Accidental Americans: Tax and Information Reporting Obligations for Certain Green Card Holders

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Green Card holders will incur serious problems with the IRS if they fail to properly terminate their U.S. resident status upon departure from the United States.

Many individuals who are U.S. residents thanks to their "Green Cards" leave the United States each year, often with no intention of ever returning. While living in the United States, these individuals comply, or at least attempt to comply, with all the complicated U.S. tax rules. This is good. The problems start when these individuals leave the country, without first consulting competent U.S. tax advisors, mistakenly believing that they no longer have any obligations with the IRS. The thought process is that an individual who no longer resides in the United States, who has no significant connections to the United States, who cannot re-enter the United States using the Green Card because he has stayed abroad too long, and/or whose Green Card has expired cannot possibly have any tax-related duties in the United States. This reasoning, though logical, is wrong, and it causes tremendous problems for these "accidental Americans." This article uses two recent Tax Court cases, both called *Topsnik*, to demonstrate the serious and unanticipated consequences for Green Card holders who do not properly terminate their status as U.S. residents, for U.S. tax purposes, when they depart.[1]

OVERVIEW OF THE RELEVANT LAW

To appreciate the arguments raised by the taxpayer and the IRS in *Topsnik*, one must first understand the most relevant tax provisions, regulations, legislative history, treaty articles, etc. These are described below.

Obtaining and Terminating U.S. Residency Status—Green Card Holders

Generally, an individual is considered a "U.S. person" for U.S. income tax purposes if he is either a U.S. citizen

or a U.S. resident. This characterization is critical because, once an individual becomes a U.S. person, he is subject to all U.S. tax obligations, which include filing annual Forms 1040 (U.S. Individual Income Tax Returns) with the IRS, paying taxes in a timely manner, and filing a potentially long list of international information returns.

Determining whether an individual is a U.S. citizen is relatively straightforward, but confirming status as a U.S. resident can be tricky. Broadly speaking, an individual can become a U.S. resident in one of four ways; he can obtain a Green Card from the relevant U.S. immigration agency, he can maintain a "substantial presence" in the United States, he can make a first-year election to be treated as a U.S. resident, or he can elect to file joint Forms 1040 with a spouse who is already a U.S. person. The focus here, and in *Topsnik*, is on the first category, i.e., the Green Card holder.

The Code generally states that an alien individual (i.e., someone who is not a U.S. citizen) shall be treated as a U.S. resident for U.S. income tax purposes if he is a "lawful permanent resident" (i.e., a Green Card holder) at any time during the relevant calendar year.[2] The Code then clarifies that an individual will be considered a "lawful permanent resident" as long as he has been granted a Green Card by the U.S. immigration authorities and "such status has not been revoked (and has not been administratively or judicially determined to have been abandoned)."[3] The regulations echo this sentiment, stating that U.S. resident status continues "unless it is rescinded, or administratively or judicially determined to have been abandoned."[4] In 2008, Congress introduced a third manner of losing U.S. resident status for tax purposes, when it inserted the following language to the Code: "An individual shall cease to be treated as a lawful permanent resident of the United States if such individual commences to be treated as a resident of a foreign country under the provisions of a tax treaty between the United States and the foreign country, does not waive the benefits of such treaty applicable to residents of the foreign country, and notifies the Secretary of the commencement of such treatment."[5] In summary, once an alien individual becomes a U.S. resident by obtaining a Green Card, he maintains this status, at least for U.S. income tax purposes, until one of three things occurs: (1) revocation/rescission of the Green Card, (2) abandonment of the Green Card, coupled with an administrative or judicial ruling confirming such abandonment, or (3) after 2008, demonstrating that an individual should be considered a resident of a foreign country under a tax treaty and filing the necessary forms with the IRS to claim such status, including Form 1040-NR (U.S. Nonresident Alien Income Tax Return), Form 8833 (Treaty-Based Return Position Disclosure Under Section 6114 or 7701(b)), and Form 8854 (Initial and Annual Expatriation Statement), if necessary.

Each of these three ways of losing U.S. residency status for U.S. income tax purposes will be examined more closely below. An individual's status as a U.S. resident has been "revoked/rescinded" when "a final administrative or judicial order of exclusion or deportation is issued."[6]

That is clear enough, but the concept of "abandonment" is a little murkier. The relevant regulation provides the following guidance, of which many taxpayers and their advisors are completely unaware:

- Who can start the "abandonment" process? An administrative or judicial determination of abandonment of resident status may be initiated by the alien individual, [or] the Immigration and Naturalization Service (INS), or a consular officer.[7]
- When does "abandonment" occur if the U.S. resident starts the process? If the alien [individual] initiates this determination [of abandonment], resident status is considered to be abandoned when the individual's application for abandonment (INS Form I-407) or a letter stating the alien's intent to abandon his or her resident status, with the Alien Registration Receipt Card (INS Form I-151 or Form I-551) enclosed, is filed with the INS or a consular officer. For purposes of this paragraph, an alien individual shall be considered to have filed a letter stating the intent to abandon resident status with the INS or a consular office if such letter is sent by certified mail, return receipt requested (or a foreign country's equivalent thereof). A copy of the letter, along with proof that the letter was mailed and received, should be retained by the alien individual.[8]
- When does "abandonment" occur if the U.S. government starts the process? If the INS or a consular officer initiates this determination [of abandonment], resident status will be considered to be abandoned upon the issuance of a final administrative order of abandonment. If an individual is granted an appeal to a federal court of competent jurisdiction, a final judicial order is required.[9]

The third manner of losing U.S. resident status applies only to so-called "dual resident taxpayers." These are individuals considered to be residents, for tax purposes, of both the United States and a foreign country with which the United States has a bilateral tax treaty. After 2008, this narrow group of individuals (which ordinarily is comprised of Green Card holders who physically reside abroad) can affirmatively rid themselves of U.S. residency status by filing Forms 1040-NR (U.S. Nonresident Alien In-

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1 *Topsnik*, 143 TC 240 (2014); *Topsnik*, 146 T.C. No. 1.

2 Section 7701(b)(1)(i); Reg. 301.7701(b)-1(b).

3 Section 7701(b)(6).

4 Reg. 301.7701(b)-1(b)(1).

5 Section 7701(b)(6). This was added by the Heroes Earnings Assistance and Relief Tax Act of 2008, P.L. 110-245, section 301(c)(2)(B); U.S. Joint Committee on Taxation, "Technical Explanation of H.R. 6081, the "Heroes Earnings Assistance and Relief Tax Act of 2008, JCX-44-08 (5/20/08).

6 Reg. 301.7701(b)-1(b)(2).

7 Reg. 301.7701(b)-1(b)(3).

8 *Id.*

9 *Id.*

come Tax Return) with the IRS and enclosing a Form 8833 (Treaty-Based Return Position Disclosure Under Section 6114 or 7701(b)) explaining to the IRS that they should be treated solely as residents of the foreign country pursuant to the "residency tie-breaker rules" found in the applicable treaty. This third manner of losing U.S. resident status for tax purposes, inserted in the Code by Congress in 2008, is consistent with the regulations issued several years earlier. They state the following:

> A "dual resident taxpayer" is an individual who is considered a resident of the United States pursuant to the internal laws of the United States and also a resident of a treaty country pursuant to the treaty partner's internal laws. If the alien individual determines that he or she is a resident of the foreign country for treaty purposes, and the alien individual claims a treaty benefit (as a nonresident of the United States) so as to reduce the individual's United States income tax liability with respect to any item of income covered by an applicable tax convention during a taxable year in which the individual was considered a dual resident taxpayer, then that individual shall be treated as a nonresident alien of the United States for purposes of computing that individual's United States income tax liability under the provisions of the Internal Revenue Code and the regulations thereunder ... .[10]

Relevant Aspects of the Bilateral Tax Treaty

A bilateral income tax treaty exists between the United States and Germany (Treaty).[11] The main issues in *Topsnik* derive from just three provisions in the Treaty, i.e., Article 1, Article 4, and Article 13. These are briefly explained below.

Article 1 states that the Treaty applies only to persons who are "residents" of Germany and/or the United States.

Article 4(1) defines the concept of a "resident" for Treaty purposes, explaining that this term means "any person, *who under the laws of that State*, is liable to tax therein by reason of his domicile, residence, place of management, place of incorporation, or any other criterion of a similar nature ... ."[12] In other words, if one is trying to determine whether an individual is a "resident" of Germany for purposes of the Treaty, he must look to local/German law. This concept is emphasized in the Technical Explanation to the Treaty, which contains the following passage:

> The determination of residence for treaty purposes looks first to a person's liability to tax as a resident *under the respective taxation laws of the Contracting States* [*i.e.*, the United States and Germany]. A person who, *under those laws*, is a resident of one Contracting State and not of the other need look no further. That person is a resident for purposes of the [Treaty] of the State in which he is a resident *under internal law*.[13]

Article 4(1) goes on to clarify that the term "resident" does *not* include "any person who is liable to tax in that State in respect only of income from sources in that State or capital situated therein."[14] The Technical Explanation to the Treaty provides clarity regarding Article 4(1), stating the following:

> *If, under [Article 4(1)], a person is liable to tax in a Contracting State only in respect of income from sources within that State, or, in the case of Germany, only in respect of capital situated in Germany,* [then] the person will *not* be treated as a resident of that Contracting State ... [15]

Article 4(2) of the Treaty contains the infamous "tie-breaker rules," which apply only when, after applying the general standards set forth in Article 4(1), a person is considered a "resident" of both the United States and Germany. Put differently, if an analysis of residency using the rules contained in Article 4(1) results in the conclusion that a person is a resident of both countries, then one must turn to a series of tie-breaker questions. These focus on criteria such as the country in which a person has a permanent home, closer personal and economic relations, a habitual abode, citizenship, etc.

Article 13 of the Treaty deals with taxation of certain gains from the sale of property. Article 13(5) states that "[g]ains from the alienation of any property other than that referred to in the preceding paragraphs shall be taxable only in the Contracting State of which the alienator is a resident." The Technical Explanation expands on this notion, explaining that Article 13(5) generally "grants to the residence State the exclusive right to tax gains from the alienation of other than property referred to in [Article 13(1) through Article 13(4)]."

CASE DESCRIPTION

Facts in a tax case can be convoluted, with large amounts of superfluous information. *Topsnik* was no exception. Below is a description of the most relevant facts, cobbled together from multiple sources.[16]

Gerd Topsnik was born in Germany. He has always been a German citizen. Gerd moved to Canada in 1957, where he made a living in various manners, perhaps the most interesting of which was his time as a professional wrestler.[17] Two decades later, in 1977, Gerd applied for and received his Form I-551 (Green Card), thereby making him a "U.S. resident" for U.S. income tax purposes. Gerd moved from Canada to Hawaii that same year.

In 1986, Gerd and another individual formed Gourmet Foods, Inc. (GFI), a U.S. corporation. It appears that Gerd had a falling out with his business associates after many years of operation, and a lawsuit ensued. The litigation was eventually settled, the result of which was that GFI would purchase Gerd's interest for a total of $5.4 million. Gerd did not get all this money at once; rather, he received an initial payment of $1.6 million in 2004, with the rest coming in the form of monthly installment payments of $42,500, beginning in September 2004 and running through 2013. Thus, in 2004, Gerd received $1.77 million, consisting of an initial payment of $1.6 million and four monthly payments of $42,500. For every year thereafter

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until full payment had been rendered, Gerd was to receive annual payments of $510,000, consisting of 12 monthly installments of $42,500. GFI sent all payments to Gerd's daughter, who was living in Canada, after which they were deposited into a credit union account in Canada.

In 2002, Gerd flew from Germany to the United States, where he presented himself to U.S. immigration agents as a returning lawful permanent resident (i.e., Green Card holder). The form that he completed and submitted to the U.S. immigration agents indicated that the purpose of his trip was to return to his home in Hawaii, he had resided in Hawaii since 1977, he was a shareholder in GFI, he traveled every six weeks in connection with his other business interests in Thailand and Germany, and he was a resident of the United States.

In 2003, Gerd applied to renew his Green Card. He stated on his application that he was a lawful permanent resident of the United States (i.e., Green Card holder) and listed his address in Hawaii as his residence. His renewal application was approved in 2004, which extended his Green Card status until March 2014.

Gerd sold his house in Hawaii in 2003. It appears that Gerd spent significant time in various countries during the following years, principally Thailand, where he operated a winery called Gourmet Foods Thailand Co. Ltd., and the Philippines, where he rented a large house for himself and his family.

In November 2010, Gerd relinquished his status as a Green Card holder by filing with U.S. immigration agents a Form I-407 (Abandonment of Lawful Permanent Resident Status) and surrendering his Green Card. He indicated at that time that he was a resident of the Philippines.

Gerd filed Forms 1040 (U.S. Individual Income Tax Returns) for 2004 and 2005, as a U.S. resident, reporting the gain from the sale of the GFI stock. Gerd later changed course with the IRS, claiming that the gain from the sale of GFI stock should *not* be taxable in the United States because of special rules found in the Treaty. Gerd formalized this new position with the IRS by (1) filing Forms 1040-NR (U.S. Nonresident Alien Income Tax Return) for 2006, 2007, 2008, and 2009, and (2) attempting to substitute Forms 1040-NR for 2004 and 2005 for the Forms 1040 that he originally filed with the IRS (i.e., those on which he indicated that he was a U.S. resident subject to worldwide taxation).

As part of this tax dispute, the IRS, through the U.S. Competent Authority, made a request to the German Competent Authority in February 2011 for information regarding Gerd's residency status and return-filing history in Germany. The IRS was able to seek this data thanks to Article 26 of the Treaty, which calls for exchange of information and administrative assistance between the United States and Germany with respect to tax matters. The German Competent Authority responded to the IRS in May 2011, providing the following results: (1) Gerd was not registered in the community in Germany where he claimed to reside; (2) There was no evidence that Gerd had a domicile or habitual residence in Germany under German law; (3) Starting in 2002, Gerd had been registered with the German tax authority as a taxpayer with limited tax liability (i.e., the equivalent of a nonresident alien for U.S. tax purposes), such that he was subject to tax in Germany only on certain income made in Germany and assets located in Germany; (4) Gerd did not file any tax returns in Germany based on his supposed status as a taxpayer with limited liability, despite repeated requests by the German tax authority; (5) Because Gerd did not voluntarily file German tax returns, the German tax authority did so for him, in the form of "substitute for returns" based on the available data; (6) Given his status as a taxpayer with limited liability, the German tax authority did not tax any gain from the sale of the GFI stock in the "substitute for returns" in Germany; (7) Gerd filed value-added tax returns for 2002, 2003, and 2004, reporting to the German tax authority minor amounts of rental income associated with a hotel/inn that Gerd professed to own, but no such returns were filed for 2005 or later years; (8) The data was unclear about who, exactly, owned

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10 Reg. 301.7701(b)-7(a)(1) .

11 The Treaty is comprised of the following items: (1) Convention Between the United States of America and the Federal Republic of Germany for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital and to Certain Other Taxes, signed in 1989 and effective in 1991; (2) The Protocol to the Treaty signed in 1989; (3) A "Technical Explanation" by the U.S. Treasury Department regarding the original text and the Protocol from 1989; (4) Another Protocol to the Treaty signed in 2006; and (5) A "Technical Explanation" by the U.S. Treasury Department regarding the Protocol from 2006. The language examined in this article is from the Treaty and Protocol from 1989. The most relevant provisions, Article 4 and Article 13, were modified in 2006, but, as the Tax Court underscored in *Topsnik*, the substance remained the same after the modifications and, because of effective dates, the modified version only affected two years in *Topsnik*, 2008 and 2009.

12 Emphasis added.

13 *Id.*

14 The 2006 Protocol slightly expanded Article 4(1) to provide that the term "resident" does not include "any person who is liable to tax in that State in respect only of income from sources in that State or profits attributable to a permanent establishment or capital situated therein."

15 *Id.*

16 The facts are based on the Decision by the Tax Court, *Topsnik*, 143 TC 240 (2014), and various documents filed by the taxpayer and the IRS as part of the case, such as Petition dated 10/3/11, Answer dated 12/2/11, Reply dated 12/30/11, First Amended Petition dated 12/2/12, Pretrial Memorandum by IRS dated 11/26/12, and Opening Brief by IRS dated 7/25/13. These documents are on file with the author.

17 Information about his professional wrestling matches can be found at *www.wrestlingdata.com*.

and operated the inn/hotel in Germany during the relevant years; and (9) Gerd was in Germany 98 days in 2005, 92 days in 2006, 44 days in 2007, 40 days in 2008, and 14 days in 2009.

From the documents submitted to the Tax Court, it appears that Gerd had three main positions. First, Gerd argued that, despite the fact that he did not formally relinquish his Green Card to U.S. immigration officials until 2010, he "informally abandoned" his status as a U.S. resident in 2003 when he sold his house in Hawaii and thereafter had only brief trips to the United States. Because he was never a U.S. citizen, because he supposedly stopped being a U.S. resident in 2003, and because he allegedly was a German resident, Gerd claimed that the capital gain from the sale of GFI stock escaped U.S. taxation under Article 13(5) of the Treaty. As explained above, according to Article 13(5), only the country in which Gerd is a "resident" for Treaty purposes has the right to tax gains from the sale of certain property. In support of his position that he was a German resident during the relevant years, Gerd underscored that he was born in Germany, is a German citizen, has a German passport, has a German driver's license, spends time in Germany each year, and has an interest in various properties in Germany.

Second, Gerd contended that, even if he were a U.S. resident until he officially abandoned his Green Card in 2010, he was also a German resident during that period. Because he was a "dual resident" during the relevant years, it is necessary to apply the tie-breaker rules in Article 4(2) of the Treaty. These tie-breaker rules, maintained Gerd, demonstrate that he should be considered only a German resident for tax purposes. Following this logic, Article 13(5) of the Treaty would dictate that only Germany, not the United States, had the right to tax the gain on the sale of the GFI stock.

Finally, Gerd took the position that, regardless of the outcome on the substantive issues, he should not be penalized because he had reasonable cause for the late filings and late payments, and he relied on his accountant with respect to the proper treatment of the capital gain for U.S. tax purposes.

The IRS, of course, disagreed with Gerd on all points. The IRS's main positions can be summarized as follows: (1) According to the relevant tax provisions and regulations, Gerd was considered a U.S. resident for U.S. income tax purposes until he formally abandoned his Green Card in November 2010 by filing with U.S. immigration agents a Form I-407 (Abandonment of Lawful Permanent Resident Status) and surrendering his Green Card; (2) Because he was a U.S. resident during the relevant years, Gerd was subject to U.S. income tax on his worldwide income, including the capital gain generated by the sale of GFI stock in 2004 and the subsequent installment payments; (3) Gerd was never a resident of Germany during the relevant period as this term is defined in Article 4 of the Treaty; therefore, there is no need to consult the tie-breaker rules in Article 4(2) and there are no grounds for Gerd's theory that he is exempt from U.S. tax on the capital gain from the sale of GFI stock under Article 13(5); and (4) Gerd should be penalized under Section 6651 for the late filings and late payments because he did not demonstrate any "reasonable cause" for these violations.

Whether an individual is a U.S. resident for tax purposes is complicated by the fact that the IRS generally refuses to answer this question ahead of time.

ANALYSIS BY THE TAX COURT

The analysis by the Tax Court in *Topsnik* can be divided into three parts.

First, the Tax Court addressed the argument by Gerd that, although he did not formally abandon his Green Card in accordance with the Code and regulations until November 2010, he "informally abandoned" his status as a U.S. resident in 2003 when he sold his home in Hawaii, purportedly acquired German residency, and thereafter made only short visits to the United States. In support of this position, Gerd cited a criminal case involving the Arms Export Control Act and its underlying regulations, the International Traffic in Arms Regulations (ITAR). In that case, the defendant successfully argued that he was not subject to prosecution because he had lost his status as a "U.S. person," even without taking formal action with U.S. immigration officials, because (1) the ITAR was silent about the how an individual loses U.S. status for purposes of the ITAR, and (2) the defendant demonstrated his intent to relinquish his U.S. status when he left the United States in 1993 and returned thereafter only for short trips to visit family. The Tax Court rejected Gerd's reliance on the criminal case because, unlike the ITAR, the Code and its regulations have specific procedures for ceasing status as a U.S. resident, and Gerd did not follow such procedures.

Second, the Tax Court dispensed with Gerd's contention that, because of a position that the U.S. government previously took in related litigation before the U.S. District Court (not the Tax Court), the IRS was now prohibited from claiming that Gerd is not a resident of Germany. Gerd filed suit in U.S. District Court in 2011, challenging the jeopardy tax assessments and related collection actions by the IRS. In response, the U.S. government filed a Motion to Dismiss, arguing that the U.S. District Court was an improper venue for the case because Gerd was a resident of Germany. In the subsequent Tax Court case, Gerd raised the what's-good-for-the-goose-is-good-

for-the-gander argument, claiming that the IRS should be judicially estopped from taking an inconsistent position, i.e., that Gerd is a U.S. resident. The Tax Court sided with the IRS, explaining that the only thing that the U.S. District Court held was, at the time that Gerd filed the Complaint in U.S. District Court in 2011 or when the U.S. District Court issued its ruling in 2012, Gerd resided in Germany. Whether Gerd was a U.S. resident during the years relevant to the Tax Court (i.e., 2004 through 2009) was not addressed by the U.S. District Court.

Third, the Tax Court determined that Gerd was not entitled to any Treaty benefits because he was not a German resident. As the Tax Court explained, after determining that Gerd was a U.S. resident under internal U.S. law during the relevant years (because of his Green Card), it must uphold the proposed taxes, penalties, and interest listed in the Notice of Deficiency, unless Gerd could prove that he was somehow exempt from tax under the Treaty. This, emphasized the Tax Court, would require a finding that (1) Gerd was also a German resident during the relevant years, as this term is defined in the Treaty, and (2) he should be considered solely a German resident under the tie-breaker rules in Article 4(2) of the Treaty. The Tax Court never got beyond the first element; that is, it never needed to apply the facts to the tie-breaker rules.

As explained above, Article 4(1) of the Treaty states that the term "resident" does *not* include "any person who is liable to tax in [Germany] in respect only of income from sources in [Germany] or capital situated [in Germany]." Also, as indicated above, the Technical Explanation to Article 4(1) states the following: "If, under [Article 4(1)], a person is liable to tax in a Contracting State only in respect of income from sources within that State, or, in the case of Germany, only in respect of capital situated in Germany, [then] the person will *not* be treated as a resident of that Contracting State ..."[18]

Rooting itself in this guidance, the Tax Court explained that "the treaty test for residence in a contracting State is the individual's liability to pay tax to the State as a resident, which, in the case of Germany, means that the individual must be taxable on his or her worldwide income." Gerd never alleged that he was subject to worldwide taxation in Germany, and the facts confirm that he was not. Indeed, the data received from the German Competent Authority indicated that Gerd was registered as a taxpayer with limited liability in Germany (i.e., the U.S. equivalent of a non-resident alien), he never filed German tax returns, and he was not taxed in Germany on the gain from the sale of GFI stock. Because the Tax Court found that Gerd was only a U.S. resident and not a German resident during the relevant years, it ultimately held that only the United States could tax Gerd on the capital gain from the sale of GFI stock. This conclusion derives from Article 13(5), which generally states that "[g]ains from the alienation of any property other than that referred to in the preceding paragraphs shall be taxable only in the Contracting State of which the alienator is a resident."

Tucked away in footnote 13 of its opinion, the Tax Court provided yet another reason for ruling against Gerd. The court explained that, even if Gerd were a dual-resident of the United States and Germany during the relevant years, he would still not be considered a resident of Germany under the tie-breaker rules in Article 4(2) because he failed to file a timely Form 1040-NR (U.S. Nonresident Alien Income Tax Return) enclosing a Form 8833 (Treaty-Based Return Position Disclosure), and enclosing a Form 8854 (Initial and Annual Expatriation Statement), if necessary, to put the IRS on notice of his position.

INTERESTING AND OBSCURE ISSUES

Topsnik, like many cases, is interesting for a number of reasons that are not apparent to those who simply read the Tax Court opinion or, worse, rely on snippets about the case from one of the many electronic tax information services. Some of the notable reasons for the importance of *Topsnik* are discussed below.

Inconsistencies in Tax and Immigration Laws

Many taxpayers, their tax advisors, their immigration experts, and their friends in similar situations are unaware of the rules in the Code and regulations about relinquishing Green Card status and how these rules differ from U.S. immigration standards. *Topsnik* highlights this reality.

Historically, whether an individual was considered a U.S. resident for tax purposes largely depended on the subjective intent of the individual. That changed when Congress enacted more objective standards in Section 7701(b) as part of the Deficit Reduction Act of 1984. Few people, of course, spend time reviewing the legislative history to a tax provision. If they had, they would realize that Congress, going back more than 30 years, clearly intended to make Green Card holders take formal steps to rid themselves of U.S. resident status. Congress believed that this was necessary to prevent individuals from taking advantage of the system, by claiming that they were U.S. residents, for immigration purposes, while declaring that they were not U.S. residents, for tax purposes. Below are relevant excerpts from the legislative history:

> Congress believed that aliens who have entered the United States as permanent residents and who have not officially lost or surrendered the right to permanent U.S. residence should be taxable as U.S. residents. These persons have the rights in the United States that are similar to those afforded U.S. citizens (including the right to enter the United States at will); equity demands that they contribute to the cost of running the government on the same basis as citizens.[19]
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> The Act defines 'lawful permanent resident' to mean an individual who has the status of having been lawfully accorded the privilege of residing permanently in

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[18] Emphasis added.

[19] U.S. Joint Committee on Taxation. General Explanation of the Revenue Provisions of the Deficit Reduction Act of 1984, JCS-41-84 (12/31/84), p. 464.

the United States as an immigrant in accordance with the immigration laws, if such status has not been revoked or administratively or judicially determined to have been abandoned. Therefore, an alien who comes to the United States so infrequently that, on scrutiny, he or she is no longer legally entitled to permanent resident status, but who has not officially lost or abandoned that status, will [still] be a resident for tax purposes. The purpose of this requirement of revocation or determination is to prevent aliens from attempting to retain an apparent right to enter or remain in the United States while attempting to avoid the tax responsibility that accompanies that right.[20]

Those congressional sentiments from 1984 were memorialized by the IRS in the regulations, explained above, stating that once an individual acquires U.S. resident status thanks to a Green Card, he can lose such status only by (1) formal revocation/rescission of the Green Card, (2) abandonment of the Green Card, followed by an administrative or judicial ruling confirming such abandonment, or (3) after 2008, filing Form 1040-NR (U.S. Nonresident Alien Income Tax Return) and Form 8833 (Treaty-Based Return Position Disclosure Under Section 6114 or 7701(b)) with the IRS, alerting the IRS that the Green Card holder is taking the position that he should only be treated as a resident of a foreign country under the tie-breakers rules in the relevant bilateral tax treaty.[21] The IRS continues to strictly follow this position, as evidenced by *Topsnik* and internal documents. For instance, a recent Chief Counsel Advisory underscores the following about termination of treatment as a Green Card holder: "[M]erely leaving the United States with no intention to return is not sufficient."[22]

Those who specialize in the overlap of U.S. tax and immigration rules and procedures have done a laudable job of attempting to educate taxpayers and their advisors that formal steps must be taken to relinquish U.S. residency status gained through a Green Card, allowing a Green Card to expire does not suffice, remaining outside the United States permanently or for long periods of time is inadequate, and many Green Card holders cannot officially lose this status until they unsuccessfully try to enter the United States. The tax/immigration specialists explain the situation more artfully:

> LPRs [*i.e.*, Lawful Permanent Residents] remain U.S. tax residents until their LPR status is revoked or administratively or judicially determined to have been abandoned. To avoid U.S. obligations incident to LPR status, formal steps must be taken to relinquish status or prove revocation. Expiration of immigrant documentation or lengthy (or permanent) absences from the United States alone do not accomplish this. While immigrants who leave the United States for extended periods may seem to have discontinued permanent ties to the United States, abandonment must be official to be effective."[23]

Unfortunately, most LPRs who leave the United States have no idea or notice of their ongoing obligation to pay tax to the United States on their worldwide income unless or until they attempt to satisfy IRS standards for termination of LPR status. Paradoxically, this could include a scenario under which an LPR remains obligated to pay U.S. taxes, even though he remains outside the United States too long (thereby not maintaining close enough ties to the United States) to be readmitted as an LPR. IRS Publication 519 cautions, in fact, that unless an LPR possesses proof of termination per the discussion above, the taxpayer remains a U.S. tax resident, even if the U.S. immigration authority would not respect the LPR status as valid because the green card had expired or because of extended absence from the United States. As a result of widespread ignorance about the intersection of U.S. immigration and tax laws, unfortunately, countless foreign nationals who obtained LPR status and later departed the United States for employment, retirement, or personal reasons may have assumed that they terminated U.S. immigrant status automatically but are now at risk of obligation for U.S. taxes (plus penalties and interest) for failure to comply with U.S. tax and disclosure obligations.[24]

No Advance Rulings on Certain Residency Issues

The question of whether an individual is a U.S. resident for tax purposes is complicated by the fact that the IRS generally refuses to answer this question ahead of time. Each year, the IRS announces the matters on which it will not issue Private Letter Rulings or Determination Letters. The most recent edition, Rev. Proc. 2016-7, 2016-1 IRB 239 explains that the IRS will not make advance decisions about certain items "either because the issues are inherently factual or for other reasons."[25] Rev. Proc. 2016-7 states that the IRS will not issue a Private Letter Ruling or Determination Letter about whether, under Section 7701(b), an individual is a U.S. resident or not.[26] Additionally, Rev. Proc. 2016-7 explains that the IRS ordinarily will not opine on certain issues, unless "unique and compelling circumstances" exist. Among the items on the "probably not" list is the following: "Whether certain persons will be considered liable to tax under the laws of a foreign country for purposes of determining if such persons are residents within the meaning of any United States income tax treaty."[27] Based on the preceding, it appears that the Tax Court litigation in *Topsnik* could not have been avoided if, say, Gerd had submitted a request for a Private Letter Ruling or Determination Letter about whether he lost U.S. resident status in 2003 when he sold his home in Hawaii and essentially left the United States.

Reminder About Non-Delegable Duty Stance of IRS

Gerd had repeated problems filing his U.S. tax returns on time. According to the documents filed with the Tax Court as part of *Topsnik*, from 1992 through 2009, Gerd filed returns late, did not file returns at all, or filed returns only after the IRS prepared "substitute for returns" on unfavorable

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20 *Id.*, p. 468.

21 Reg. 301.7701(b)-1(b)(2); Reg. 301.7701(b)-1(b)(3); Section 7701(b)(6).

22 "IRS Addresses Rules Affecting Green Card Holders, Expats," 2012 Worldwide Tax Daily 194-28 (8/15/14).

23 Dodd-Major and Singer, "When Immigration and Tax Converge," 65 Tax Notes International 917 (3/19/12), p. 931.

24 *Id.*, pp. 934-935.

25 Rev. Proc. 2016-7, section 2.01.

26 Rev. Proc. 2016-7, section 3.01(7).

27 Rev. Proc. 2016-7, section 4.01(11).

terms. Gerd suggested to the Tax Court that he should not be penalized because there was "reasonable cause" and he relied on a U.S. tax professional, at least with respect to how the installment sale payments from the sale of GFI stock should have been reported.[28]

The Tax Court pointed out that the Forms 1040 for 2004 and 2005 were filed late, and the Forms 1040-NR for 2006 through 2009 were filed only after the IRS had already prepared "substitute for returns." The court seemed irritated with the ambiguity or incompleteness of the penalty defenses raised by Gerd. It held that, to the extent that Gerd was attempting to argue that his delinquent Forms 1040 and Forms 1040-NR were "the product of instructions from counsel, and, therefore, not attributable to him," that position fails because of the Supreme Court authority in *Boyle*, 469 U.S. 241, 55 AFTR2d 85-1535 (1985).

The Tax Court does not go into detail about the penalty issue in *Topsnik*, but it raises an interesting, and often misunderstood, rule: A taxpayer generally is entitled to rely on "advice" from qualified, informed U.S. tax professionals to avoid penalties, but he cannot escape sanctions when the U.S. tax professional is simply completing a "ministerial task" for the taxpayer, such as filing a U.S. tax return or submitting a filing-extension for a U.S. tax return. The following two cases do a good job of explaining this distinction.

In *Boyle*, the Supreme Court ruled that a taxpayer cannot avoid the late-filing penalty by relying on his advisor to perform the "ministerial act" of filing a tax return. The Court contrasted that situation with one in which an accountant advises a taxpayer on a substantive matter of tax law, such as whether a tax liability exists. The Court held that it is reasonable for a taxpayer to rely on substantive advice from an accountant or attorney because most taxpayers are not qualified to discern an error in such advice. However, the Court indicated that lay persons know that tax returns have fixed filing dates and that taxes must be paid when due: "It requires no special training or effort to ascertain a deadline and make sure that it is met. The failure to make a timely filing of a tax return is not excused by the taxpayer's reliance on an agent, and such reliance is no 'reasonable cause' for a late filing under § 6651(a)(1)." Thus, under *Boyle*, taxpayers have a non-delegable duty to file a timely return.

In *McMahan*, 114 F.3d 366, 79 AFTR2d 97-2808 (CA-2, 1997), the court expanded the ruling in *Boyle*, holding that a taxpayer has a non-delegable duty to file a timely return or to seek a timely filing-extension; reliance on an advisor to complete and mail an extension request does not fall within "substantive advice" exception to penalties established in *Boyle*. The court held the following:

> As the holding in *Boyle* ... makes evident, reliance on an agent for the ministerial task of filing a tax return by the statutory deadline does not constitute reasonable cause ... The underlying rationale for *Boyle's* bright-line rule focuses on the need for an unbending standard to ensure the prompt filing and payment of taxes. The duty to file a return and to pay taxes on time is plainly placed upon the taxpayer. Unlike a substantive issue of tax law for which a taxpayer must rely on an expert, the deadline for filing a return is unambiguous and easily ascertainable. It requires no special training or effort to understand. Consequently, the Supreme Court believed it unreasonable [in *United States v. Boyle*] for the executor simply to rely on the attorney to comply with the statutory deadline ... Similar reasoning governs the case at hand. Petitioner here had a personal, non-delegable duty to file a timely return by August 15 unless and until he received a second extension. This duty included the timely filing of an application for an extension... As the tax court noted below, "[i]t would be anomalous to excuse a late return where the taxpayer asked his agent to file an extension request but not excuse a late return where the taxpayer asked his agent to file a return." We agree that such a result would not only be anomalous, but it would also create a loophole for taxpayers to avoid both the timely filing of tax returns and the otherwise applicable late-filing penalties.

Accidental Americans Subject to Exit Tax Under Section 877A

Section 877A imposes a mark-to-market regime on certain taxpayers who decide to leave the United States, *i.e.*, to "expatriate." These taxpayers generally must pretend, for U.S. tax purposes, to sell all their property at fair market value the day before their "expatriation date" and pay the corresponding income taxes to the IRS.[29] This so-called "exit tax" applies only to "covered expatriates."[30] Thus, in order for the "exit tax" to apply, the taxpayer must be not only an "expatriate," but also a "covered expatriate."

Expatriate / Long-Term Resident of the United States. The term "expatriate" means either a U.S. citizen who relinquishes his citizenship, or a "long-term resident" of the United States who ceases to be a "lawful permanent resident" of the United States, *e.g.*, because he ceases to be a Green Card Holder.[31]

For its part, the term "long-term resident" is defined by cross-reference to Section 877(e)(2), which states the following:[32]

> [T]he term "long-term resident" means any individual (other than a citizen of the United States) who is a lawful permanent resident of the United States [*i.e.*, a Green Card Holder] in at least 8 taxable years during the period of 15 taxable years ending with the taxable year during which [Green Card status is terminated] ...

The legislative history provides additional clarity regarding what a "long-term resident" means in the context of the "exit tax." The Conference Report to the Health Insurance Portability and Accountability Act of 1996 states the following in this regard:

> The present-law expatriation tax provisions apply only to certain U.S. citizens who lose their citizenship. The House bill

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28 First Amended Petition, 12/6/12, p. 7. It states the following regarding the reasonable reliance defense: "Circumstances giving rise to capital gain computational adjustment amounts asserted by the examining agent to be applicable to the year 2004 were in fact brought by a professional tax preparer and not be petitioner who properly relied on such professional advice so as to have the amounts in question properly computed under complicated installment sale rules."

29 Section 877A generally applies to individuals who cease to be U.S. citizens or lawful permanent residents on or after 6/17/08. See Notice 2009-85, 2009-45 IRB 598.

30 Section 877A(a)(1).

31 Section 877A(g)(2).

32 Section 877A(g)(5).

> extends these expatriation tax provisions to apply also to long-term residents of the United States whose U.S. residency is terminated. For this purpose, a long-term resident is any individual who was a lawful permanent resident of the United States for at least 8 out of the 15 taxable years ending with the year in which such termination occurs ...[33]

Likewise, the IRS's Instructions to Form 8854 (Initial and Annual Expatriation Statement) contain guidance confirming that the "exit tax" applies only to "long-term residents" and, for purposes of determining this status, a taxpayer does not count the year in which he is treated as a resident of a foreign country under a tax treaty.

> Expatriation tax provisions apply to U.S. citizens who have relinquished their citizenship and long-term residents who have ended their residency (expatriated).
>
> 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).
>
> Expatriation includes the acts of relinquishing U.S. citizenship and terminating long-term residency.
>
> Long-term resident (LTR) defined. You are an LTR if you were a lawful permanent resident of the United States [*i.e.*, a Green Card Holder] in at least 8 of the last 15 tax years ending with the year your status as an LTR ends. In determining if you meet the 8-year requirement, do not count any year that you were treated as a resident of a foreign country under a tax treaty and did not waive treaty benefits applicable to residents of the country.

Finally, IRS Publication 519 (U.S. Tax Guide for Aliens) expressly states that, for purposes of determining long-term resident status for purposes of Section 877A, a taxpayer does not count the year in which he is treated as a resident of a foreign country under a tax treaty.

> Long-term resident defined. You are a long-term resident if you were a lawful permanent resident of the United States [*i.e.*, a Green Card Holder] in at least 8 of the last 15 tax years ending with the year your residency ends. In determining if you meet the 8-year requirement, do not count any year that you were treated as a resident of a foreign country under a tax treaty and did not waive treaty benefits.[34]

Covered Expatriate. For purposes of Section 877A, the term "covered expatriate" means an "expatriate" (including a long-term resident of the United States) who has an average annual U.S. income tax liability for the past five years of a particular amount, or who has a net worth exceeding a certain threshold, or who cannot certify to the IRS that he has been in full U.S. tax compliance for the past five years.[35] If the "expatriate" fails even one of the preceding three tests, he will be considered a "covered expatriate," subject to the general mark-to-market deemed sale rules the year he departs from the United States.

Expatriation Date. The "expatriation date" for "long-term residents" is the date on which they cease to be lawful permanent residents under Section 7701(b)(6).[36] As explained above, loss of lawful permanent resident status occurs when (1) a Green Card is revoked/rescinded, (2) a Green Card is abandoned, and then an administrative or judicial ruling confirms such abandonment, or (3) after 2008, an individual officially takes the position with the IRS that he is a resident of a foreign country under the tie-breaker rules of the relevant treaty by filing Form 1040-NR (U.S. Nonresident Alien Income Tax Return), Form 8833 (Treaty-Based Return Position Disclosure Under Section 6114 or 7701(b)), and Form 8854 (Initial and Annual Expatriation Statement), if necessary.

Observations About Expatriation and Accidental Americans. Although not the issue in *Topsnik*, it is apparent that Gerd, along with many other Green Card holders in his position, will unwittingly be subject to the "exit tax" under Section 877A the year in which they officially expatriate. Indeed, as the author was completing this article, the Tax Court issued another opinion, this one in January 2016, holding that Gerd must pay the "exit tax" on the fair market value of the promissory note related to the sale of GFI stock. The court primarily based its ruling on the following grounds: (1) Gerd was a "long-term resident" because he had a Green Card from 1977 to 2010, which far exceeds the eight-year threshold; (2) He was a "covered expatriate" because he failed to file Form 8854 (Initial and Annual Expatriation Statement) when he expatriated in 2010 and because of his inability, in all events, to certify to the IRS that he had been fully U.S. tax compliant in the five years preceding 2010; (3) His "expatriation date" was November 2010, when he officially surrendered his Green Card to U.S. immigration agents and completed Form I-407 (Abandonment of Lawful Permanent Resident Status); and (4) The promissory note that Gerd received in connection with the installment sale of his shares in GFI (and the related future payments) constitutes "property" that is subject to the mark-to-market sale rule in Section 877A.[37]

One should anticipate seeing IRS personnel raising more issues involving "accidental Americans" and the "exit tax" under Section 877A. This is because the IRS recently issued an International Practice Unit (IPU) concerning the tax residency of Green Card holders, which Revenue Agents use in conducting audits. The IPU gives Revenue Agents this warning and guidance:

> Caution: An LPR may be subject to special expatriation tax rules if, among other conditions, LPR status has been rescinded or there has been a final administrative or judicial determination that LPR status has been abandoned, or if he or she has taken the position that he or she is a resident of a treaty country, and he or she has been an LPR for at least 8 of the last 15 years ending with the year when U.S. residency ended.[38]

Unforeseen Information-Reporting Obligations With the IRS

The Tax Court held in *Topsnik* that Gerd was solely a resident of the United States during the relevant years (*i.e.*, 2004 through 2009) under the Treaty, and not a dual-resident of the United States and Germany. Accordingly, it was unnecessary for the

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33 H. Rep't No. 104-736, 104th Congress, 2d Session, 324 (1996) Conference Report.

34 IRS Publication 519 (U.S. Tax Guide for Aliens) (2012), p. 22.

35 Section 877A(g)(1)(A); Notice 2009-85, section 2(A).

36 Section 877A(g)(3)(B).

37 *Topsnik*, 146 T.C. No. 1.

38 IRS Large Business & International, International Practice Unit "Determining Tax Residency Status of Lawful Permanent Resident," 12/15/14.

Tax Court to examine whether Gerd should be treated as a resident of Germany under the tie-breaker rules found in Article 4(2) of the Treaty. As a U.S. resident, Gerd is subject to a large number of information-reporting requirements regarding foreign accounts, entities, other assets, and activities. This is becoming common knowledge for tax practitioners now that the IRS has been implementing a long list of offshore voluntary disclosure programs starting in 2009. What is not well known, however, is that Gerd would have been subject to many information-reporting obligations until he formally relinquished his U.S. residency status in November 2010, even if he had been successful in convincing the Tax Court that he was a dual-resident from 2004 through 2009.

Information-reporting duties, noncompliance, and the related penalties were not discussed in *Topsnik*. Nevertheless, documentation filed with the Tax Court as part of the litigation suggests that these issues existed. For instance, the materials indicate that, during the relevant years, (1) Gerd spent significant time in Thailand, the Philippines, Canada, Germany, and elsewhere, (2) all payments to Gerd related to the sale of GFI stock were sent to his daughter in Canada and then deposited into a credit union account there, (3) Gerd may have owned a hotel/inn and other properties in Germany, (4) Gerd owned and operated a winery business in Thailand, and (5) Gerd had a bank account in Thailand.[39] The point here is not to speculate about Gerd's particular issues, but rather to use them as an opportunity to discuss obligations and issues for U.S. persons, including dual-residents who are determined to be residents of a foreign country under the tie-breaker rules in a bilateral tax treaty.

Overview of Duties of U.S Persons. A U.S. person ordinarily has several duties each year if he holds a financial interest in a foreign account whose balance surpasses the relevant thresholds: (1) report all income deposited into the account on Form 1040, (2) include all passive income (e.g., interest, dividends, capital gains) generated by the account on Form 1040, (3) check the "yes" box in Part III (Foreign Accounts and Trusts) of Schedule B to Form 1040, disclosing both the existence and location of the foreign account, (4) enclose a Form 8938 (Statement of Specified Foreign Financial Assets) with Form 1040, (5) e-file a FinCEN Form 114 (FBAR), and (6) enclose a Form 8621 (Information Return by a Shareholder of a Passive Foreign Investment Company or Qualified Electing Fund) with Form 1040, if the foreign account contains foreign mutual funds.

Failure to meet any of the preceding duties can lead to severe penalties for taxpayers. For instance, even in a relatively benign case, under reporting of income triggers back taxes, accuracy-related penalties, and interest charges.[40] Moreover, if the taxpayer fails to file Form 8938 in a timely manner, the IRS can assert a penalty of $10,000 per year.[41] Finally, neglecting to file an FBAR can spark huge sanctions. In the case of "non-willful" violations, the maximum penalty is $10,000 per unreported account, per year.[42] The FBAR penalty increases significantly, though, when a taxpayer's inaction is deliberate; the IRS may assert a fine equal to $100,000 or 50% of the balance in the account at the time of the violation, whichever amount is larger.[43]

There are additional information-reporting requirements, unrelated to foreign accounts. For instance, certain categories of U.S. persons must file a Form 5471 (Information Return of U.S. Persons with Respect to Certain Foreign Corporations) to report their relationships with a foreign corporation.[44] The Form 5471 must be filed as an attachment to the U.S. person's timely federal income tax return.[45] If the U.S. person fails to file Form 5471, the IRS generally may assert a penalty of $10,000 per year.[46] The IRS will not assert this penalty, though, if the U.S. person can demonstrate that "reasonable cause" existed for the violation.[47]

There is a long list of other potential reporting requirements, including, but certainly not limited to, Form 8865 (Return of U.S. Persons With Respect to Certain Foreign Partnerships), Form 8858 (Information Return of U.S. Persons With Respect to Foreign Disregarded Entities), Form 926 (Return by a U.S. Transferor of Property to a Foreign Corporation), and Form 3520 (Annual Return To Report Transactions With Foreign Trusts and Receipt of Certain Foreign Gifts). These and many other information returns are not discussed here, out of respect for space, time, and attention spans.

Unexpected Duties of Dual-Residents. The list of potential international information reporting obligations is long. However, to convey the point, it is sufficient to review the FBAR, Form 8938, and Form 5471. Before doing so, we first turn to the legislative history and regulations, which set the scene for how individuals, who are considered residents of foreign countries for U.S. income tax purposes, can nonetheless be considered U.S. residents when it comes to filing information-returns with the IRS.

The legislative history from 1984 explains the following:

> [A]n alien who is a resident of the United States under the new statutory definition but who is a resident of a treaty partner of the United States (and not a resident of the United States) under a U.S. income tax treaty is eligible for the benefits that the treaty extends to residents of the treaty partner. However, notwithstanding the treatment of the alien as a resident of

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[39] See, e.g., Pretrial Memorandum by IRS, p. 5 (stating that Gerd directed GFI to send all payments to his daughter, in Canada, such payments were "then deposited into a credit union account in Canada," and "[i]t appears that [the daughter who lives in Canada] handles all of his banking and administrative matters." Pretrial Memorandum by IRS, pp. 17-18 (stating that Gerd owned and operated a winery business in Thailand). Opening Brief by IRS, p. 18 (stating that "Petitioner has a bank account in Thailand.")

[40] Section 6662.

[41] Section 6038D(d)(1); Reg. 1.6038D-8(a).

[42] 31 U.S.C. section 5321(a)(5)(B)(i) (as in effect after 10/22/04).

[43] 31 U.S.C. sections 5321(a)(5)(C)(i) and (D)(ii) (as in effect after 10/22/04).

[44] Section 6038; Reg. 1.6038-2; Section 6046; Instructions to Form 5471.

[45] Section 6038(a)(2); Reg. 1.6038-2(i).

[46] Section 6038(b)(1); Reg. 1.6038-2(k)(1)(i).

[47] Reg. 1.6038-2(k)(3)(i).

the other country for treaty purposes, the Act treats the alien as a U.S. resident for purposes of the internal tax laws of the United States. For example, if the alien owns more than 50 percent of the voting power of a foreign corporation, [then] the foreign corporation will be a controlled foreign corporation ... ."[48]

The regulations, issued in 1992, confirm the earlier theme in the legislative history:

> Generally, for purposes of the Internal Revenue Code other than the computation of the individual's United States income tax liability, the individual shall be treated as a United States resident. Therefore, for example, the individual shall be treated as a United States resident for purposes of determining whether a foreign corporation is a controlled foreign corporation under section 957 or whether a foreign corporation is a foreign personal holding company under section 552.[49]

Now, jump forward a few decades to see how the guidance from the legislative history and the regulations is being carried out today.

FBAR. Neither the FBAR form nor the Instructions address the issue, but an obscure page in the Preamble to the most recent FBAR regulations states the following: "A legal permanent resident [*i.e.*, Green Card Holder] who elects under a tax treaty to be treated as a non-resident for tax purposes must still file the FBAR."[50] In other words, when a Green Card holder files a Form 1040NR with the IRS and attaches a Form 8833 stating that he should be treated solely as a resident of a foreign country under the tie-breaker rules of the relevant treaty, the Green Card holder must still file the FBAR or potentially suffer large penalties.

Form 8938. The IRS initially took the position that U.S. residency status for any part of the year, no matter how small and/or non-exclusive, suffices to trigger the Form 8938 filing requirement. In this regard, the Preamble to the Temporary Regulations explained that "[a] resident alien who elects to be taxed as a resident of a foreign country pursuant to a U.S. income tax treaty's residency tie-breaker rules is a specified individual for purposes of Section 6038D and the regulations."[51] The initial version of the Instructions for Form 8938 echoed that sentiment, giving the following warning to individuals with multiple residences: "If you qualify as a resident alien, you are a specified individual even if you elect to be taxed as a resident of a foreign country under the provisions of a U.S. income tax treaty. If you have to file Form 8938, attach it to your Form 1040NR."[52]

The IRS received comments in response to the Temporary Regulations, including at least one suggesting that dual-residents who file a Form 8833 (Treaty-Based Return Position) claiming foreign residency under the "tie-breaker" rules should not be considered a U.S. person (i.e., a specified individual) for purposes of Form 8938.[53] Unexpectedly, the IRS accepted this recommendation and reversed course regarding the rules affecting dual-residents. The IRS explained its capitulation in the Preamble to the Final Regulations, as follows:

> The Treasury Department and the IRS have concluded that reporting under Section 6038D is closely associated with the determination of an individual's income tax liability. Because the taxpayer's filing of a Form 8833 with his or her Form 1040NR (or other appropriate form) will permit the IRS to identify individuals in this category and take follow-up enforcement actions when considered appropriate, reporting of Form 8938 ... is *not* essential to effective IRS tax enforcement efforts relating to this category of U.S. residents.[54]

The Final Regulations contain new rules expressly relieving dual-residents from filing Forms 8938 in various circumstances.[55]

Form 5471. The FBAR rules say, if an individual is a U.S. resident, he must file an FBAR, regardless of whether he is considered a foreign resident under the tie-breaker rules of a bilateral tax treaty. The IRS, acknowledging and implementing public comments, now takes the opposite position with respect to Form 8938. If an individual is a non-resident for treaty purposes, then he is not required to attach Form 8938 to Form 1040-NR. The rules regarding Form 5471 fall somewhere in between. The regulations allow certain individuals claiming to be foreign residents under a treaty to file an abbreviated version of Form 5471:

> If an individual who is a United States person required to furnish information with respect to a foreign corporation under section 6038 is entitled under a treaty to be treated as a nonresident of the United States, and if the individual claims this treaty benefit, and if there are no other United States persons that are required to furnish information under section 6038 with respect to the foreign corporation, then the individual may satisfy the requirements [concerning earnings and profits, transactions with related parties, financial statements, functional currencies and conversions, etc.] by filing the audited foreign financial statements of the foreign corporation with the individual's return required under section 6038.[56]

CONCLUSION

Topsnik is a cautionary tale. This case, coupled with the analysis in this article, demonstrates that Green Card holders will incur serious problems with the IRS if they fail to properly terminate their U.S. resident status upon departure from the United States. These troubles include unanticipated payment of annual U.S. income taxes on worldwide income, expansive international information-reporting duties related to foreign accounts, entities, other assets and activities, penalties for failing to file requisite U.S. tax and information returns, and potential exposure to a hefty "exit tax." The lesson, of course, is two-fold: Tax advisors working in the international arena must understand the overlap of U.S. tax and immigration rules, and taxpayers (particularly Green Card holders leaving the United States) should seek advice from competent U.S. advisors to avoid becoming yet another "accidental American." ●

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48 U.S. Joint Committee on Taxation. General Explanation of the Revenue Provisions of the Deficit Reduction Act of 1984, JCS-41-84 (12/31/84), pg. 468.

49 Reg. 301.7701(b)-7(a)(3).

50 76 Fed. Reg. 10238 (2/24/11).

51 T.D. 9657, Preamble to Temporary Regulations, 76 Fed. Reg. 78555 (12/19/11).

52 Instructions for Form 8938 (November 2011), p. 2.

53 TD 9706, Preamble to Final Regulations, 76 Fed. Reg. 73818, 12/12/14.

54 *Id.*

55 Regs. 1.6038D-2(e)(1), (2), and (3).

56 Reg. 1.6038-2(j)(2)(ii).

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