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March 2, 2015

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The Honorable John Koskinen
Commissioner
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20224

Re: Request for Guidance on the Tax Status of Certain Expatriates.

Dear Commissioner Koskinen:

Enclosed please find comments requesting guidance on the tax status of individuals who expatriated on or before June 3, 2004 ("Comments"). These Comments are submitted on behalf of the American Bar Association Section of Taxation and have not been approved by the House of Delegates or the Board of Governors of the American Bar Association. Accordingly, they should not be construed as representing the position of the American Bar Association.

The Section would be pleased to discuss the Comments with you or your staff if that would be helpful.

Sincerely,



Armando Gomez
Chair, Section of Taxation

Enclosure

cc: Hon. Mark J. Mazur, Assistant Secretary (Tax Policy), Department of the Treasury
Emily S. McMahon, Deputy Assistant Secretary (Tax Policy), Department of the Treasury
Hon. William J. Wilkins, Chief Counsel, Internal Revenue Service
Robert Stack, Deputy Assistant Secretary (International Tax Affairs), Department of the Treasury
Danielle Rolfes, International Tax Counsel, Department of the Treasury

**AMERICAN BAR ASSOCIATION
SECTION OF TAXATION**

COMMENTS ON THE TAX STATUS OF CERTAIN EXPATRIATES

These comments (“Comments”) are submitted on behalf of the American Bar Association Section of Taxation (the “Section”) and have not been approved by the House of Delegates or Board of Governors of the American Bar Association. Accordingly, they should not be construed as representing the position of the American Bar Association.

Principal responsibility for preparing these Comments was exercised by Michael J. Miller of the Section’s U.S. Activities of Foreigners and Tax Treaties Committee (the “Committee”). Substantial contributions were made by Summer A. LePree and Michael J. A. Karlin. The Comments were reviewed by David G. Shapiro, the Last Retiring Chair of the Committee. The Comments were further reviewed by William B. Sherman of the Section’s Committee on Government Submissions, Alan I. Appel, the Section’s Council Director for the Committee, and Peter H. Blessing, the Section’s Vice Chair (Government Relations).

Although the members of the Section of Taxation who participated in preparing these Comments have clients who might be affected by the federal tax principles addressed by these Comments, no such member or the firm or organization to which such member belongs has been engaged by a client to make a government submission with respect to, or otherwise to influence the development or outcome of, the specific subject matter of these Comments.

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Date: March 2, 2015

EXECUTIVE SUMMARY

These Comments address the need for guidance regarding the tax status of individuals who expatriated on or before June 3, 2004.

An individual can cease to be a citizen under the pertinent provisions of the Immigration and Nationality Act (the "INA"),¹ by being naturalized in another country with the intent to relinquish U.S. citizenship, without ever providing a notice of any kind to the Department of State, the Internal Revenue Service (the "Service"), or any other agency of the U.S. Government. Many individuals have relinquished U.S. citizenship by this method, which is still controlling today for nationality purposes, over the past decades.

Historically, an individual's loss of citizenship for nationality purposes was also controlling for tax purposes. The American Jobs Creation Act of 2004 (the "2004 Act"),² however, created a disparity between expatriation for nationality purposes and expatriation for tax purposes. Specifically, the 2004 Act enacted new section 7701(n),³ which provided for the first time that an individual who ceased to be a citizen in accordance with the INA would continue to be treated as a citizen for federal tax purposes, until a specified notice requirement was satisfied. Section 7701(n) was effective only for individuals who expatriated after June 3, 2004, so individuals who had relinquished citizenship on or before that date were not affected, even where they had never provided any notice described in that provision.

The Heroes Earnings Assistance and Relief Tax Act of 2008 (the "2008 Act"),⁴ repealed section 7701(n) and enacted the current expatriation rules, which are set forth principally in section 877A. Under section 877A, there continues to be a distinction between expatriation for nationality purposes and expatriation for tax purposes. Section 877A(g)(4) provides that an individual is considered to have relinquished citizenship for federal tax purposes on the earliest date that one of four specified "notice events" occurs. Similarly, section 7701(a)(50) generally provides that an individual shall not cease to be treated as a U.S. citizen before the date on which the individual's citizenship is treated as relinquished under section 877A(g)(4). Pursuant to section 301(g) of the 2008 Act, these provisions are effective for any individual whose expatriation date (defined as the date on which the individual relinquished citizenship) is on or after June 17, 2008.

Many individuals who long ago (prior to enactment of the 2004 Act) naturalized in other countries with the intention of no longer being U.S. citizens, and who therefore ceased to be citizens under the INA, are distressed at the prospect that the Service may take the view that sections 877A and 7701(a)(50) retroactively reinstated their status as citizens for federal tax purposes. This argument could be made based on the failure of any of the four specified "notice events" to have occurred with respect to a particular individual who otherwise ceased to be a

¹ 8 U.S.C. § 1481(a).

² Pub. L. No. 108-357, 118 Stat. 1418 (2004).

³ References to a "section" are to a section of the Internal Revenue Code of 1986, as amended (the "Code"), unless otherwise indicated.

⁴ Pub. L. No. 110-245, 122 Stat. 1624 (2008).

U.S. citizen for nationality purposes years, or even decades, before either the 2004 Act or the 2008 Act were enacted.

A great many former citizens are particularly concerned in light of the Service's offshore initiatives and, more recently, implementation of the "FATCA" provisions of the Hiring Incentives to Restore Employment Act (the "2010 HIRE Act").⁵ These developments have given rise to a growing awareness that certain expatriates may potentially be viewed as U.S. citizens by the Service and may therefore be subject to onerous tax obligations.

In our view, sections 877A and 7701(a)(50) should not be considered to apply to individuals who had previously ceased to be citizens, for both nationality and federal tax purposes, prior to the date those provisions were enacted. In particular, these sections should not apply to individuals who relinquished citizenship on or before June 3, 2004, and whose noncitizen status was deliberately grandfathered under the 2004 Act, or to individuals who relinquished their citizenship in accordance with the requirements of former section 7701(n) after June 3, 2004 and prior to June 17, 2008.

Accordingly, we recommend that Treasury and the Service issue guidance confirming that individuals who ceased to be citizens in accordance with the INA on or before June 3, 2004, or in accordance with the requirements of former section 7701(n) after June 3, 2004 and prior to June 17, 2008, are not subject to section 877A or section 7701(a)(50) and continue to be treated as noncitizens of the United States for federal tax purposes following the enactment of the 2008 Act.

⁵ Pub. L. No. 111-147, 124 Stat. 71 (2010); *see* I.R.C. §§ 1471-1474.

DISCUSSION

I. How Citizenship May Be Terminated

Under the pertinent provisions of the INA, an individual may lose his or her citizenship by voluntarily performing any of the following acts with the intention of relinquishing U.S. nationality:

1. becoming naturalized in another country;
2. formally declaring allegiance to another country;
3. serving in a foreign army;
4. serving in certain types of foreign government employment if the individual is a national of the foreign country or takes an oath of allegiance to that foreign country;
5. making a formal renunciation of nationality before a U.S. diplomatic or consular officer in a foreign country;
6. making a formal written renunciation of nationality in the United States during a time of war; or
7. committing any act of treason or similar act against the United States.⁶

Some of these actions inherently involve the provision of a notice to the U.S. Government (*e.g.*, formal renunciation to a diplomatic or consular officer), but many do not (*e.g.*, obtaining naturalization in a foreign country). Consequently, absent some additional notice requirement, it may take many years after an individual's loss of citizenship before the Service learns about an individual's expatriation.

II. Overview and History of Individual Expatriation Rules

A. The Foreign Investors Tax Act of 1966

The first expatriation rules were enacted in 1966. The Foreign Investors Tax Act of 1966 (the "1966 Act")⁷ enacted section 877, pursuant to which an alternative tax regime generally was prescribed for every nonresident alien individual who lost his or her U.S. citizenship at any time after March 8, 1965, and within the 10-year period immediately preceding the close of the relevant taxable year, unless that loss of citizenship "did not have for one of its principal

⁶ 8 U.S.C. § 1481(a). In certain instances, additional requirements apply, such as having achieved the age of 18 at the time of the specified action. As originally enacted in 1952, Pub. L. No. 82-414, §349, 66 Stat. 163, the INA did not expressly require that the specified action be accompanied by the intention of relinquishing U.S. citizenship. Following a decision by the Supreme Court holding that the Fourteenth Amendment prohibits Congress from stripping an individual of citizenship in the absence of such an intention, *Afroyim v. Rusk*, 387 U.S. 253, 268 (1967), *overruling Perez v. Brownell*, 356 U.S. 44, 61 (1958), the INA was revised in 1986. Pub. L. No. 99-653, § 18(a), 100 Stat. 3658. There have been other amendments as well over the last 60 years, but they are not pertinent to the discussion herein.

⁷ Pub. L. No. 89-809, 80 Stat. 1539 (1966).

purposes the avoidance of tax under this subtitle or subtitle B[.]”⁸ Under the alternative tax regime, certain gains (*e.g.*, from dispositions of stock issued by a domestic corporation and debt obligations of a U.S. person) that would otherwise have a foreign source were deemed to have a U.S. source, and thus were rendered taxable, during the 10-year period following expatriation.

There was not at that time any rule that could in any circumstance cause a former citizen to continue to be treated as a citizen for tax purposes. The status of an individual for nationality purposes was determinative for federal tax purposes.

B. The Health Insurance Portability and Accountability Act of 1996

The expatriation rules enacted under the 1966 Act were rarely invoked, and Congress determined that changes to strengthen the expatriation rules were needed. As part of the Health Insurance Portability and Accountability Act of 1996 (the “1996 Act”),⁹ section 877 was modified to add a presumption of tax avoidance in cases where an expatriate’s net worth equaled or exceeded \$500,000 (net worth test), or the expatriate’s average federal income tax liability over a specified five-year period exceeded \$100,000 (tax liability test), with both figures adjusted for inflation in subsequent years.¹⁰ A taxpayer to whom the presumption applied could, if certain requirements were satisfied, submit a ruling request asking the Service for a determination that the alternative tax regime did not apply because he or she did not have a principal purpose of tax avoidance.¹¹

The 1996 Act also enacted section 6039F (subsequently redesignated as section 6039G in 1997), which required expatriates to file an information statement (eventually taking the form of Form 8854) with the Service by a specified date, extended application of the expatriation rules to “long-term residents,”¹² and added additional categories of income treated as U.S.-source under the alternative tax regime.¹³

Notwithstanding these important changes, the basic approach from 1966 was largely retained. As of 1996, the status of an individual for federal nationality purposes remained determinative for federal tax purposes.¹⁴

C. The 2003 Joint Committee on Taxation Report

In 2003, the staff of the Joint Committee on Taxation released a report that reviewed the tax rules related to tax-motivated expatriation that were enacted as part of the 1996 Act (the

⁸ Certain exceptions (not relevant to this discussion) were set forth in section 877(d).

⁹ Pub. L. No. 104-191, 110 Stat. 1936 (1996).

¹⁰ See former I.R.C. § 877(a)(2).

¹¹ See former I.R.C. § 877(c); Notice 97-19, 1997-1 C.B. 394, obsoleted by Notice 2005-36, 2005-1 C.B. 1007; Notice 98-34, 1998-2 C.B. 29, obsoleted by Notice 2005-36, 2005-1 C.B. 1007.

¹² In very general terms, an individual who held a green card during at least eight taxable years during a specified 15-year period (without invoking the benefits of a treaty “tie-breaker” rule) was considered a long-term resident. See former I.R.C. § 877(e).

¹³ See former I.R.C. § 877(d).

¹⁴ And, while section 6039F introduced the requirement to file an information statement on Form 8854, there was no suggestion that noncompliance would affect the expatriate’s status as a nonresident alien.

“2003 JCT Report”).¹⁵ The 2003 JCT Report outlines the state of the law immediately prior to the 2004 legislation described below. In the background section describing then-present law, the 2003 JCT Report provides in part as follows:

Under present law, the Immigration and Nationality Act governs the determination of when a U.S. citizen is treated for U.S. Federal tax purposes as having relinquished citizenship. Similarly, an individual’s U.S. residency is considered terminated for U.S. Federal tax purposes when the individual ceases to be a lawful permanent resident under the immigration law (or is treated as a resident of another country under a tax treaty and does not waive benefits of such treaty). In view of this reliance on immigration-law status, it is possible in many instances for a U.S. citizen or resident to convert his or her Federal tax status to that of a nonresident noncitizen without notifying the IRS.¹⁶

The 2003 JCT Report further observes that, although individuals who relinquish their citizenship or terminate their residency are required to provide tax information statements on Form 8854, “difficulties have been encountered in enforcing this requirement, and in many cases the IRS does not receive information that it needs to enforce the alternative tax regime. In these cases, an individual may become a non-resident non-citizen of the United States for Federal tax purposes -- and enjoy reductions in U.S. taxes from such tax status -- despite failing to provide the tax information statements necessary for the IRS to monitor and enforce compliance with the alternative tax regime.”¹⁷

Accordingly, the staff of the Joint Committee on Taxation recommended that an individual should continue to be treated as a citizen or long-term resident for federal tax purposes until such individual: (1) notified the Department of State or the Immigration and Naturalization Service,¹⁸ and (2) filed a complete and accurate tax information statement with the Service on Form 8854.

The staff of the Joint Committee on Taxation also made a number of other recommendations, including (1) replacing the subjective intention-based test with an objective test for determining whether the alternative tax regime applies; (2) imposing full taxation on individuals who are otherwise subject to the alternative tax regime and who return to the United States for extended periods; (3) imposing gift tax on gifts of stock of certain closely-held foreign corporations that hold U.S.-situs assets; and (4) imposing an annual return-filing requirement for individuals subject to the alternative tax regime, during the 10-year post-expatriation period.¹⁹

¹⁵ Joint Committee on Taxation, *Review of the Present-Law Tax and Immigration Treatment of Relinquishment of Citizenship and Termination of Long-Term Residency*, (JCS-2-03), February 2003.

¹⁶ *Id.* at 209 (emphasis added; footnotes omitted).

¹⁷ *Id.* (footnotes omitted).

¹⁸ The relevant functions of the Immigration and Naturalization Service, an agency within the Department of Justice, have, since March 1, 2003, been exercised by U.S. Citizenship and Immigration Services (formerly known as the Bureau of Citizenship and Immigration Services), an agency within the Department of Homeland Security. See Homeland Security Act of 2002, Pub. L. No. 107–296, 116 Stat. 2135 *et seq.*, § 451 and Part XV. See also 68 Fed. Reg. 9824 (2003).

¹⁹ 2003 JCT Report, *supra* note 15, at 205-215.

D. The American Jobs Creation Act of 2004

Consistent with the recommendations offered by the staff of the Joint Committee on Taxation, the 2004 Act made a number of significant changes to the expatriation rules. First and foremost, the 2004 Act enacted section 7701(n), which for the first time untethered the citizenship status of an individual for federal tax purposes from the status of such individual for nationality purposes.

Section 7701(n) provided in pertinent part as follows:

(n) Special rules for determining when an individual is no longer a United States citizen or long-term resident. For purposes of this chapter—

(1) United States citizens. An individual who would (but for this paragraph) cease to be treated as a citizen of the United States shall continue to be treated as a citizen of the United States until such individual—

(A) gives notice of an expatriating act (with the requisite intent to relinquish citizenship) to the Secretary of State, and

(B) provides a statement in accordance with section 6039G (if such a statement is otherwise required).

Thus, pursuant to section 7701(n)(1), an individual who relinquished citizenship by, for example, becoming naturalized in another country with the intention to no longer be a U.S. citizen, would remain a citizen, solely for federal tax purposes, until he or she (1) notified the Secretary of State, and (2) if required under section 6039G, filed a certain statement (Form 8854) with the Service.

The 2004 Act also: (1) replaced the subjective intention-based test with objective standards for determining whether former citizens or former long-term residents were subject to the alternative tax regime;²⁰ (2) imposed full U.S. taxation for individuals who were otherwise subject to the alternative tax regime and who return to the United States for extended periods;²¹ (3) imposed U.S. gift tax on gifts of stock of certain closely-held foreign corporations that hold U.S.-situated property; and (4) required Form 8854 to be filed annually during the relevant 10-year period by individuals subject to the alternative tax regime.

The effective date of section 7701(n) is particularly noteworthy. As expressly provided under section 804(f) of the 2004 Act, section 7701(n) (and the other expatriation-related

²⁰ Following the 2004 Act, a former citizen (or long-term resident) was subject to the alternative tax regime for a 10-year period following citizenship relinquishment or residency termination, unless s/he: (1) (a) established that his or her average annual net income tax liability for the five preceding years did not exceed \$124,000 (adjusted for inflation after 2004) and his or her net worth did not exceed \$2 million, or (b) satisfied certain limited exceptions for dual citizens and minors with no substantial contact with the United States; and (2) certified under penalties of perjury that he or she had complied with all federal tax obligations for the preceding five years.

²¹ Pursuant to section 877(g), an individual who was physically present in the United States for more than 30 days during any calendar year within the above-described ten-year period was treated as a U.S. citizen or resident for all purposes of the Code.

provisions of the 2004 Act) “shall apply to individuals who expatriate after June 3, 2004.” No special definition of expatriation was provided for this purpose. Thus, there is no question that individuals who successfully relinquished their citizenship for nationality purposes on or before June 3, 2004 continued to be respected as noncitizens for federal tax purposes after the 2004 Act.

E. The Heroes Earnings Assistance and Relief Tax Act of 2008

The next major change to the expatriation rules came with the passage of the 2008 Act. The 2008 Act completely overhauled the expatriation rules by replacing the alternative tax regime (which had been in existence in some form or other since 1966) with an exit tax, set forth in new section 877A. Subject to important exceptions, the new exit tax generally treats a “covered expatriate” as if he or she had sold all of his or her property for fair market value on the day preceding the “expatriation date.”

The 2008 Act also enacted new section 7701(a)(50), which generally provides that an individual shall not cease to be treated as a U.S. citizen before the date on which the individual’s citizenship is treated as relinquished under section 877A(g)(4),²² and repealed section 7701(n). Finally, the 2008 Act enacted section 2801, which imposes a transfer tax on gifts received by U.S. persons from “covered expatriates.”²³

Sections 877A, 2801, and 7701(a)(50) are effective (and, pursuant to new section 877(h), section 877 is ineffective) for any individual whose “expatriation date” is on or after June 17, 2008. Section 877A(g)(3) defines the term “expatriation date” as:

- (A) the date an individual relinquishes United States citizenship, or
- (B) in the case of a long-term resident of the United States, the date on which the individual ceases to be a lawful permanent resident of the United States (within the meaning of section 7701(b)(6)).

Section 877A(g)(4) then creates a special tax definition of relinquishment of United States citizenship:

- (4) Relinquishment of citizenship. A citizen shall be treated as relinquishing his United States citizenship on the earliest of—
 - (A) the date the individual renounces his United States nationality before a diplomatic or consular officer of the United States pursuant to paragraph (5) of section 349(a) of the Immigration and Nationality Act (8 U.S.C. 1481(a)(5)),
 - (B) the date the individual furnishes to the United States Department of State a signed statement of voluntary relinquishment of United States nationality confirming the performance of an act of expatriation specified

²² Pursuant to section 7701(a)(50)(B), a limited exception is to apply under regulations to an individual who became at birth a citizen of the United States and of another country. No such regulations have been issued.

²³ Conforming changes to the information-reporting provisions of section 6039G were made as well.

in paragraph (1), (2), (3), or (4) of section 349(a) of the Immigration and Nationality Act (8 U.S.C. 1481(a)(1)-(4)),

(C) the date the United States Department of State issues to the individual a certificate of loss of nationality, or

(D) the date a court of the United States cancels a naturalized citizen's certificate of naturalization.

Subparagraph (A) or (B) shall not apply to any individual unless the renunciation or voluntary relinquishment is subsequently approved by the issuance to the individual of a certificate of loss of nationality by the United States Department of State.

Section 7701(a)(50) ties the termination of U.S. citizenship for tax purposes to the special tax definition of relinquishment of United States citizenship in section 877A(g)(4) as follows:

(50) Termination of United States citizenship.

(A) In general. An individual shall not cease to be treated as a United States citizen before the date on which the individual's citizenship is treated as relinquished under section 877A(g)(4).

(B) Dual citizens. Under regulations prescribed by the Secretary, subparagraph (A) shall not apply to an individual who became at birth a citizen of the United States and a citizen of another country.

III. Discussion of Effective Date Issue

As noted above, a person can lose citizenship under the INA without ever providing a notice of any kind to the Department of State, the Service, or any other agency of the U.S. Government. This occurs automatically when an individual is naturalized in another country with the intention of no longer being a U.S. citizen.²⁴

However, under a literal interpretation of the 2008 Act, it might be argued that such individuals are deemed never to have lost citizenship for federal tax purposes, even if their loss of citizenship occurred many years or even decades ago. Consider the following example.

Example: John Doe is a natural-born U.S. citizen who naturalized in Canada on January 1, 1975, with the intention of no longer being a U.S. citizen.²⁵ Pursuant to the INA, he ceased to be a citizen on that date. Recently, Mr. Doe spoke with an immigration lawyer who advised him to get a certificate of loss of nationality ("CLN"). On February 1, 2014, Mr. Doe furnishes to the Department of State a signed statement of voluntary relinquishment of United States nationality regarding his prior act of expatriation. On September 1, 2014, the Department of State issued a CLN to Mr. Doe, confirming that he ceased to be a citizen on January 1, 1975.

²⁴ See 8 U.S.C. § 1481(a)(5).

²⁵ He did not acquire a green card or reside in the United States at any time thereafter.

As discussed above, section 877A(g)(3) defines the expatriation date as the date an individual relinquishes his citizenship. For this purpose, section 877A(g)(4) provides that an individual is considered to have relinquished citizenship on the earliest of (A) the date the individual renounces his U.S. nationality before a diplomatic or consular officer of the United States, (B) the date the individual furnishes to the U.S. Department of State a signed statement of voluntary relinquishment of United States nationality confirming the performance of a specified act of expatriation, (C) the date the U.S. Department of State issues to the individual a CLN, or (D) the date a U.S. court cancels a naturalized citizen's certificate of naturalization. Section 7701(a)(50) similarly provides that an individual shall not cease to be treated as a U.S. citizen prior to the date on which the individual's citizenship is treated as relinquished under section 877A(g)(4).

Under a literal application of these rules, Mr. Doe arguably is considered to have relinquished citizenship for federal tax purposes on February 1, 2014, because the provision of his signed statement to the U.S. Department of State on such date was the first to occur of the "notice events" set forth in section 877A(g)(4). And, because section 301(g) of the 2008 Act provides that sections 877A and 7701(a)(50) apply to any individual whose "expatriation date" is on or after the date of enactment, *i.e.*, June 17, 2008, Mr. Doe arguably is retroactively deemed to have remained a citizen for federal tax purposes through January 31, 2014, even though he ceased to be a citizen under the INA in 1975, nearly four decades earlier. Indeed, it has come to our attention that a great many former citizens are extremely distressed about this possibility, particularly in light of the Service's offshore initiatives and, more recently, implementation of the "FATCA" provisions of the 2010 HIRE Act. For the reasons discussed below, we are of the view that such an interpretation of sections 877A and 7701(a)(50) would not be proper.

Starting with the text of the statute, section 877A(g)(4) applies only to a "citizen." A "citizen" should be construed as an individual who had such status for federal tax purposes immediately prior to the enactment of the statute, on June 17, 2008, which was not the case with Mr. Doe. Similarly, both section 877A(g) and section 7701(a)(50) speak in terms of *relinquishing* citizenship and *ceasing* to be treated as a citizen. Again, these terms should be construed to refer to such an action occurring on or after the date of enactment. In our view, an individual whom both the federal tax law and the INA recognized as having relinquished citizenship prior to the date of enactment of sections 877A and 7701(a)(50) (including, for periods after June 3, 2004 and prior to June 17, 2008, by complying with former section 7701(n)) was not intended to again to be subject to the process of relinquishing citizenship and thus was not within the intended scope of sections 877A(g)(4) and 7701(a)(50).

Moreover, as of the date sections 877A and 7701(a)(50) were enacted in 2008, Mr. Doe had been treated as a nonresident alien under the federal tax law for more than 33 years. The definition of citizen for nationality purposes had historically been controlling, and as stated (and confirmed) in the 2003 JCT Report, this was unchanged by both the 1966 and 1996 Acts.

Indeed, it is only in 2004 that it first became possible for an individual to lose citizenship under the INA but remain a citizen for federal tax purposes. This result was mandated in certain circumstances by former section 7701(n), but this provision was effective only for individuals who expatriated (for nationality purposes) after June 3, 2004. Individuals who relinquished

citizenship on or before that date, such as Mr. Doe in the above example, were not affected by the enactment of the 2004 Act, and continued to be treated as noncitizens for federal tax purposes.

Therefore, immediately prior to the enactment of sections 877A and 7701(a)(50) on June 17, 2008, Mr. Doe had been, for federal tax purposes, a noncitizen for the preceding 33 years. We believe that Congress could not have intended in the 2008 Act to change this result, particularly in light of the fact that the noncitizen status of persons such as Mr. Doe had been quite deliberately grandfathered four years earlier under the 2004 Act. Indeed, if Congress truly had intended to disturb settled expectations in such a manner, we expect that the statute would have been more explicit or at least that the legislative history would have included some explanation of why Congress considered this appropriate. The statute is not explicit and the legislative history includes no such explanation.

Furthermore, it is well established that a statute must not be interpreted to compel absurd results.²⁶ Application of section 877A to Mr. Doe on a retroactive basis would also appear to raise serious Constitutional issues under the Due Process Clause,²⁷ and there is “a well recognized doctrine that doubtful statutory construction involving possible unconstitutionality should always be rejected in favor of a reasonable construction by which the constitutional conflict can be avoided.”²⁸

In our view, sections 877A and 7701(a)(50) should not be considered to apply to individuals who had ceased to be citizens, for both nationality and federal tax purposes, prior to June 17, 2008, and a contrary application of the law would be inconsistent with Congressional intent, as manifested in the 2004 Act. For the reasons explained above, this excludes all individuals, such as Mr. Doe in the example above, who relinquished citizenship on or before June 3, 2004, and whose noncitizen status was deliberately grandfathered under former section 7701(n). It also excludes individuals who relinquished their citizenship in accordance with the requirements of former section 7701(n) after June 3, 2004 and prior to June 17, 2008.

²⁶ The leading case most frequently cited for this proposition is *United States v. American Trucking Associations, Inc.*, 310 U.S. 534, 543 (1940) (footnotes omitted) (“There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning. When that meaning has led to absurd or futile results, however, this Court has looked beyond the words to the purpose of the act.”). See also, e.g., *Albertson’s, Inc. v. Commissioner*, 42 F.3d 537 (9th Cir. 1994); *Brooks v. Donovan*, 699 F.2d 1010 (9th Cir. 1983); *Bongiovanni v. Commissioner*, 470 F.2d 921 (2nd Cir. 1972); *Marsman v. Commissioner*, 205 F.2d 335 (4th Cir. 1953); *Packard v. Commissioner*, 139 T.C. No. 15 (2012); *Ordlock v. Commissioner*, 126 T.C. 47 (2006).

²⁷ As observed by the Supreme Court in *United States v. Carlton*, 512 U.S. 26, 30 (1994), a number of the Court’s decisions “have stated that the validity of a retroactive tax provision under the Due Process Clause depends upon whether ‘retroactive application is so harsh and oppressive as to transgress the constitutional limitation.’” *Welch v. Henry*, 305 U.S. at 147, quoted in *United States v. Hemme*, 476 U.S. at 568-569.” Thus, for example, as noted in *Milliken v. United States*, 283 U.S. 15, 20-21 (1931), the Court has on several occasions held certain attempts to tax gifts on a retroactive basis to be “so palpably arbitrary and unreasonable as to infringe the due process clause.” *Nichols v. Coolidge*, supra; *Untermeyer v. Anderson*, 276 U.S. 440, 48 S. Ct. 353, 72 L. Ed. 645; *Coolidge v. Long*, 282 U.S. 582, 51 S. Ct. 306, 75 L. Ed.—, decided Feb. 24, 1931.” The due process questions in this case seem even more severe.

²⁸ *Independent Life Insurance Co. of America*, 17 B.T.A. 757, 764 (1929) (citations omitted).

We therefore recommend that Treasury and the Service issue guidance, in any form that they deem appropriate, confirming that individuals who relinquished citizenship under the INA on or before June 3, 2004, or in accordance with the requirements of former section 7701(n) after June 3, 2004 and prior to June 17, 2008, are not subject to sections 877A and 7701(a)(50) and thus continue to be treated as noncitizens of the United States for federal tax purposes following the 2008 Act.