DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

OFFICE OF THE CHIEF COUNSEL

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Reference: Request for Information Letter on Residence for Gift Tax Purposes and Nonresident Alien Gift to U.S. Citizen

Dear :

This letter responds to your request for information regarding rules under the Internal Revenue Code ("Code") for determining whether an individual is a resident of the United States for gift tax purposes. You also requested information regarding the rules that may apply to a gift made by a nonresident alien individual to a U.S. citizen.

The Gift Tax

1. Imposition of the Gift Tax

Section 2501(a)(1) of the Code provides that a tax is imposed for each calendar year on the transfer of property by gift during such calendar year by any individual, resident or nonresident. Section 2501(a)(2) provides that except as provided in § 2501(b)(3), § 2501(a)(1) does not apply to the transfer of intangible property by a nonresident not a citizen of the United States. Section 2501(a)(3)(A) provides that § 2501(a)(2) does not apply in the case of a donor to whom § 877(b) applies for the taxable year which includes the date of the transfer.

Section 25.2501-1(a)(1) of the Gift Tax Regulations provides that the gift tax applies to all transfers by gift of property, wherever situated, by an individual who is a citizen or resident of the United States, to the extent the value of the transfers exceeds the amount of the exclusions authorized by § 2503 and the deductions authorized by §§ 2521 (as in effect prior to its repeal by the Tax Reform Act of 1976), 2522, and 2523. For each "calendar period" (as defined in § 25.2502-1(c)(1)), the tax described in this

paragraph (a) is imposed on the transfer of property by gift during such calendar period.

Section 25.2501-1(a)(3) provides that the gift tax does not apply to any transfer by gift of intangible property on or after January 1, 1967, by a nonresident not a citizen of the United States (whether or not he was engaged in business in the United States), unless the donor is an expatriate who lost his United States citizenship after March 8, 1965, and within the 10-year period ending with the date of transfer, and the loss of citizenship -- (a) did not result from the application of § 301(b), 350, or 355 of the Immigration and Nationality Act, as amended (8 U.S.C. 1401(b), 1482, or 1487); and (b) had for one of its principal purposes (but not necessarily its only principal purpose) the avoidance of Federal income, estate, or gift tax.

Section 2504(a)(1) provides that in computing taxable gifts for preceding calendar periods for purposes of computing the tax for any calendar year there shall be treated as gifts such transfers as were considered to be gifts under the gift tax laws applicable to the calendar period in which the transfers were made.

Section 2504(b) provides that in the case of gifts made to any person by the donor during preceding calendar periods, the amount excluded, if any, by the provisions of gift tax laws applicable to the periods in which the gifts were made shall not, for purposes of § 2504(a), be included in the total amount of the gifts made during such preceding calendar periods.

Section 2504(c) provides that if the time has expired under § 6501 within which a tax may be assessed under this chapter 12 (or under corresponding provisions of prior laws) on -- (1) the transfer of property by gift made during a preceding calendar period (as defined in § 2502(b)); or (2) an increase in taxable gifts required under § 2701(d), the value thereof shall, for purposes of computing the tax under this chapter, be the value as finally determined (within the meaning of § 2001(f)(2)) for purposes of this chapter.

Section 2505(a) provides that in the case of a citizen or resident of the United States, there shall be allowed as a credit against the tax imposed by § 2501 for each calendar year an amount equal to -- (1) the applicable credit amount in effect under § 2010(c) which would apply if the donor died as of the end of the calendar year, reduced by (2) the sum of the amounts allowable as a credit to the individual under this section for all preceding calendar periods.

Section 2511(a) provides that the tax imposed by § 2501 shall apply whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible; but in the case of a nonresident not a citizen of the United States, shall apply to a transfer only if the property is situated within the United States.

Section 25.2511-3(a)(1) provides, in part, that the gift tax applies only to the transfer of real property and tangible personal property situated in the United States at the time of

the transfer if either -- (i) the gift was made on or after January 1, 1967, by a nonresident not a citizen of the United States who was not an expatriate to whom § 2501(a)(2) was inapplicable on the date of the gift by reason of § 2501(a)(3) and § 25.2501-1(a)(3) or (ii) the gift was made before January 1, 1967, by a nonresident not a citizen of the United States who was not engaged in business in the United States during the calendar year in which the gift was made.

Section 25.2511-3(b) provides that for purposes of applying the gift tax to the transfer of property owned and held by a nonresident not a citizen of the United States at the time of the transfer -- (1) real property and tangible personal property constitute property within the United States only if they are physically situated therein; (2) except as provided otherwise in subparagraphs (3) and (4) of this paragraph (relating to shares of stock and debt obligations), intangible personal property constitutes property within the United States if it consists of a property right issued by or enforceable against a resident of the United States or a domestic corporation (public or private), irrespective of where the written evidence of the property is physically located at the time of the transfer.

2. Determining Residence for Gift Tax Purposes

Section 25.2501-1(b) provides that for gift tax purposes, a resident of the United States is an individual who has his domicile in the United States at the time of the gift. For this purpose, the United States includes the States and the District of Columbia. All other individuals are nonresidents for gift tax purposes. A person acquires a domicile in a place by living there, for even a brief period of time, with no definite present intention of moving therefrom. Residence without the requisite intention to remain indefinitely will not constitute domicile, nor will intention to change domicile effect such a change unless accompanied by actual removal. Section 25.2501-1(b).

The test to determine whether an individual is domiciled in the United States is a facts and circumstances test that is particular to the individual in question. There are numerous cases that illustrate the application of this test by the courts. See Estate of Kahn v. Commissioner, T.C. Memo. 1998-22 (Pakistani citizen was U.S. resident); Estate of Fokker v. Commissioner, 10 T.C. 1225 (1948) (citizen of the Netherlands was U.S. resident); Estate of Paquette v. Commissioner, T.C. Memo. 1983-571 (Canadian citizen was not U.S. resident); Forni v. Commissioner, 22 T.C. 975 (1954) (Italian citizen was not U.S. resident); Estate of Nienhuys v. Commissioner, 17 T.C. 1149 (1952) (citizen of the Netherlands was not U.S. resident); Estate of Jack ex rel Blair v. U.S., 54 Fed. Cl. 590 (Fed. Cl. 2002) (Canadian citizen was U.S. resident); Cooper v. Reynolds, 24 F.2d 150 (D. Wyo. 1927) (British citizen was U.S. resident).

Information Reporting for Receipt of Foreign Gift

A nonresident alien individual who makes a gift to a U.S. citizen or resident does not have federal income tax obligations or reporting requirements with respect to such a gift.[1]

[1] For purposes of the discussion in this section, the rules in § 7701(b) and the regulations thereunder,

A U.S. citizen or resident who receives a gift from a nonresident alien individual is generally not subject to federal income tax on the gift pursuant to § 102 of the Code. Section 6039F, however, generally requires that a U.S. citizen or resident report a foreign gift exceeding $10,000 that he or she receives during the taxable year to the IRS. The reporting is done on Part IV of Form 3520, Annual Return to Report Transactions with Foreign Trusts and Receipt of Certain Foreign Gifts. Section 6039F provides that a foreign gift is "any amount received from a person other than a United States person which the recipient treats as a gift or bequest."[2]

In Notice 97-34, the Internal Revenue Service increased the minimum reportable amount for aggregate gifts that U.S. citizens or residents receive from nonresident alien individuals to $100,000 per nonresident alien donor. Notice 97-34 maintains the $10,000 minimum reporting amount in § 6039F for gifts from foreign corporations and partnerships, although the $10,000 threshold is adjusted annually for inflation. In determining whether gifts from a nonresident alien donor meet the $100,000 reporting threshold, a U.S. citizen or resident must aggregate gifts from that donor and persons related to that donor for the taxable year in question. For example, if a U.S. citizen or resident receives $70,000 from nonresident alien A and $50,000 from nonresident alien B, and the U.S. citizen or resident knows or has reason to know A and B are related, the U.S. citizen or resident must report the gifts because the total amount exceeds $100,000.

The Form 3520 is due on the same date, including extensions, as the U.S. citizen or resident recipient's federal income tax return. The instructions for Form 3520 provide additional information regarding completion and filing of the form.

If a U.S. citizen or resident fails to report a gift from a nonresident alien, as required by § 6039F, the tax consequences of the receipt of the gift will be determined by the IRS and a penalty equal to 5 percent of the amount of the foreign gift will apply for each month for which the failure to report continues (not to exceed a total 25 percent). Section 6039F(c) provides that the penalty will not apply if the U.S. citizen or resident recipient demonstrates that the failure to report is due to reasonable cause and not due to willful neglect.

This letter has called your attention to certain general principles of the law. It is intended for informational purposes only and does not constitute a ruling. See Rev. Proc. 2013-1, §2.04, 2013-1 I.R.B. 1 (Jan. 2, 2013).

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apply in determining whether an individual is a U.S. resident or a nonresident alien.

[2] U.S. persons who receive gifts or bequests from a "covered expatriate" (as defined in § 877A(g)(1)), on or after June 17, 2008, generally will be required to pay a transfer tax under § 2801. In Notice 2009-85, the Internal Revenue Service indicated that guidance will be issued for U.S. persons who receive gifts or bequests on or after June 17, 2008, from covered expatriates who are subject to the rules of the notice. Notice 2009-85 further provides that satisfaction of the reporting and tax obligations for gifts or bequests from covered expatriates will be deferred, pending the issuance of guidance. A reasonable period of time will be provided for satisfying the reporting and tax payment requirements provided in that guidance.

If you have any additional questions, please contact at ( ) .

Sincerely,

By: _____
M Grace Fleeman
Senior Technical Reviewer, Branch 1
(International)