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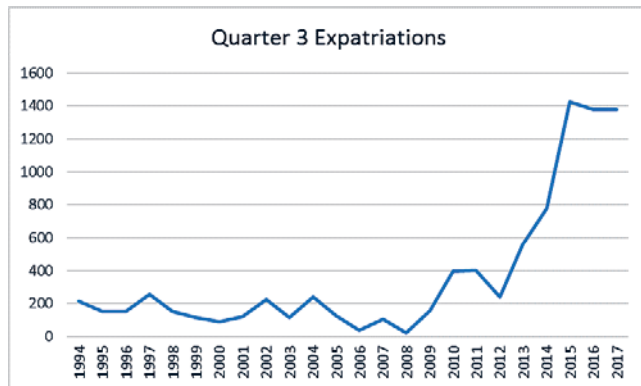
Expatriation

Withers Bergman LLP partners discuss the steady increase in the number of citizens and long-term permanent residents who relinquish their U.S. citizenship or U.S. green card and warn of traps for the unwary including the so-called “mark-to-market” or “exit” tax.

2017 on Track to Be Banner Year for Expatriations

BY SHANNON SMITH RETZKE, AARON SCHUMACHER,
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The third quarter numbers are out. It is clear that 2017 is setting a record breaking pace for Americans giving up their citizenship.



Each quarter, the Internal Revenue Service publishes a list of the names of each person who has given their United States citizenship. In our experience, the list is intended to be but is clearly not complete). This list includes certain long-term residents who are treated as if they were citizens of the United States who lost citizenship. On November 2, 2017, the IRS issued a Notice listing American expatriates for the quarter ended September 30, 2017 reflecting 1,376, with a year to date figure

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of 4,448. At this rate, 2017 will almost certainly be the highest expatriation year on record as it is already clearly much higher than an average year. To put these number in context, the third quarter figure listed for 2017 is over thirteen times the same figure for 2007. The year to date figure for 2017 alone approximates the total number of expatriations for 1991 through 1997.

While the number of expatriates is small as compared to the overall population on the United States as a whole, the rate of expatriation has been steadily increasing. This trend may not surprise those expecting Americans to flee Trump’s America. However, this should be viewed with more informal reports that greencard and visa-based residents are beginning to seek US citizenship in much increased numbers out of fear that Trumpian nationalism has made their existing immigration status here less assured.

At the intersection of tax and immigration law lies great opportunity for the well advised and traps for the unwary. The current US expatriation tax regime applies to citizens and long-term permanent residents that relinquish their US citizenship or US green card (if they have held their green card for at least eight out of the last 15 years) and fall within the definition of a “covered expatriate.” An individual is regarded as a “covered expatriate” if such person: (i) has a net worth of US \$2,000,000 or more; (ii) has an average US income tax liability for the five-year period prior to expatriation of greater than US \$162,000 (as adjusted and updated from time to time for inflation); or (iii) fails to certify under penalty of perjury that he or she has complied with US tax requirements for the five preceding tax years.

A covered expatriate is subject to a so-called “mark-to-market” or “exit” tax which applies to the net unrealized gain on the expatriate’s worldwide assets as if such property were sold for its fair market value on the day before the expatriation date. Any net gain on the

deemed sale in excess of US \$699,000 (as adjusted and updated from time to time for inflation) is taxable at the US capital gains tax rate. While it may be possible to defer payment on the deemed sale and mark-to-market of some assets by making a deferral election, IRS guidance on this election illustrates that this is a complicated and potentially cumbersome election process.

The “exit tax” on high net worth and high-income taxpayers can make it prohibitive for certain individuals to expatriate, although with proper planning and structuring, often this tax can be mitigated or avoided altogether. Further, failing to create a match of timing between the expatriation tax and actual tax, can potentially cause future double taxation.

Further, giving up US citizenship has real non-tax impact. It may be obvious that an expatriate would no longer be able to vote (for or against Trump). However, it

may be less obvious that giving up your American passport means that you no longer have the benefit of getting assistance from the US government when outside of the United States and that you may need to apply for visas to travel to countries where you previously traveled visa free with your US passport.

An additional issue to consider is whether a covered expatriate has US children. If a covered expatriate leaves their US citizen or resident heirs a gift or bequest, the recipient pays a 40 percent tax for the privilege of receiving the gift or bequest. Note that under the current Trump/GOP US tax reform proposal, this tax may apply even if there is no longer an estate or gift tax (status of this position is clearly subject to likely revision). In addition, the normal US rules for gifts and bequests apply.