 8 U.S.C. § 1481 (West 2008)); see also Tang, *supra* note 184, at 621.

196. Walker, *supra* note 70, at 577 (citing *Shanks v. Dupont*, 28 U.S. (3. Pet.) 242, 246 (1830)).

197. *Id.*

198. The right to emigrate is the right to change one's physical residence. In contrast, the right to expatriate is the right to change one's citizenship. See Detlev F. Vagts, *The Proposed Expatriation Tax – A Human Rights Violation?*, 89 AM. J. INT'L L. 578, 578-79 (1995).

199. International Covenant on Civil and Political Rights, Mar. 23, 1976, 999 U.N.T.S. 171, available at <http://www1.umn.edu/humanrts/instree/b3ccpr.htm>.

13(2) and 15(2) of the Universal Declaration of Human Rights as adopted by the United Nations General Assembly on December 10, 1948.²⁰⁰ The United States officially recognizes both the right to emigrate and the right to expatriate.²⁰¹

The rights to emigrate and expatriate are not, of course, unlimited or unqualified. The protection extends to arbitrary or unreasonable infringements that prohibit their exercise, or to conditions that are so burdensome that they amount to a de facto denial of these rights.²⁰² In the case of the exit tax, it is clear that there is no complete prohibition, nor is the imposition of the tax so burdensome as to act as a prohibition on the exercise of these rights. As the Staff of the Joint Committee on Taxation noted, while some might be deterred from renouncing citizenship or emigrating because of an exit tax, they are not actually required to pay the tax as a condition of exercising these rights.²⁰³ The question thus becomes whether the exit tax constitutes “an ‘arbitrary’ burden imposed on such rights.”²⁰⁴

As might be expected, the standard for determining whether a burden on such rights is arbitrary under international law is not clear. To avoid being arbitrary, the restriction “must pursue a legitimate governmental aim and be narrowly tailored to be proportional to that aim.”²⁰⁵ The U.S. State Department, in assessing the 1995 proposed exit tax, took the position that the proposed tax did not constitute an arbitrary infringement on these rights under international law because they fairly addressed the governmental aim of equalizing the overall tax burdens between those who remain U.S. citizens or residents and those who do not.²⁰⁶ Other commentators agreed with the State Department’s analysis,²⁰⁷ suggesting it is logical to argue that it is not arbitrary “for special rules to apply when a person exits the jurisdiction of the country’s tax system, so long as the special rules are not irrational when

200. Universal Declaration of Human Rights, G.A. Res 217A, at 71, U.N. GAOR, 3d Sess., U.N. Doc. A/810 (Dec. 10, 1948), available at <http://www.un.org/Overview/rights.html>.

201. See JCT Report 1995, *supra* note 145, at 91.

202. *Id.*

203. *Id.* at 93.

204. *Id.* at 94.

205. *Id.* (citing HURST HANNUM, *THE RIGHT TO LEAVE AND RETURN IN INTERNATIONAL LAW AND PRACTICE* 26-27 (1987); Jeffrey Barist, et al., *Who May Leave: A Review of Soviet Practice Restricting Emigration on Grounds of Knowledge of ‘State Secrets’ In Comparison With Standards of International Law and the Policies of Other States*, 15 *HOFSTRA L. REV.* 381, 401, 406 (1987)).

206. JCT Report 1995, *supra* note 145, at 95. This is one of the likely reasons for adopting the exit tax. See *supra* notes 171-173 and accompanying text.

207. JCT Report 1995, *supra* note 145, at 95.

compared to the aggregate tax system (i.e., income, estate, and gift taxes) and the underlying motive is to protect the integrity of the system rather than to penalize or prohibit the exercise of the right to emigrate or expatriate.”²⁰⁸ Indeed, other countries, including Australia, Canada and Denmark, include similar taxation rules that deem assets sold upon exiting the taxing jurisdiction.²⁰⁹ The JCT’s conclusion that the 1995 proposed exit tax does not constitute an arbitrary infringement on the right to expatriate is likely correctly applied to the HEART Act’s exit tax as well.

2. Enforcement Issues

One of the policy issues often raised concerning the tax system applied to expatriates is the enforceability of such a system. The Joint Committee on Taxation’s report in 2003 raised serious questions about the enforceability of the then-existing system of taxation on expatriates because of the limited contact the expatriates would have during the 10-year period following expatriation.²¹⁰ One of the suggested benefits of the exit tax is that there is no need to maintain contact with the expatriate for a lengthy period after expatriation, since the tax realization event occurs the day before the date of expatriation.²¹¹ Some commentators have suggested that enforcing an exit tax depends on the assumption that individuals (and their assets) are more likely to be found in the U.S. at the time of expatriation than after, and that such an assumption is invalid because expatriates who are determined to evade U.S. tax will simply ignore their U.S. tax obligations just as they would have before.²¹² Thus, the argument goes, the exit tax, like the prior system, relies on voluntary compliance by the affected individuals.²¹³

Other commentators have argued that the IRS could take advantage of the increased information available due to the Department of Homeland Security’s entry-exit system regarding an expatriate’s country of citizenship, current residence, time of expected return to the United States, and current contact information, and that this information would

208. *Id.* at 98.

209. *Id.* at 99 and Appendix B; *see also* Walker, *supra* note 70.

210. JCT Report 2003, *supra* note 170, at 8.

211. *See* Cynthia Blum & Paula N. Singer, *A Coherent Policy Proposal for U.S. Residence-Based Taxation of Individuals*, VAND. J. TRANSNAT’L L. 705, 733-34 (2008); Tang, *supra* note 184, at 643.

212. Walker, *supra* note 70; JCT Report 1995, *supra* note 145, at 68.

213. Walker, *supra* note 70.

make it easier to enforce the exit tax.²¹⁴ The availability of this information, however, does not in and of itself improve the enforceability of the tax. In addition, while the Staff of the Joint Committee on Taxation suggests that adoption of an exit tax would make planning for legal avoidance more challenging because a comprehensive tax base is utilized, making it “more difficult to structure one’s holdings in a manner designed to avoid the mark-to-market tax,”²¹⁵ there is no detailed explanation of how this is so. If, for example, a taxpayer invests in U.S.-source capital assets, any sale or transfer of those assets for the 10-year period after the taxpayer expatriates would result in realization of a tax under the prior system. The only effect of the adoption of the exit tax on tax planning is to replace the 10-year window with an accelerated realization event with regard to U.S.-source assets. Thus, any planning opportunities to avoid the capital gains tax on U.S.-source assets acquired while under U.S. taxing jurisdiction are not likely to be effective. On the other hand, to the extent the taxpayer invests in foreign-source assets prior to expatriation, such planning would have been effective under the prior system because the gains would not be U.S.-source income following expatriation. Under the exit tax, those gains would be realized upon expatriation. In this sense, the adoption of the exit tax does make tax planning opportunities more difficult, but not necessarily impossible.

3. Liquidity and Valuation Issues

The 1995 JCT report points to both liquidity and valuation issues that arise in the context of the implementation of an exit tax. In commenting on the 1995 exit tax proposals, the report points out that such a tax might raise liquidity issues where assets held at the time of expatriation are not liquid and therefore a taxpayer may not have sufficient funds available to pay the relevant tax.²¹⁶ This liquidity argument is one of the traditional claims raised by those opposing an exit tax system.²¹⁷ Two possible approaches have been suggested to deal with this problem: abandon the accrual tax approach with regard to such

214. Blum, *supra* note 211, at 737-38.

215. See JCT Report 2003, *supra* note 170, at 198; see also JCT Report 1995, *supra* note 145, at 68.

216. JCT Report 1995, *supra* note 145, at 67; see also JCT Report 2003, *supra* note 170, at 198-99.

217. See Colon, *supra* note 145, at 36; Farkas-DiNardo, *supra* note 86, at 41; Tang, *supra* note 184, at 643.

illiquid assets, or allow for deferral of the tax liability at the cost of an interest charge.²¹⁸

The HEART Act takes the latter approach, allowing an expatriate to irrevocably elect, on a property-by-property basis, to defer payment of the exit tax, subject to accrual of interest at the rate normally applicable to underpayments of taxation, furnishing of a bond accepted by the Secretary of the Treasury, and furnishing of consent to a waiver of any treaty rights that would preclude assessment or collection of the tax.²¹⁹ Of course, this deferral does come with significant costs. The deferral is subject to interest accrual at a not-inconsequential rate,²²⁰ and the taxpayer must furnish a bond,²²¹ which adds to the taxpayer's costs.

Another area of concern regarding the exit tax is the valuation disputes between taxpayers and the I.R.S. that are likely to result from the new tax system.²²² Because the tax is imposed on a deemed sale the day before expatriation occurs, the gain that is being taxed is unrealized, and in the case of illiquid assets or assets with no readily ascertainable market value, the amount of such gain is certain to be the source of vigorous litigation. Such valuation disputes are already common in dealing with the transfer of illiquid assets such as partial interests in real estate and limited partnership interests in family limited partnership entities.²²³ Similar valuation problems are certain to arise in the context of the exit tax as well.

4. Timing Issues

Another potential problem that should be considered are the incentives the exit tax creates regarding the timing of expatriation. One possible effect of the adoption of the exit tax is to encourage expatriation to occur sooner than it otherwise might.²²⁴ For example, if a taxpayer has assets that are very likely to appreciate significantly in the near future, it would be beneficial for the taxpayer to expatriate immediately,

218. Colon, *supra* note 145, at 36-37.

219. I.R.C. § 877A(b) (West 2008); *see supra* notes 115-121 and accompanying text.

220. The interest rate applicable to the underpayment of taxes is the federal short-term interest rate plus three percentage points. I.R.C. § 6621(a)(2). For example, the interest rate applicable to the underpayment of taxes for the month beginning October 1, 2008 is 6%. Rev. Rul. 2008-47, 2008-39 I.R.B. 760 at § 6621.

221. *See supra* note 117 and accompanying text.

222. JCT Report 2003, *supra* note 170, at 198.

223. *See* Adam S. Chodorow, *Valuing Corporations for Estate Tax Purposes: A Blount Reappraisal*, 3 HASTINGS BUS. L. J. 1 (2006); James R. MacCrate, *Family Limited Partnerships, Corporations, and Valuation Issues*, APPRAISAL J., July 2000, at 239.

224. *See* Abreu, *supra* note 6, at 1118.

before the assets appreciate. Under the exit tax system, no tax would be due, because there is no gain inherent in the assets. In contrast, under the pre-HEART Act system, there was no incentive to accelerate expatriation because the income would still be subject to U.S. income taxation when realized for a 10-year period.²²⁵

Likewise, under the exit tax system, an individual who receives a substantial inheritance has an incentive to immediately expatriate.²²⁶ Because the assets will receive a step-up in basis to fair market value at death,²²⁷ there would not be any gain recognized upon the occurrence of the deemed sale under the exit tax system. Again, the incentive is for the taxpayer to accelerate expatriation before any additional gain occurs. In both of these situations, the potential income tax savings can be a strong motivator for the timing of the decision to expatriate.

On the other hand, the change in the transfer tax rules under the HEART Act may mitigate some of these concerns. If an individual considering expatriation knows that he will be a covered expatriate under the new system, and if his heirs and beneficiaries are U.S. citizens or permanent residents, then the transfer of assets by gift or bequest to those heirs and beneficiaries will be subject to estate and gift taxation. Thus, in the examples above, both the assets likely to significantly appreciate in the near future and the assets recently received as a substantial inheritance would be subject to estate and gift tax under the new transfer tax system. Moreover, the tax rates applicable to such transfers are at the highest marginal tax rate applicable to such transfers.²²⁸ Thus, unless the heirs and beneficiaries are not U.S. citizens or permanent residents or are likely to expatriate themselves, the estate and gift tax provisions may be a significant disincentive to expatriate.

5. Potential for Double Taxation

Finally, the possibility of expatriates being subject to double taxation issues should be considered. An expatriate will likely be subject to taxation in a foreign country of residence after expatriation when

225. See *supra* notes 69-74 and accompanying text.

226. See Abreu, *supra* note 6, at 1118.

227. I.R.C. § 1014 (West 2008). The step-up in basis rules only apply to decedents dying before December 31, 2009. § 1014(f). Special rules regarding the basis of property acquired from a decedent dying after December 31, 2009 apply. § 1022. These rules are designed to coordinate with the presently scheduled elimination of the estate tax; however, it is unclear whether Congress will, in fact, eliminate the estate tax or will retain it in some form after 2010. See *supra* note 37. If the estate tax is maintained, then the new rules under § 1022 are likely to change.

228. I.R.C. § 2801(a)(1) (West 2008).

assets are actually sold or liquidated at some future point after expatriation.²²⁹ The sale of the asset may also be subject to tax in the jurisdiction where the property is located.²³⁰ Thus, the gain that is taxed under the exit tax for U.S. income tax purposes will likely be taxed again upon disposition of the asset. While the HEART Act adjusts the expatriate's basis in the asset for U.S. tax purposes, thus avoiding double taxation by the U.S. in the event the taxpayer returns to U.S. taxing jurisdiction,²³¹ no such adjustment is guaranteed for foreign tax purposes.²³² While these potential double taxation issues are not technically of concern to the U.S. government, they are a concern from a policy standpoint in examining the implementation of the HEART Act.

VII. CONCLUSION

The HEART Act imposes a dramatic change in the tax system applicable to those who expatriate, imposing an exit tax on expatriates by accelerating the tax due on the built-in gain on assets held at the time of expatriation, even though no actual sale or other disposition of the asset has taken place. This article has examined numerous possible justifications existing for the adoption of such a tax system, both from a policy perspective, in terms of incentives and horizontal equity issues, and from an administrative perspective.

Despite these improvements, there are significant issues that still must be considered. These include potential constitutional and international law issues, as well as problems with enforcement, liquidity and valuation issues, timing issues, and the potential for double taxation. I hope that the discussion in this article might bring some of these significant concerns to light and become the impetus for future research addressing solutions to these problems.

229. JCT Report 2003, *supra* note 170, at 199.

230. *Id.*

231. *See supra* note 114 and accompanying text.

232. As the Joint Committee report recognizes, most countries do tax gains that have accrued prior to the individual's immigration to and residence in that country. JCT Report 2003, *supra* note 170, at 199 n.568.

