Delays by IRS in Processing International Voluntary Disclosure Cases: Expatriations Thwarted, Estate Taxes Imposed, and Solutions Explored

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I. Introduction

Delays are inevitable when dealing with any large bureaucracy, like the IRS. Most of the time, excessive slowness by the IRS can be mitigated by filing a "protective" claim for refund to safeguard a position while a tax dispute is pending, making a cash deposit (instead of a payment) to stop the accrual of liabilities, nullifying IRS actions because they were taken outside the applicable assessment or collection period, submitting a claim for abatement of interest due to unreasonable postponements of ministerial duties, and more. However, certain delays by the IRS have serious consequences, and few effective ways for taxpayers to remedy them. This has occurred recently in connection with the offshore voluntary disclosure program ("OVDP"), for which the IRS stopped accepting applications in September 2018. While the OVDP is in the process of winding down, the unique problems that it has caused for certain taxpayers remain. This article analyzes issues triggered by the slow processing of OVDP cases by the IRS, as well as potential solutions.

II. Setting the Scene

The following hypothetical scenario places the problems in context.

The taxpayer, who we will call Accidental American Antonio, was born in the United States solely because his parents were temporarily working here for a foreign company. His parents were not U.S. citizens, not Green Card holders, and not considered U.S. persons for tax purposes because of the "substantial presence" test or any other reason. The parents were always non-resident aliens, even during their short work-related stay in the United States. Accidental American Antonio was a U.S. citizen by birth, but he did not enjoy the country for long. Indeed, he permanently returned with his parents, to their home country of

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Spain, when Accidental American Antonio was merely a few months old.

Accidental American Antonio remained in Spain the rest of his life, studying, working, marrying, paying taxes, and otherwise contributing to local society. Through a combination of hard work and good luck, Accidental American Antonio prospered in Spain, building a successful business and amassing considerable wealth.

One day, Accidental American Antonio receives a letter from one of the Spanish banks with which he has an account asking him, and presumably the rest of its accountholders, to confirm that he is not a U.S. person. Accidental American Antonio knew that he had been born in the United States and lived there a few brief months in his infancy, but he believed that this had no bearing on tax issues. How could it? He had been reporting all income and paying all required taxes in Spain his entire life, he had no assets outside of Spain, he only received income in Spain, and the only contact that he had with the United States consisted of periodic trips (business and pleasure) that resulted in him spending a total of about 40 days per year there, in hotels. To be certain, Accidental American Antonio had no education, training, or skills with respect to the unique worldwide system of taxation and reporting in the United States.

Alarmed by the letter from the bank, Accidental American Antonio consults his Spanish accountant. He had never inquired about tax matters beyond Spain because, as far as he knew, Accidental American Antonio was a full-blooded Spaniard, with the Real Madrid jersey to prove it. It is at this meeting that Accidental American Antonio learns, for the first time, that he has always had worldwide tax and information-reporting duties with the IRS solely because he had the fortune (or misfortune, depending on one's perspective) of being born in the United States.

Accidental American Antonio is shocked, scared, and mad. His first instinct is to immediately expatriate from the United States to rid himself of these unwanted and unbeneficial U.S. duties. However, after allowing his Spanish accountant to do some initial research, Accidental American Antonio learns that he cannot expatriate without first rectifying his past non-compliance. Therefore, he develops a two-step plan, consisting of getting in good standing with the IRS *via* the most appropriate method, and then expatriating as soon as possible thereafter. Accidental American Antonio starts to implement this plan by hiring U.S. tax professionals, discussing the available disclosure programs and eligibility requirements, gathering all relevant tax and financial data in Spain, and participating in the OVDP.[1]

Accidental American Antonio, like most participants in the OVDP, hoped for a swift resolution of all matters. He was disappointed, though. After filing the application, receiving "pre-clearance" and then "preliminary acceptance" from the IRS, submitting all necessary U.S. returns and supporting documentation, and paying all required tax liabilities, the process stalled. It took many months for the OVDP case just to be assigned to a Revenue Agent. Then, the Revenue Agent did little more during the following months than demand that Accidental American Antonio "voluntarily" grant the IRS multiple extensions of the relevant assessment periods, by filing Forms 872 (*Consent to Extend the Time to Assess Tax*), or get "removed" from the OVDP for lack of cooperation.[2]

Unfortunately for Accidental American Antonio and his family, he died unexpectedly during this multi-year delay by the IRS in advancing the OVDP process. Thus, at the time of his death, Accidental American Antonio could not confirm U.S. tax compliance for the most recent five years because the IRS had not issued a Form 906 (Closing Agreement) under the OVDP. Therefore, he was unable to expatriate, and he was thus subject to U.S. estate tax on the value of his worldwide assets, including those in Spain.

III. Potential Solution

Taxpayers, like Accidental American Antonio, often face intransigence from the IRS in these types of situations. Applying a black-and-white thought process, the IRS focuses on just one fact; that is, Accidental American Antonio was a U.S. citizen at the time of his death, such that he must pay U.S. estate tax on his sizable assets in Spain. One novel strategy for countering the IRS's rigid stance would be for the estate of Accidental American Antonio ("Estate") to file a request for a private letter ruling ("PLR") under Reg. §301.9100-3 to effectively make a retroactive Code Sec. 877A election, thereby allowing Accidental American Antonio to expatriate from the United States *before* his death as a result of the excessive delays by the IRS in processing his OVDP case. This article examines, below, three rationales on which such a PLR request might be based.

A. First Rationale—Code Sec. 877A and Reg. §301.9100-3

1. Extensions to File Elections

a. In General. Reg. §§301.9100-1 through 301.9100-3 are the IRS's procedural and administrative regulations allowing taxpayers to obtain extensions of time to make certain elections and apply for tax relief. In formulating the

standards for granting an extension, the IRS identified two policies that must be balanced. The first policy is promoting efficient tax administration by providing limited time periods for taxpayers to choose among alternative tax treatments and encouraging prompt tax reporting. The second policy is "permitting taxpayers that are in reasonable compliance with the tax laws to minimize their tax liability by collecting from them only the amount of tax they would have paid if they had been fully informed and well advised."[3]

Reg. §§301.9100-1 through 301.9100-3 contemplate three types of "elections." First, the term "regulatory election" means one whose due date is set by a regulation published in the Federal Register or a revenue ruling, revenue procedure, notice, or announcement published in the Internal Revenue Bulletin.[4] Second, the term "statutory election" means one whose due date is contained in a statute.[5] Third, the term "election" is broadly defined as an application for relief from tax or a request to adopt, change, or retain an accounting method or accounting period. The phrase "application for relief from tax" has been defined by the IRS to possess its ordinary and usual meaning, and includes actions taken by a taxpayer (other than elections) in compliance with a regulation, revenue ruling, revenue procedure, or published notice, at least in part to avoid the imposition of taxes.[6]

If the deadline for a particular election has passed, taxpayers may request an extension of time to file a late election under the requirements of Reg. §301.9100-3.

b. Relief Under Reg. §301.9100-3. Extension requests "*will be granted*" by the IRS when the taxpayer provides the evidence (including the requisite affidavits) to establish to the satisfaction of the IRS that the following two factors have been met: (i) the taxpayer acted reasonably and in good faith, and (ii) granting the extension will not prejudice the interests of the U.S. Government.[7] These two factors are examined below.

i. First Factor—Reasonably and in Good Faith. With respect to the first factor, a taxpayer is generally deemed to have acted reasonably and in good faith if one of the following is true:

- The taxpayer requests relief before the IRS discovers the failure to make the regulatory election; *or*
- The taxpayer failed to make the election because of intervening events beyond the taxpayer's control; *or*
- The taxpayer failed to make the election because, after exercising reasonable diligence (taking into account the taxpayer's experience and the complexity of the return or issue), the taxpayer was unaware of the necessity for the election; *or*
- The taxpayer reasonably relied on the written advice of the IRS; *or*
- The taxpayer reasonably relied on a qualified, informed tax professional, and the tax professional failed to make, or advise the taxpayer to make, the election.[8]

Notwithstanding the general rules described above, a taxpayer will be deemed *not* to have acted reasonably and in good faith if any of the following is true:

- The taxpayer seeks to alter a return position for which an accuracy-related penalty has been or could be imposed under Code Sec. 6662 at the time the taxpayer requests relief (taking into account any "qualified amended return" filed), and the new position requires or permits a regulatory election for which relief is requested; or
- The taxpayer was informed in all material respects of the required election and related tax consequences, but chose not to file the election; or
- The taxpayer uses hindsight in requesting relief. In other words, if specific facts have changed, since the due date for making the election, that make the election advantageous to a taxpayer, the IRS will not ordinarily grant relief. In such cases, the IRS will grant an extension request only when the taxpayer provides strong proof that the taxpayer's decision to seek relief did not involve hindsight.[9]

ii. Second Factor—Government's Interests Not Be Prejudiced. With respect to the second element, the IRS applies two standards in determining whether the interests of the U.S. Government would be prejudiced by the granting of an extension request.[10] First, the interests of the U.S. Government are prejudiced if granting the extension request would result in a taxpayer (or taxpayers) having a lower tax liability in the aggregate, for all taxable years affected by the election, than the taxpayer (or taxpayers) would have had if the election had been timely made, taking into account the time value of money.[11] Second, the interests of the U.S. Government are ordinarily prejudiced if the taxable year in which the regulatory election should have been made, or any taxable years that would have been affected by the election had it been timely made, are closed by the general period of limitations on assessment before the taxpayer receives an IRS ruling granting the extension request.[12]

2. Overview of Expatriation and Code Sec. 877A

a. Relevant History. In 1966, Congress enacted the U.S. expatriation tax rules to discourage U.S. citizens

from moving abroad and surrendering their citizenship in order to avoid paying U.S. taxes.[13] The specific tax provisions created to further this congressional objective were Code Secs. 871 and 877.[14] Code Sec. 877 originally imposed taxes on certain U.S. individuals who surrendered their U.S. citizenship within the prior 10 years with a tax-avoidance purpose. Later, in 1966, Congress revised Code Sec. 877 to cover long-term residents ("LTRs") who terminated their residency, and imposed information-reporting requirements under Code Sec. 6039G.[15] The IRS provided guidance about the rules of Code Sec. 877 in Notice 97-19.[16] In 2004, Congress again revised Code Sec. 877 based on various recommendations from the Joint Committee on Taxation.[17] Finally, in 2008, Congress made its final revision thus far by replacing Code Sec. 877 with a new provision, Code Sec. 877A.[18] The IRS has not yet issued regulations concerning Code Sec. 877A, and the main guidance is found in Notice 2009-85.[19] Code Sec. 877A is described in more detail below.

b. Code Sec. 877A Generally. Code Sec. 877A generally imposes a mark-to-market tax regime on certain taxpayers who decide to "expatriate." These taxpayers generally must pretend to sell all their property at fair market value the day before their "expatriation date" and pay the corresponding U.S. income taxes on any gains.[20] This so-called "exit tax" applies only to "covered expatriates."[21] Thus, in order for the "exit tax" to apply, a taxpayer must be not only an "expatriate," but also a "covered expatriate."

c. Expatriate/U.S. Citizen. The term "expatriate" means either a U.S. citizen who relinquishes his citizenship, or an LTR who ceases to be a "lawful permanent resident" of the United States.[22] The IRS's Instructions to Form 8854 (*Initial and Annual Expatriation Statement*) contain the following guidance determining the act of expatriation: "You are considered to have expatriated on the date you relinquished your citizenship (in the case of a former citizen) or terminated your long-term residency status (in the case of a former U.S. resident)."

A U.S. citizen is treated as relinquishing his U.S. citizenship on the earliest of the following dates: (i) The individual renounces his U.S. nationality before a diplomatic or consular office[23]; (ii) The individual furnishes to the Department of State a signed statement of voluntary relinquishment of U.S. nationality[24]; (iii) The Department of State issues to the individual a certificate of loss of U.S. nationality; or (iv) A U.S. court cancels a naturalized citizen's certificate of nationalization.[25]

d. Expatriation Date. The "expatriation date" for a U.S. citizen is the date he relinquishes U.S. citizenship under one of the four methods described above.[26]

e. Covered Expatriate and Exceptions. For purposes of Code Sec. 877A, the term "covered expatriate" means an "expatriate" who either has an average annual U.S. income tax liability for the past five years of a particular amount ("Tax Liability Test"), *or* who has a net worth exceeding a certain threshold ("Net Worth Test"), *or* who cannot certify to the IRS that he has been in full U.S. tax compliance for the past five years ("Certification Test").[27] If the "expatriate" fails even one of the preceding three tests, then he will be considered a "covered expatriate."

f. Exceptions to Covered Expatriate Status. There are two exceptions to classification as a "covered expatriate." An individual shall *not* be treated as a "covered expatriate," and thus shall *not* be subject to exit tax, if that individual *either*:

- Became at birth both a U.S. citizen and a citizen of another country and, as of the expatriation date, continues to be a citizen of, and is taxed as a resident of, such other country, and has not been a U.S. resident because of the "substantial presence" test for more than 10 taxable years during the 15-taxable-year period ending with the taxable year during which expatriation occurs,[28] *or*
- The individual's relinquishment of U.S. citizenship occurs before such individual attains age 18 and the individual has not been a U.S. resident for more than 10 taxable years before the date of relinquishment.[29]

According to relevant congressional reports, the two exceptions set forth above were created in order to relieve from the exit tax individuals whose principal purpose for expatriating was not tax avoidance and who were previously unaware of their status as U.S. citizens.[30] Those falling into this category are often referred to as "accidental Americans."

g. Requirement to File Form 8854. U.S. citizens who relinquish their U.S. citizenship, and who are subject to the Code Sec. 877A rules (even if they are exempt from the exit tax), must file a Form 8854 either (i) as soon as possible after expatriation, or (ii) by the due date for the first Form 1040NR (*U.S. Nonresident Alien Income Tax Return*).[31] As explained above, U.S. citizens remain subject to tax as U.S. citizens until they formally relinquish their citizenship with the appropriate U.S. Government authorities or file Form 8854.[32]

The need to file Form 8854 is explained in various sources. For instance, Code Sec. 6039G(a) generally states that any individual to whom Code Sec. 877A applies for any taxable year shall provide a statement (*i.e.*, Form 8854) for such year, which includes the basic information described in the statute, plus "such other information as the [IRS] may prescribe."[33] The IRS has not issued regulations yet, so taxpayers must look to Notice 2009-85.[34] It explains that a "covered expatriate" is an expatriate who meets the Tax Liability Test, who meets the Net Worth Test, or who cannot meet the Certification Test. It expands on the third aspect, as follows:

> A taxpayer is a covered expatriate if he "fails to certify, under penalties of perjury, compliance with all U.S. federal tax obligations for the five taxable years preceding the taxable year that includes the expatriation date, including, but not limited to, obligations to file income tax, employment tax, gift tax, and information returns, if applicable, and obligations to pay all relevant tax liabilities, interest, and penalties (the 'certification test'). *This certification must be made on Form 8854 and must be filed by the due date of the taxpayer's federal income tax return for the taxable year that includes the day before the expatriation date*."[35]

Notice 2009-85 contains additional language confirming the need for taxpayers to file Form 8854 to demonstrate requisite U.S. tax compliance during the relevant period. Below are a few of the many instances:

> Certification of compliance with tax obligations for preceding five years. *All U.S. citizens who relinquish their U.S. citizenship … must file Form 8854* in order to certify, under penalties of perjury, that they have been in compliance with all federal tax laws during the five years preceding the year of expatriation. Individuals who fail to make such certification will be treated as covered expatriates within the meaning of Code Sec. 877A(g), whether or not they also meet the tax liability test or the net worth test.[36]

> **Example 22.** A relinquishes his citizenship on December 1, 2009. Under Code Sec. 877A(a)(1), A is deemed to have sold all of A's property on November 30, 2009, the day before the expatriation date. *A must certify on a Form 8854 filed with Form 1040NR for the 2009 taxable year that A has complied with all of A's federal tax obligations for 2004 through 2008*. For the portion of the taxable year that includes the day before the expatriation date, A must attach a Form 1040 (or other schedule, as provided in Reg. §1.6012-1(b)(2)(ii)(b)) to his Form 1040NR. If A does not file Form 8854, A will be treated as a covered expatriate, even if A does not meet the tax liability test or the net worth test.[37]

Like Notice 2009-85, Form 8854 itself clarifies that filing is mandatory for U.S. citizens desiring to leave the United States behind. Form 8854 poses the following question: "Do you certify under penalties of perjury that you have complied with all of your tax obligations for the 5 preceding tax years (see instructions)?"[38] Taxpayers uncertain about the question can turn to the corresponding instructions from the IRS, which state the following:

> Check the "Yes" box if you have complied with your tax obligations for the 5 tax years ending before the date on which you expatriated, including, but not limited to, your obligations to file income tax, employment tax, gift tax, and information returns, if applicable, and your obligations to pay all relevant tax liabilities, interest, and penalties. You will be subject to tax under Code Sec. 877A if you have not complied with these obligations, regardless of whether your average annual income tax liability or net worth exceeds the applicable threshold amounts.[39]

3. Expatriation and Relief Under Reg. §301.9100-1 et seq.

Notice 97-19, which was the guidance issued by the IRS in connection with former Code Sec. 877, provided taxpayers the ability to obtain relief under Reg. §301.9100-1 *et seq*. for certain U.S. expatriation issues. Specifically, because Code Sec. 877 required not only relinquishing U.S. citizenship, but also doing so without a tax-avoidance purpose, many taxpayers filed PLR requests to rebut the presumption that they were leaving to avoid U.S. taxes. Since 1997, the IRS has reviewed over 250 such PLR requests.[40] Although the rules of Code Sec. 877 differ from the current rules of Code Sec. 877A, these PLRs support the notion that expatriation and the related tax issues constitute "elections" for purposes of Reg. §301.9100-1 *et seq*.

B. Second Rationale—Remedying Harm Caused by IRS

Harm caused to taxpayers by the IRS comes in many forms. The IRS, along with the Tax Court, have

recognized that although this can occur unintentionally, rules must be in place to afford a remedy to affected taxpayers. Specific types of harm to taxpayers caused by the IRS include, but are not limited to, (i) excessive tax assessments, (ii) delays, and (iii) disparate treatment among the same class of taxpayers. These three types of harm are discussed below.

1. Excessive Assessments

Generally, Code Sec. 6404(a) provides relief for taxpayers when the IRS assesses certain excessive, illegal, or erroneous tax liabilities.[41] Specifically, it authorizes the IRS to abate the portion of the assessment of any liability that is (i) excessive in amount, (ii) assessed after the expiration of the relevant statute of limitations, or (iii) erroneously or illegally assessed.[42]

The IRS generally defines "excessive" as "in excess of the correct tax liability."[43] The Tax Court has expanded this definition. For example, in 2003, the term excessive, as it relates to interest under Code Sec. 6404(a), was defined by the Tax Court in *H & H Trim & Upholstery Co., Inc.* to include not only interest that is erroneously or illegally assessed, but also interest that is in excess of what is fair and equitable under the circumstances.[44] The Tax Court stated in that case that "the plain meaning of the word 'excessive' takes into account the concept of what is fair, or more appropriate here, unfair."[45] Additionally, in 2005, the Tax Court discussed the issue of fairness in *The Law Offices of Michael B.L. Hepps*, confirming its earlier definition of "excessive" and explaining that it encompasses "a concept of fairness under all of the facts and circumstances."[46] Based on the preceding statutory language and Tax Court precedent, taxpayers are entitled to relief under Code Sec. 6404(a) not only when a liability is "in excess of the correct tax liability," but also when it is unfair under the particular circumstances.

2. Delay

a. Description of Code Sec. 6404(e) and Relevant Regulations. Code Sec. 6404(e)(1)(A) provides that the IRS may abate part or all of an assessment of interest under the following circumstances: (i) There was an error or delay; (ii) Such error or delay was unreasonable; (iii) The error was made, or the delay was caused, by an officer or employee of the IRS who was acting in his/her official capacity; (iv) The employee or officer was performing a ministerial act or a managerial act; (v) No significant aspect of the error or delay is attributable to the taxpayer or to a person related to the taxpayer; and (vi) The error or delay occurs after the IRS has contacted the taxpayer in writing with respect to a deficiency.[47] According to congressional reports and case law, Code Sec. 6404(e) was enacted to provide abatement in cases where it "would be widely perceived as grossly unfair" to penalize taxpayers and force them to pay interest resulting from an IRS delay.[48]

The term "ministerial act" means a procedural act that does not involve the exercise of judgment or discretion, and that occurs during the processing of a taxpayer's case after all the prerequisites to the act, such as conferences and review by supervisors, have taken place.[49] Issuing either a notice of deficiency or a notice and demand for payment after all procedural and substantive preliminaries have been completed constitutes a "ministerial act."[50] Similarly, once a tax liability has been determined, the assessment of the tax is a "ministerial act."[51]

The term "managerial act" means an administrative act that occurs during the processing of a taxpayer's case involving the temporary or permanent loss of records or the exercise of judgment or discretion relating to management of personnel.[52] For example, assigning only one employee to multiple cases such that review and settlement is extremely delayed constitutes a managerial error.[53] Code Sec. 6404(e) authorizes the IRS to abate interest during the period in which the settlement of a case is set aside as the result of a managerial error.[54]

b. Confirmation of Delays Caused by IRS. The Treasury Inspector General for Tax Administration ("TIGTA"), Taxpayer Advocate Service ("TAS"), and various tax practitioners have confirmed the delays caused by the IRS in connection with the voluntary disclosure programs, including the OVDP.

In its 2011 report to Congress, TAS stated its concern that the IRS's international tax administration was "one-sided" and focused on stepped-up enforcement without any corresponding increase in services.[55] The report described the voluntary disclosure initiatives as "poorly designed" and stated there was a lack of transparency and inadequate taxpayer service, caused at least in part by a lack of coordination with the international taxpayer service.[56] The TAS report called for "greater internal coordination and strategic, service wide direction of international taxpayer service."[57]

In 2012, TAS cited similar concerns. It expressed concern that the IRS had increased the burden and cost for taxpayers to correct past violations through voluntary disclosure programs and forced taxpayers to either opt in or opt out of the OVDP, which increased processing times. The "average" processing time was 550 days (*i.e.*, over a year and a half) for those opting out of the relevant

OVDP.[58] TAS also pointed out that many of the "benign actors" would have made "quiet disclosures" to correct their past, unintentional non-compliance more quickly and efficiently, but the IRS warned them not to do so.[59]

In 2013, TAS repeated its earlier concerns.[60] It cited even longer processing times than in the previous years for cases in the voluntary disclosure programs.[61] The already long delays were likely worsened by U.S. Government shutdowns in 2013.[62]

In 2014, TAS again reiterated its concerns about the voluntary disclosure programs, specifically the OVDP, and the effects on taxpayer rights in its report.[63] Again, the TAS emphasized that "IRS delays may have prompted some benign actors to accept disproportionate offshore penalties," and "OVDP cases generally remain unresolved for long periods."[64] Also, in 2014, TIGTA issued a report indicating that certain international training topics, used to educate IRS employees assigned to international cases, contained several inaccuracies that caused significant delays in resolving hundreds of cases.[65]

In 2016, TIGTA released a report appropriately titled "Improvements Are Needed in Offshore Voluntary Disclosure Compliance and Processing Efforts."[66] It stated that "under the current process, the IRS has taken nearly two years to complete 20,587 case certifications, with 241 cases taking at least four years to complete."[67] TIGTA explained that the reason for these excessive delays is "internal control weaknesses" and "poor communication between functions."[68] TIGTA recommended that the IRS centrally track and control taxpayer OVDP requests because the long processing time of the OVDP cases "may cause unnecessary burden on those taxpayers who are attempting to become compliant."[69]

3. Harm Caused by Disparate Treatment of Similarly-Situated Taxpayers

The IRS, through its complex set of rules and regulations, has caused certain U.S. taxpayers in similar situations to receive disparate treatment.

An individual is considered a "U.S. person" for federal tax purposes if (i) he is a U.S. citizen, (ii) he is a U.S. lawful permanent resident ("Green Card holder"),[70] or (iii) he has a "substantial presence" in the United States.[71] While taxpayers falling into all three categories are considered "U.S. persons," the options available to them for making an election to expatriate under Code Sec. 877A differ drastically.

Expatriation elections can be made for three types of U.S. persons under Code Sec. 877A. First, Green Card holders who are not LTRs, and who are residents of a foreign country, can simply make an election on Form 1040NR and Form 8833 (*Treaty-Based Return Position Disclosure*), pursuant to an applicable tax treaty, to expatriate from the United States for the entire year for which the forms are filed.[72] For example, Green Card holders for the past five years can file their 2015 Form 1040 by April 15, 2016, making an expatriation election under Code Sec. 877A, effective as of January 1, 2016. This essentially allows a "retroactive" expatriation election, and these individuals are not subject to the exit tax under Code Sec. 877A and are not required to file Form 8854.[73] Moreover, because these individuals would be considered to have elected to expatriate as of January 1, 2016, they would not be subject to U.S. federal estate tax if they died in 2016.

Second, individuals who are considered U.S. residents by virtue of their "substantial presence" in the United States are able to file a Form 1040NR attaching a statement establishing their U.S. residency termination date and effectively expatriate "retroactively" from the United States. For example, U.S. residents who had a "substantial presence" in the United States for the past five years can file their 2015 Forms 1040NR by April 15, 2016, with the attached statement, and the IRS will not treat them as a U.S. resident past January 1, 2016. These individuals are not subject to the exit tax under Code Sec. 877A and are not required to file Form 8854.[74] Moreover, because these individuals would be considered to have elected to expatriate as of January 1, 2016, they would not be subject to U.S. federal estate tax if they died in 2016.

Third, individuals who are U.S. citizens by birth, including "accidental Americans" who were born in the United States *solely* because their parents were in the United States temporarily, must formally relinquish U.S. citizenship and file a Form 8854 certifying that they have been U.S. tax compliant for the last five years. These requirements even apply to those U.S. citizens who have never resided in the United States for any substantial amount of time, as well as to those who have been specifically exempted from the exit tax under Code Sec. 877A.[75] As a result, these "accidental Americans" are forced to spend a considerable amount of time and money to become U.S. tax compliant for at least the most recent five years, generally through voluntary disclosure programs like the OVDP, in order to comply with the requirements for a valid expatriation for U.S. tax purposes. Moreover, these "accidental Americans" are deprived of the opportunity, which is available to many Green Card Holders and U.S. residents because of the "substantial presence" test, to effectively fix the expatriation date retroactively.

C. Third Rationale—Consistency with Tax Policy

The Obama Administration, made aware of the unfair treatment of accidental Americans, proposed legislation that would provide relief to dual-citizens meeting certain criteria.[76] Specifically, as part of the "revenue proposals" for 2016, the Obama Administration recognized that "individuals who became citizens of both the United States and another country at birth may have had minimal contact with the United States and may not learn until later in life that they are U.S. citizens."[77] It also acknowledged that, in order for these individuals to relinquish their U.S. citizenship in accordance with current law, many would be subject to significant U.S. taxes.[78] To correct this situation, the Obama Administration proposed an exception, which would exempt an individual from the exit tax under Code Sec. 877A if he meets the following criteria:

- Became at birth a U.S. citizen and a citizen of another country;
- At all times, up to and including the individual's expatriation date, has been a citizen of a country other than the United States;
- Has not been a U.S. resident because of the "substantial presence" test since attaining age 18;
- Has never held a U.S. passport, or has held a U.S. passport for the sole purpose of departing from the United States;
- Relinquishes his U.S. citizenship within two years after the later of January 1, 2016, or the date on which the individual learns that he is a U.S. citizen; and
- Certifies under penalties of perjury his compliance with all U.S. federal tax obligations that would have applied during the five years preceding the year of expatriation if the individual had been a non-resident alien during that period.[79]

The exception proposed by the Obama Administration, above, is similar to the existing exceptions in Code Sec. 877A(g)(1)(B), which liberates from the exit tax those individuals who (i) became at birth a U.S. citizen and a citizen of another country, and as of the expatriation date, continues to be a citizen of, and is taxed as a resident of, such other country, and has not been a U.S. resident because of "substantial presence" for more than 10 taxable years during the 15-taxable-year period ending with the taxable year during which expatriation occurs, *or* (ii) the individual's relinquishment of U.S. citizenship occurs before such individual attains age 18 and the individual has not been a U.S. resident for more than 10 taxable years before the date of relinquishment.

The major difference in the proposal by the Obama Administration is the last requirement. The individual would only need to have complied with U.S. tax reporting for income from U.S. sources, if we were to assume that he were a non-resident alien, instead of a U.S. person. This means that the individual would not have needed to report worldwide income to the IRS, disclosed information about foreign assets, *etc*. Rather, he only would have been required to report to the IRS all income derived from U.S. sources, which likely would be $0 if he were truly an "accidental American." Thus, individuals electing to expatriate under the proposal by the Obama Administration would *not* need to participate in the OVDP, and would *not* be subject to detrimental multi-year delays by the IRS.

IV. Application of the Three Rationales Accidental American Antonio

A. First Rationale—Reg. §301-9100-3 Applies to Expatriation Elections

1. Expatriation Constitutes a "Regulatory Election"

As explained above, the IRS has discretion to grant a reasonable extension, pursuant to Reg. §301.9100-3, to make certain "regulatory elections."[80] Also, as explained above, the term "regulatory election" means one whose due date is set by a regulation published in the Federal Register or a revenue ruling, revenue procedure, *notice*, or announcement published in the Internal Revenue Bulletin.[81] The due date for expatriating by filing Form 8854 originates in Notice 2009-85, thereby making it a "regulatory election."[82] The relevant portion of the document, titled "Filing and Reporting Requirements," and featuring subsections called "Initial Filing Obligations for the Year of Expatriation" and "Time and Manner of Filing Form 8854," confirms that taxpayers must utilize Notice 2009-85 to determine due dates and other aspects of compliance:

> Background … The Treasury Department and the IRS intend to issue regulations under Code Sec. 877A that will require covered expatriates who are

liable for tax under Code Sec. 877A to report certain information in connection with their expatriation. *Until the issuance of such regulations, covered expatriates must report information in compliance with the rules set forth in this notice and any other information that the IRS may require*.

Because the election to expatriate under Code Sec. 877A is a "regulatory election," Accidental American Antonio can request an extension under Reg. §301.9100-3.

2. Analysis of Standards

Extension requests "*will be granted*" by the IRS when the taxpayer demonstrates that the following two factors have been met: (i) the taxpayer acted reasonably and in good faith, and (ii) granting the extension will not prejudice the interests of the U.S. Government.[83] Both of these elements are met in Accidental American Antonio's case.

a. First Factor—Acting Reasonably and in Good Faith. A taxpayer generally is deemed to have acted reasonably and in good faith if any one of five factors is met.[84] Here, three of these factors have been satisfied.

First, Accidental American Antonio is requesting an extension to make the expatriation election with respect to Code Sec. 877A *before* the IRS has discovered his failure to make the election. To date, the IRS has not communicated with Accidental American Antonio or his Estate about this issue.

Second, Accidental American Antonio failed to make the election because of events beyond his control, including (i) the IRS requirement that he participate in a voluntary disclosure program to rectify his past, unintentional U.S. tax non-compliance, (ii) his inability to make an election under Code Sec. 877A because of the requirement on Form 8854 for him to certify to full U.S. tax compliance, as a U.S. citizen (as opposed to as a non-resident alien) for the last five years *before* expatriating, (iii) the IRS's multi-year delay in processing his OVDP submission, and (iv) his unexpected and untimely death while waiting for the IRS to process his OVDP submission, conduct the required certification/audit/review of his Voluntary Disclosure Packet, and, ultimately, issue the Form 906 (*i.e.*, Closing Agreement) confirming tax compliance during the OVDP period.

Third, Accidental American Antonio failed to make the expatriation election before his untimely death because, even after exercising reasonable diligence to maintain tax compliance in his home country, Spain, for his entire life, Accidental American Antonio was unaware of his U.S. tax non-compliance, the steps necessary to rectify it, and the ability and need to make an expatriation election under Code Sec. 877A. As discussed above, Accidental American Antonio was unaware of his U.S. tax non-compliance until shortly before he started participating in the OVDP because (i) he is a U.S. citizen solely because he was born here by happenstance, (ii) his entire family consists of Spanish citizens and residents, (iii) he had been reporting all income and paying all required taxes in Spain his entire life, (iv) he had no assets outside of Spain, (v) he only received income in Spain, (vi) the only contact that he had with the United States was related to short-term business trips, and (vii) had no education, training, or skills with respect to the unique worldwide system of taxation and reporting in the United States.

After filing the application for the OVDP, receiving "pre-clearance" and then "preliminary acceptance" from the IRS, submitting all necessary U.S. returns and supporting documentation, and paying all required tax liabilities, the process stalled for Accidental American Antonio. It took many months for the OVDP case just to be assigned to a Revenue Agent. Then, the Revenue Agent did little more during the following months than demand that Accidental American Antonio grant the IRS extensions of the relevant assessment periods.

Accidental American Antonio died during this extended waiting period. In other words, due to the delay by the IRS in advancing the OVDP process and thus confirming U.S. tax compliance by Accidental American Antonio for the most recent five years by issuing a Form 906 (*i.e.*, Closing Agreement), Accidental American Antonio was unable to expatriate, as planned, before his unexpected death. As a result, Accidental American Antonio was considered a U.S. citizen upon death, and is detrimentally subjected to U.S. estate tax.

Notwithstanding that Accidental American Antonio meets the general rules described above, Reg. §301.9100-3(b)(3) provides that a taxpayer will still be deemed not to have acted reasonably and in good faith if any one of three factors is met. Here, none of these factors is present. First, Accidental American Antonio is not seeking to alter a return position for which an accuracy-related penalty under Code Sec. 6662 has been or could be imposed because an expatriation election under Code Sec. 877A is not subject to such penalties, and, in all events, there was reasonable cause for the oversight and Accidental American Antonio acted in good faith.[85] Second, Accidental American Antonio was *not* informed in all material respects about the

expatriation election under Code Sec. 877A and simply opted not to make it. As an "accidental American," he was unaware of the expatriation election until just before applying for the OVDP, and he would not be eligible to make the expatriation election until he completed the OVDP and received the fully-executed Form 906 (*i.e.*, Closing Agreement) from the IRS. Third, Accidental American Antonio is not using hindsight in requesting an extension.

b. Second Factor—Granting the Extension Will Not Cause Prejudice. Even if a taxpayer acts reasonably and in good faith, an extension will not be granted if the interests of the U.S. Government would be prejudiced by doing so.[86] Allowing Accidental American Antonio to make an expatriation election before his death will not prejudice the U.S. Government's interests because it would not result in a lower tax liability in the year affected by the election if the election had been made when Accidental American Antonio discovered his unintentional U.S. tax non-compliance and began participating in the OVDP. Accidental American Antonio would have been considered a non-resident alien at the time of death either way.

B. Second Rationale—Curing Harm Caused by IRS Delay

Failing to grant Accidental American Antonio's request would result in an excessive tax liability. If the IRS were not to allow Accidental American Antonio to make an expatriation election, the tax imposed upon death would be excessive under Code Sec. 6404(a), as expanded and clarified by the Tax Court in *H & H Trim & Upholstery Co., Inc.* and *The Law Offices of Michael B.L. Hepps*.

In addition, the IRS should grant relief because the inability of Accidental American Antonio to make an expatriation election back when he began the OVDP is direct result of the delays caused by the IRS. The following requirements under Code Sec. 6404(a) have been met in Accidental American Antonio's case: (i) There was an error or delay; (ii) Such error or delay was unreasonable; (iii) The error was made, or the delay was caused, by the IRS acting in its official capacity; (iv) The IRS was performing a ministerial act or a managerial act of assigning an OVDP case to a Revenue Agent and having such Revenue Agent process it; (v) No significant aspect of the error or delay is attributable to Accidental American Antonio or to a person related to him; and (vi) The error or delay occurred after Accidental American Antonio voluntarily approached the IRS regarding a deficiency, and the IRS confirmed that Accidental American Antonio was participating in the OVDP by sending a "pre-clearance letter" and a "preliminary acceptance letter" for the OVDP. As explained earlier in this PLR request, numerous reports from TIGTA and TAS describe the excessive delays by the IRS in processing cases submitted by taxpayers, like Accidental American Antonio, under the OVDP. Furthermore, imposing the additional tax on Accidental American Antonio resulting from the excessive delays by the IRS "would be widely perceived as grossly unfair."[87]

C. Third Rationale—Disparate Treatment of Taxpayers

As explained above, an individual can be considered a "U.S. person" for federal tax purposes if he is a U.S. citizen, he is a Green Card holder, or he has a "substantial presence" in the United States. Taxpayers falling into all three categories are considered "U.S. persons," but the options available to them for making an election to expatriate under Code Sec. 877A differ drastically. Also, as explained above, many Green Card holders, as well as individuals who are considered U.S. residents by virtue of their "substantial presence" in the United States, can essentially file a retroactive expatriation election (*i.e.*, filing by April 15 of Year 2 to confirm expatriation as of December 31 of Year 1), which might allow them to avoid being subject to the U.S. estate tax if they died in Year 2.

By contrast, "accidental Americans," like Accidental American Antonio, who were born in the United States *solely* because their parents were in the United States temporarily, must formally relinquish U.S. citizenship and file a Form 8854 certifying that they have been U.S. tax compliant for the last five years. Consequently, these "accidental Americans" are forced to spend a considerable amount of time, effort, and money to become U.S. tax compliant for at least the most recent five years, generally through voluntary disclosure programs like the OVDP, in order to comply with the requirements for a valid expatriation for U.S. tax purposes. Moreover, these "accidental Americans" are deprived of the opportunity, available to many Green Card holders and U.S. residents because of "substantial presence," to effectively fix the expatriation date retroactively. The IRS should grant relief to Accidental American Antonio in order to avoid this disparate, unjust treatment, of similarly-situated taxpayers.

Granting relief to Accidental American Antonio under Reg. §301.9100-3 would also be consistent with the recent legislative proposal by the Obama Administration for "accidental Americans." The Obama Administration

proposed an exception, which would exempt individuals from the exit tax under Code Sec. 877A, if they meet the following criteria: Became at birth both a U.S. citizen and a citizen of another country; At all times, up to and including the individual's expatriation date, has been a citizen of a country other than the United States; Has not been a U.S. resident because of "substantial presence" since attaining age 18; Has never held a U.S. passport, or has held a U.S. passport for the sole purpose of departing from the United States; Relinquishes his U.S. citizenship within two years after the later of January 1, 2016, or the date on which the individual learns that he is a U.S. citizen; and Certifies under penalties of perjury his compliance with all U.S. tax obligations that would have applied during the five years preceding the year of expatriation, if the individual had been a non-resident alien (instead of a U.S. person) during that period.[88]

XII. Conclusion

As this article demonstrates, long delays by the IRS in processing and concluding OVDP cases can be deadly for taxpayers, and then financially deadly for their estates after that. Given that hundreds of thousands of taxpayers applied for the OVDP, a large number of cases resulted in multi-year delays by the IRS, and many disclosures were made by elderly taxpayers, the events surrounding Accidental American Antonio cannot be singular. Taxpayers, estates, and advisors in similar situations might implement the strategies and legal theories addressed in this article, because being subjected to the U.S. estate tax, after pro-actively approaching the IRS to rectify past non-compliance and then immediately expatriate (on a tax-free basis), is a bitter pill to swallow.

ENDNOTES

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1 Please note that, despite the fact that his violations were non-willful, Accidental American Antonio was ineligible for all voluntary disclosure programs, other than the OVDP: (i) He was ineligible for the Streamline Foreign Offshore Procedure because he was not physically outside the United States for at least 330 full days during one of the three most recent closed years; (ii) He was ineligible for the Streamline Domestic Offshore Procedure because he did not file a timely yet inaccurate or incomplete Form 1040 for the past three closed years; and (iii) He was ineligible for the Delinquent International Information Return Submissions Procedure and the Delinquent FBAR Submissions Procedure because his sole violation was not the failure to file these types of returns, as he also had unreported income.

2 Revenue Agents generally make such demands for Forms 872 pursuant to the Frequently Asked Questions ("FAQs") issued by the IRS as guidance for the OVDP. FAQ #43 states the following: "Will I be required to complete and sign agreements to extend the period of time to assess tax (including tax penalties) and to assess FBAR penalties for any years that are otherwise set to expire while my voluntary disclosure is being processed by the IRS? Yes. Properly completed and signed agreements to extend the period of time to assess tax (including tax penalties) and to assess FBAR penalties are required to be submitted as part of the voluntary disclosure package."

3 T.D. 8742, 62 FR 68168.

4 Reg. §301.9100-1(b).

5 Reg. §301.9100-1(b).

6 *See generally* GCM 38316 (Mar. 21, 1980).

7 Reg. §301.9100-1(c); Reg. §301.9100-3(a).

8 Reg. §301.9100-3(b)(1).

9 Reg. §301.9100-3(b)(3).

10 Reg. §301.9100-3(c).

11 Reg. §301.9100-3(c)(1)(i).

12 Reg. §301.9100-3(c)(1)(ii).

13 HR Rep. No. 1450, 89th Cong., 2d Sess. 22–23 (1966); S. Rep. No. 1707, 89th Cong., 2d Sess. 28–29 (1966); *See also W.N. Dillon*, 56 TC 228, Dec. 30,768 (1971) (husband and wife expatriated, in an effort to avoid paying U.S. taxes, after husband became involved in lucrative oil-production scheme but before he was paid from such scheme).

14 Act Sec. 103(f)(1) of Foreign Investors Tax Act of 1966.

15 Act Sec. 511 of Health Insurance Portability and Accountability Act of 1996; HR Rep. No. 496, pt. 1, 104th Cong., 2d Sess. 148 (1996); Joint Committee on Taxation, 104th Cong., 2d Sess., General Explanation of Tax Legislation Enacted in the 104th Congress, at 378–379 (1996).

16 Notice 97-19, 1997 CB 394 (Feb. 24, 1997).

17 American Jobs Creation Act of 2004, Sections 804(a) through (c), and Section 804(e) (June 3, 2004); Joint Committee on Taxation, Review of the Present-Law Tax and Immigration Treatment of Relinquishment of Citizenship and Termination of Long-Term Residency, at 103–137 (JCS-2-03, Feb. 2003); S. Rep. No. 192, 108th Cong., 1st Sess. 148–149 (2003); HR Rep. No. 548, pt. 1, 108th Cong., 2d Sess. 253–254 (2004); HR Conf. Rep. No. 755, 108th Cong., 2d Sess. 568–580 (2004).

18 P.L. 110-245, 122 Stat. 1624 HR 6081, 110th Cong., 2d Sess.; Act Sec. 301 of Heroes Earnings Assistance and Relief Tax Act of 2008 (June 17, 2008).

19 Notice 2009-85, 2009-45 IRB 598 (Oct. 15, 2009).

20 Code Sec. 877A generally applies to individuals who cease to be U.S. citizens or lawful permanent residents on or after June 17, 2008. *See* Notice 2009-85.

21 Code Sec. 877A(a)(1).

22 Code Sec. 877A(g)(2).

23 8 USC §1481(a)(5).

24 8 USC §1481(a)(1)-(4).

25 Notice 2009-85, Section 2(A).

26 Code Sec. 877A(g)(2)(B).

27 Code Sec. 877A(g)(1)(A); Notice 2009-85, Section 2(A); Code Sec. 877(a)(2)(A), (B) and (C).

28 Code Sec. 877A(g)(1)(B)(i)(I) and (II).

29 Code Sec. 877A(g)(1)(B)(ii)(I) and (II).

30 S. Rep. No. 1707, 89th Cong., 2d Sess. 28–29 (1966).

31 Code Sec. 6039G(a).

32 Code Sec. 6039G; Instructions to Form 8854.

33 Code Sec. 6039G(b).

34 Notice 2009-85, 2009-45 IRB 598, Section 1—Overview. It states the following: "Section 877(i) provides that the Secretary shall prescribe such regulations as may be necessary or appropriate to carry out the purposes of Section 877A. The Treasury Department and the Internal Revenue Service (IRS) expect to issue regulations to incorporate the guidance set forth in this notice. Until such regulations are issued, taxpayers may rely on the guidance set forth in this notice."

35 Notice 2009-85, 2009-45 IRB 598, Section 2(A)—Individuals Covered—Definitions.

36 Notice 2009-85, 2009-45 IRB 598, Section 8(C)—Filing and Reporting Requirements—Form 8854.

37 Notice 2009-85, 2009-45 IRB 598, Section 8(C)—Filing and Reporting Requirements—Form 8854.

38 Form 8854, Part IV, Section A, Question 6.

[39] 2011 Instructions for Form 8854, p. 4.

[40] LTR 200602003; LTR 200552008; LTR 200550009; LTR 200547002; LTR 200542017; LTR 200537024; LTR 200537023; LTR 200531002; LTR 200525011; LTR 200521016; LTR 200521015; LTR 200520024; LTR 200520016; LTR 200519010; LTR 200518019; LTR 200517008; LTR 200517007; LTR 200516007; LTR 200515001; LTR 200514007; LTR 200510021; LTR 200510019; LTR 200510006; LTR 200510005; LTR 200510004; LTR 200510003; LTR 200510001; LTR 200509004; LTR 200508010; LTR 200508006; LTR 200506001; LTR 200504023; LTR 200502038; LTR 200452014; LTR 200452008; LTR 200451018; LTR 200448026; LTR 200448025; LTR 200442004; LTR 200440006; LTR 200439040; LTR 200438037; LTR 200434011; LTR 200433013; LTR 200428018; LTR 200426016; LTR 200426009; LTR 200422049; LTR 200422048; LTR 200422022; LTR 200419019; LTR 200418037; LTR 200415005; LTR 200414034; LTR 200414032; LTR 200407010; LTR 200407009; LTR 200406012; LTR 200403047; LTR 200403045; LTR 200403032; LTR 200351004; LTR 200351004; LTR 200346010; LTR 200336024; LTR 200335027; LTR 200335016; LTR 200332024; LTR 200330036; LTR 200329034; LTR 200329033; LTR 200329025; LTR 200328031; LTR 200328028; LTR 200326033; LTR 200324021; LTR 200323030; LTR 200323027; LTR 200320021; LTR 200318055; LTR 200318054; LTR 200318041; LTR 200314026; LTR 200314025; LTR 200312014; LTR 200310020; LTR 200310008; LTR 200309025; LTR 200309023; LTR 200307083; LTR 200306037; LTR 200306036; LTR 200304008; LTR 200304007; LTR 200250025; LTR 200247041; LTR 200246025; LTR 200245033; LTR 200242012; LTR 200242011; LTR 200241010; LTR 200240041; LTR 200239027; LTR 200238015; LTR 200238014; LTR 200235003; LTR 200234060; LTR 200234046; LTR 200234036; LTR 200230021; LTR 200229012; LTR 200225011; LTR 200224024; LTR 200221037; LTR 200218028; LTR 200218024; LTR 200216021; LTR 200216020; LTR 200216019; LTR 200215044; LTR 200214013; LTR 200212019; LTR 200212018; LTR 200211033; LTR 200206029; LTR 200201029; LTR 200145021; LTR 200141042; LTR 200139021; LTR 200137030; LTR 200133039; LTR 200133026; LTR 200133024; LTR 200133023; LTR 200133022; LTR 200133021; LTR 200131025; LTR 200130024; LTR 200130023; LTR 200128041; LTR 200125059; LTR 200125016; LTR 200125015; LTR 200123056; LTR 200123038; LTR 200123037; LTR 200119046; LTR 200119044; LTR 200119043; LTR 200119042; LTR 200116035; LTR 200116034; LTR 200116030; LTR 200116029; LTR 200115024; LTR 200114003; LTR 200111005; LTR 200111002; LTR 200110006; LTR 200109044; LTR 200109009; LTR 200109008; LTR 200108037; LTR 200105054; LTR 200105051; LTR 200103067; LTR 200052033; LTR 200052030; LTR 200052029; LTR 200050031; LTR 200047016; LTR 200045018; LTR 200045017; LTR 200044037; LTR 200044036; LTR 200044027; LTR 200042023; LTR 200042021; LTR 200040030; LTR 200037038; LTR 200037037; LTR 200036044; LTR 200035032; LTR 200032036; LTR 200032032; LTR 200031036; LTR 200031035; LTR 200024038; LTR 200024033; LTR 200021024; LTR 200020047; LTR 200020025; LTR 200020021; LTR 200019030; LTR 200019025; LTR 200019008; LTR 200017024; LTR 200016010; LTR 200015036; LTR 200014006; LTR 200012077; LTR 200011045; LTR 200011043; LTR 200011042; LTR 200011039; LTR 200011038; LTR 200008041; LTR 200008035; LTR 200005032; LTR 200003035; LTR 200003020; LTR 200001034; LTR 199952064; LTR 199951030; LTR 199951019; LTR 199951016; LTR 199950038; LTR 199948033; LTR 199946019; LTR 199945044; LTR 199942014; LTR 199937029; LTR 199935074; LTR 199935072; LTR 199933026; LTR 199931027; LTR 199930019; LTR 199928028; LTR 199927032; LTR 199927013; LTR 199926031; LTR 199925022; LTR 199924035; LTR 199924034; LTR 199923043; LTR 199922047; LTR 199922021; LTR 199921030; LTR 199921029; LTR 199918038; LTR 199917042; LTR 199917041; LTR 199917037; LTR 199917035; LTR 199916038; LTR 199914029; LTR 199912015; LTR 199912014; LTR 9808016; LTR 9807025; LTR 9807021; LTR 9807020; LTR 9807019; LTR 9802026; LTR 9802021; LTR 9802013; LTR 9801049; LTR 9752007; LTR 9739025; and LTR 9724021.

[41] Code Sec. 6404(a).

[42] Code Sec. 6404(a).

[43] Reg. §301.6404-1(a).

[44] *H & H Trim & Upholstery Co., Inc.*, 85 TCM 747, Dec. 55,010(M), TC Memo. 2003-9.

[45] *H & H Trim & Upholstery Co., Inc.*, 85 TCM 747, Dec. 55,010(M), TC Memo. 2003-9.

[46] *The Law Offices of Michael B.L. Hepps*, 89 TCM 1429, Dec. 56,056(M), TC Memo. 2005-138.

[47] Code Sec. 6404(e)(1)(A).

[48] H. Rept. 99-226, (1985); S. Rept. 99-313, (1986); *R.J. Bucaro*, 98 TCM 388, Dec. 57,978(M), TC Memo. 2009-247.

[49] Reg. §301.6404-2(b)(2).

[50] *T. Corson*, 123 TC 202, 207–208, Dec. 55,716 (2004).

[51] *T. Corson*, 123 TC 202, 208, Dec. 55,716 (2004).

[52] Reg. §301.6404-2(b)(1).

[53] *T.F. Dadian*, 87 TCM 1344, Dec. 55,641(M), TC Memo. 2004-121.

[54] *T.F. Dadian*, 87 TCM 1344, Dec. 55,641(M), TC Memo. 2004-121.

[55] Taxpayer Advocate Service 2011 Annual Report to Congress, Vol. I, p. 178 (Dec. 31, 2011).

[56] Taxpayer Advocate Service 2011 Annual Report to Congress, Vol. I, p. 179 (Dec. 31, 2011).

[57] Taxpayer Advocate Service 2011 Annual Report to Congress, Vol. I, p. 180 (Dec. 31, 2011).

[58] Taxpayer Advocate Service 2012 Annual Report to Congress, Vol. I, p. 135 (Dec. 31, 2012).

[59] Taxpayer Advocate Service 2012 Annual Report to Congress, Vol. I, p. 138 (Dec. 31, 2012).

[60] Taxpayer Advocate Service 2013 Annual Report to Congress, Vol. I, p. 228 (Dec. 31, 2013).

[61] Taxpayer Advocate Service 2013 Annual Report to Congress, Vol. I, p. 232 (Dec. 31, 2013).

[62] William Hoffman and David van den Berg, *After Government Reopens, Tax Community Braces for Long Delays at IRS* (Oct. 28, 2013).

[63] Taxpayer Advocate Service 2014 Annual Report to Congress, Vol. I (Dec. 31, 2014).

[64] Taxpayer Advocate Service 2014 Annual Report to Congress, Vol. I, p. 88 (Dec. 31, 2014).

[65] TIGTA Report 2014-30-054, p. 7 (Sept. 12, 2014).

[66] TIGTA Report 2016-30-030 (June 2, 2016).

[67] TIGTA Report 2016-30-030, p. 12 (June 2, 2016).

[68] TIGTA Report 2016-30-030, p. 12 (June 2, 2016).

[69] TIGTA Report 2016-30-030, p. 15 (June 2, 2016).

[70] Code Sec. 7701(b)(1)(A)(i) and Code Sec. 7701(b)(6).

[71] Code Sec. 7701(b)(1)(A)(ii) and Code Sec. 7701(b)(3).

[72] Code Secs. 877A(a), 877(e)(2), and 877A(g).

[73] Code Secs. 877A(a), 877(e)(2), and 877A(g).

[74] Code Secs. 877A(a), 877(e)(2), and 877A(g).

[75] Code Sec. 877A(g)(1)(B)(i)(I) and (II).

[76] General Explanations of the Administration's Fiscal Year 2016 Revenue Proposals, Department of Treasury, p. 282 (Feb. 2015).

[77] General Explanations of the Administration's Fiscal Year 2016 Revenue Proposals, Department of Treasury, p. 282 (Feb. 2015).

[78] General Explanations of the Administration's Fiscal Year 2016 Revenue Proposals, Department of Treasury, p. 283 (Feb. 2015).

[79] General Explanations of the Administration's Fiscal Year 2016 Revenue Proposals, Department of Treasury, p. 283 (Feb. 2015).

[80] Reg. §301.9100-1(c).

[81] Reg. §301.9100-1(b).

[82] Notice 2009-85, 2009-45 IRB 598, Section 8 (A through C).

[83] Reg. §301.9100-3(a).

[84] Reg. §301.9100-3(b)(1).

[85] Reg. §1.6662-1, Code Sec. 6664(c)(1), Reg. §1.6664-4(a).

[86] Reg. §301.9100-3(c).

[87] H. Rept. 99-226, (1985); S. Rept. 99-313, (1986); *R.J. Bucaro*, 98 TCM 388, Dec. 57,978(M), TC Memo. 2009-247.

[88] H. Rept. 99-226, (1985); S. Rept. 99-313, (1986); *R.J. Bucaro*, 98 TCM 388, Dec. 57,978(M), TC Memo. 2009-247.