



September 2015

## GT Bulletin - IRS Proposes Rules for Tax on Gifts From Expatriates

On Sept. 9, 2015, the IRS issued long-awaited guidance on the 2008 legislation relating to gifts to United States persons made by former U.S. citizens and long-term residents who expatriate on or after June 17, 2008, and are classified as “covered expatriates.”<sup>1</sup> The guidance came in the form of proposed regulations, which will be effective only after final regulations, potentially incorporating changes made as a result of further analysis and responses to comments, are published in the Federal Register.

The statutory provision that imposes the tax and is interpreted by these proposed regulations is Section 2801 of the Code.<sup>2</sup> Under that section, the applicable tax is not imposed on the donor, which is the typical case under the Code, but rather on the donee, in this case, the U.S. taxpayer<sup>3</sup> recipient of the gift.

***Some of the key provisions and definitions include:***

<sup>1</sup> Section 2801 of the Code defines “covered expatriate” by reference to the section 877A(g)(1) definition of that term. Section 877A(g)(1) generally provides that an individual who expatriates on or after June 17, 2008, is a covered expatriate if, on the expatriation date, (1) the individual's average annual net income tax liability is greater than \$124,000 (indexed for inflation) for the previous five taxable years, (2) the individual's net worth is at least \$2,000,000 (not indexed), or (3) the individual fails to certify under penalty of perjury that he or she has complied with all U.S. tax obligations for the five preceding taxable years. The proposed regulations provide that, if an expatriate meets the definition of a covered expatriate, the expatriate is considered a covered expatriate for purposes of section 2801 at all times after the expatriation date, except during any period beginning after the expatriation date during which such individual is subject to United States estate or gift tax as a U.S. citizen or resident.

<sup>2</sup> All references to the “Code” are to the Internal Revenue Code of 1986, as amended.

<sup>3</sup> For purposes of Section 2801, a U.S. taxpayer is defined as a person who is a U.S. citizen or a U.S. resident at the time of the receipt of the gift.

### Definition of U.S. Resident:

United States persons potentially liable for the Section 2801 are United States citizens and United States residents, as well as domestic trusts.

The proposed regulations define<sup>4</sup> the term “citizen or resident of the United States” as an individual who is a citizen or resident of the United States under the estate and gift tax rules of the Code. Accordingly, whether an individual is a “resident” is based on *domicile* in the United States, notwithstanding that section 877A of the Code, the income tax provision that defines the term “covered expatriate,” adopts the income tax definition of that term set forth in Section 7701(b) of the Code and accompanying regulations. That definition includes many persons who do not have United States domiciles, but satisfy various other tests set out in those provisions.

Definition of “Covered Gift”: For purposes of the 2008 legislation, a “covered gift or bequest” is generally defined as any property acquired by gift from a covered expatriate or by reason of the death of the covered expatriate. There are important exceptions for transfers to certain spouses and charities, or which are reported on timely filed gift or estate tax returns by the covered expatriate or his personal representatives.

Transfers in trust: If the covered gift is made to a domestic trust, such trust is treated as a United States citizen, and the tax on such gift is paid by the domestic trust. In the case of a covered gift made to a foreign trust, any transfer from such trust (whether from income or corpus) to a United States citizen or resident is taxed in the same manner as if such distribution were a covered gift or bequest. However, the regulations provide a complex exception, with a number of conditions, limitations, and possible penalties, under which trusts treated as foreign under pre-existing rules may elect to be treated as domestic solely for purposes of Section 2801. In that case, the transfer to the trust is considered the taxable event, rather than the distribution of property from the trust to a beneficiary or beneficiaries.

### Liability for payment and computation of tax:

As indicated above, under normal rules the donor is liable for the payment of gift taxes, but under the Code and proposed regulations, the U.S. donee is responsible.

Section 28.2801-4 of the proposed regulations provides specific rules regarding the payment of the section 2801 tax, a potential income tax deduction for gifts that are also included in income by the recipient, and the calculation of tax when some funds are in a trust are attributable to gifts by a covered expatriate or his or her estate, and others are not.

Generally, the section 2801 tax is determined by reducing the total amount of covered gifts and covered bequests received during the calendar year by the dollar amount of the per-donee exclusion in effect under section 2503(b) of the Code for that calendar year (\$14,000 in 2015), and then multiplying the net amount by the highest estate or gift tax rate in effect during that calendar year. The resulting tax then is reduced by any gift tax paid to a foreign country with regard to those transfers.<sup>5</sup>

The tax is also imposed on distributions from foreign trusts attributable to covered gifts or covered bequests, received by a U.S. citizen or resident from a covered expatriate during a calendar year. Domestic trusts, as well as foreign trusts electing to be treated as domestic trusts for purposes of section 2801, are subject to tax under section 2801 in the same manner as if the trusts were U.S. citizens. Accordingly, the section 2801 tax is paid by the U.S. citizen or resident, domestic trust, or foreign trust electing to be treated as a domestic trust for purposes of section 2801 that receives the covered gift or covered bequest. For purposes of this part 28, references to a U.S. citizen or U.S. residents are considered to include a domestic trust and a foreign trust electing to be treated as a domestic trust for purposes of section 2801. Complex computations may be required where a foreign trust is funded in part by a covered expatriate and in part by other persons, and later makes distributions to its beneficiaries.

Planning opportunities: Persons considering expatriation should consider whether donative transfers should be made before they take that step. It will also be important for non-U.S. children and other beneficiaries of covered expatriates who may be planning to become U.S. domiciliaries to receive gifts before they actually change their domicile to the United States. Determining whether a foreign trust should make the special “domestic” election will also require careful

---

<sup>4</sup> Section 28.2801-2 of the proposed regulations defines terms for purposes of Section 2801.

<sup>5</sup> See Section 28.2801-4(e).

analysis of the benefits and costs of doing so.

This *GT Alert* was prepared by **Lawrence H. Heller** and **Norman H. Lane**. Questions about this information can be directed to:

- > [Lawrence H. Heller](#) | +1 310.586.7709 | [hellerl@gtlaw.com](mailto:hellerl@gtlaw.com)
- > [Norman H. Lane](#) | +1 310.586.6539 | [lanen@gtlaw.com](mailto:lanen@gtlaw.com)
- > Or your [Greenberg Traurig](#) attorney

<b>Albany</b> +1 518.689.1400	<b>Denver</b> +1 303.572.6500	<b>New York</b> +1 212.801.9200	<b>Shanghai</b> +86 (21) 6391 6633
<b>Amsterdam</b> + 31 (0) 20 301 7300	<b>Fort Lauderdale</b> +1 954.765.0500	<b>Northern Virginia</b> +1 703.749.1300	<b>Silicon Valley</b> +1 650.328.8500
<b>Atlanta</b> +1 678.553.2100	<b>Houston</b> +1 713.374.3500	<b>Orange County</b> +1 949.732.6500	<b>Tallahassee</b> +1 850.222.6891
<b>Austin</b> +1 512.320.7200	<b>Las Vegas</b> +1 702.792.3773	<b>Orlando</b> +1 407.420.1000	<b>Tampa</b> +1 813.318.5700
<b>Boca Raton</b> +1 561.955.7600	<b>London*</b> +44 (0) 203 349 8700	<b>Philadelphia</b> +1 215.988.7800	<b>Tel Aviv^</b> +972 (0) 3 636 6000
<b>Boston</b> +1 617.310.6000	<b>Los Angeles</b> +1 310.586.7700	<b>Phoenix</b> +1 602.445.8000	<b>Tokyo¤</b> +81 (0)3 4510 2200
<b>Chicago</b> +1 312.456.8400	<b>Mexico City+</b> +52 (1) 55 5029.0000	<b>Sacramento</b> +1 916.442.1111	<b>Warsaw~</b> +48 22 690 6100
<b>Dallas</b> +1 214.665.3600	<b>Miami</b> +1 305.579.0500	<b>San Francisco</b> +1 415.655.1300	<b>Washington, D.C.</b> +1 202.331.3100
<b>Delaware</b> +1 302.661.7000	<b>New Jersey</b> +1 973.360.7900	<b>Seoul∞</b> +82 (0) 2 369 1000	<b>Westchester County</b> +1 914.286.2900
			<b>West Palm Beach</b> +1 561.650.7900

*Tax Advice Disclosure: To ensure compliance with requirements imposed by the IRS under Circular 230, we inform you that any U.S. federal tax advice contained in this communication (including any attachments), unless otherwise specifically stated, was not intended or written to be used, and cannot be used, for the purpose of (1) avoiding penalties under the Internal Revenue Code or (2) promoting, marketing or recommending to another party any matters addressed herein*

*This Greenberg Traurig Client Advisory is issued for informational purposes only and is not intended to be construed or used as general legal advice nor as a solicitation of any type. Please contact the author(s) or your Greenberg Traurig contact if you have questions regarding the currency of this information. The hiring of a lawyer is an important decision. Before you decide, ask for written information about the lawyer's legal qualifications and experience. Greenberg Traurig is a service mark and trade name of Greenberg Traurig, LLP and Greenberg Traurig, P.A. \*Operates as Greenberg Traurig Maher LLP. \*\*Greenberg Traurig is not responsible for any legal or other services rendered by attorneys employed by the strategic alliance firms. +Greenberg Traurig's Mexico City office is operated by Greenberg Traurig, S.C., an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. ∞Operates as Greenberg Traurig LLP Foreign Legal Consultant Office. ^Greenberg Traurig's Tel Aviv office is a branch of Greenberg Traurig, P.A., Florida, USA. ¤Greenberg Traurig Tokyo Law Offices are operated by GT Tokyo Horitsu Jimusho, an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. ~Greenberg Traurig's Warsaw office is operated by Greenberg Traurig Grzesiak sp.k., an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. Certain partners in Greenberg Traurig Grzesiak sp.k. are also shareholders in Greenberg Traurig, P.A. Images in this advertisement do not depict Greenberg Traurig attorneys, clients, staff or facilities. No aspect of this advertisement has been approved by the Supreme Court of New Jersey. ©2015 Greenberg Traurig, LLP. All rights reserved.*