

# US Tax Issues for Immigrants & Aliens

Presented by  
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# Learning Objectives

- Determine residency under the green card & substantial presence tests
- Recognize & correctly report effectively connected income
- Determine a nonresident alien's US filing requirements
- Make appropriate entries on *Form 1040-NR*
- Address issues specific to the NRA, including community property reporting, estate and gift tax rules, & state non-conformity

# Questions we'll answer

- How do residency for immigration and tax purposes overlap and differ?
- So you're an NRA; is that a bad or good thing?
- Is income US-sourced and effectively connected?
- Can NRAs claim deductions and credits?
- Which tax return (*Form 1040* or *1040-NR*) must be filed?
- Do NRAs have other filing obligations as well?



# Why does it matter?

- US Citizens & Resident Aliens are taxed on *worldwide* income
- Non-resident Aliens are taxed only on *US-sourced* income



# Is immigration status the same as residency?

- No – these are separate determinations
- Individual in US on temporary visa may be a:
  - Resident Alien
  - Non-resident Alien
  - Dual-status
  - Non-resident treated as a Resident

# Illegal Aliens

- Must file US tax returns as though they were US citizens/residents
- Must use an Individual Taxpayer ID Number [*Form W-7*]
- CA has removed the word “alien” from Labor Code  
→ undocumented worker





# Polling Question # 1

Residency for federal tax purposes is the same as:

- Residency for state tax purposes
- Residency for immigration purposes
- Neither

# Non-Resident Alien (NRA)

- “Alien” is not a US citizen by birth or naturalization  
**BEWARE:** Some foreign citizens may be deemed US citizens by accident of birth = inadvertent citizens
- “Non-resident” does not have Green Card and has not been present in the US for requisite time

## TWO tests for tax residency

1. Green Card
2. Substantial Presence Test





# Green Card

(Form I-551)

- Issued to lawful permanent residents by US Citizenship & Immigration Services (USCIS)
    - Formerly Immigration & Naturalization Service (INS)
    - Renamed in 2003 when integrated into Dept. of Homeland Security (DHS)
  - Immigration status permanent unless naturalization process completed, immigration judge issues removal order, move out of US permanently, travel abroad for extended period, fail to file requisite US tax returns
  - BUT loss of immigration status does *not* affect tax residency
    - Must renounce status *in writing* (Form I-407)
    - Status is administratively or judicially revoked
- NOTE:** Taxpayer continues to have US tax filing requirements

Department of the Treasury  
Internal Revenue Service

▶ Attach to Form 1040-NR or Form 1040-NR-EZ.  
▶ Go to [www.irs.gov/Form8840](http://www.irs.gov/Form8840) for the latest information.

**2019**

Attachment  
Sequence No. **101**

# Substantial Presence Test (SPT)

Your first name and initial

Last name

Your U.S. taxpayer identification number, if any

Fill in your

Address in country of residence

Address in the United States

addresses only if you are filing this form by itself, not with your U.S. tax return

- Must be physically present in US (states & D.C. but not possessions or territories) for at least:
  - 31 days during current tax year AND

## Part I General Information

- 1 Type of U.S. visa (for example, F, J, M, etc.) and date you entered the United States ▶
- 2 Of what country or countries did you enter the United States?
- 3 What country or countries issued you a passport?
- 4 Enter your passport number(s) ▶
- 5 Enter the number of days you were physically present in the United States for each year: 2019, 2018, 2017
- 6 During 2019, did you (a) acquire lawful permanent resident status in the United States or have an application pending to change your status to that of a lawful permanent resident of the United States? See instructions  Yes  No

- **UNLESS** individual maintains a foreign tax home and a closer connection to *one* country [attach *Form 8840* to tax return]

→ US arrival & departure history available online at DHS I-94 website



Get I-94 Information

I-94 FAQ

### Most Recent I-94

Admission (I-94) Record Number: [REDACTED]

Print

Most Recent Date of Entry: 2012 August 04

Class of Admission: F1

Admit Until Date:

Details provided on the I-94 Information form:

Last/Surname: [REDACTED]

First (Given) Name: [REDACTED]

Birth Date: [REDACTED]

Passport Number: [REDACTED]

Country of Issuance: [REDACTED]

Get Travel History

▶ Effective April 26, 2013, DHS began automating the admission process. An alien lawfully admitted or paroled into the U.S. is no longer required to be in possession of a preprinted Form I-94. A record of admission printed from the CBP website constitutes a lawful record of admission. See 8 CFR § 1.4(d).

▶ If an employer, local, state or federal agency requests admission information, present your admission (I-94) number along with any additional required documents requested by that employer or agency.

▶ Note: For security reasons, we recommend that you close your browser after you have finished retrieving your I-94 number.

[For inquiries or questions regarding your I-94, please click here.](#)

[Accessibility](#) | [Privacy Policy](#)

# Example: Day Count

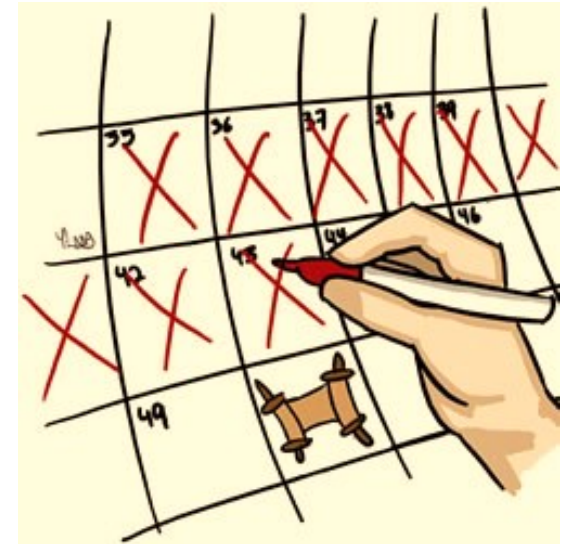
Taxpayer was physically present in US for 120 days in each year 2019, 2020 & 2021...

- 120 days in 2021 *plus*
- 40 days in 2020 (1/3 of 120) *plus*
- 20 days in 2019 (1/6 of 120)

Total number of counted days = 180

➔ Does not meet SPT for 2021

➔ Is not a “resident”



# Days not counted

If individual...

- regularly commutes to work in US from Canada or Mexico
- is in the US for < 24 hours due to international transit
- is a crew member of a foreign vessel
- is unable to leave the US due to a medical condition [file Form 8843]  
**REMINDER:** up to 60 days *not* counted between 2/1 and 4/1/20 due to COVID travel disruptions
- is an “exempt” individual

# Exempt individuals

▶ Go to [www.irs.gov/Form8843](http://www.irs.gov/Form8843) for the latest information.

For the year January 1—December 31, 2019, or other tax year

beginning

, 2019, and ending

, 20

Department of the Treasury  
Internal Revenue Service

Your first name \_\_\_\_\_

- Foreign government employees & diplomats if only temporary stay

Fill in your  
addresses only if  
you are filing this  
form by check and  
not with your tax  
return

Address in country of residence

Address in the United States

- Teachers on J or Q visas if in US < 2 calendar years

## Part I General Information

- Students on F, J, M or Q if in US < 5 calendar years

b Current nonimmigrant status. If your status has changed, also enter date of change and previous status. See instructions.

2 Of what country or countries were you a citizen during the tax year?

- Professional athletes competing for charity

3a What country or countries have you a passport?

b Enter your passport number(s) ▶

4a Enter the actual number of days you were present in the United States during:

2019

2018

20

b Enter the number of days in 2019 you claim you can exclude for purposes of the substantial presence test ▶

Exempt individuals:

- ❖ do *not* count days

- ❖ are subject to SPT for all periods before and after exempt period

# Exempt Visas

Type of Visa	Work Restrictions
<u>Academic</u> F-1 Students F-2 Dependents of F-1	May only work on-campus for < 20 hours/week No work authorization
<u>Exchange Visitors</u> J-1 Exchange students & scholars J-2 Dependents of J-1	May only work for program sponsor Work authorized under certain circumstances
<u>Vocational and Language Students</u> M-1 Vocational student M-2 Dependents of M-1	Work authorized under certain circumstances No work authorization
<u>Cultural Exchange Visitors</u> Q-1 International Cultural Exchange	Work authorized for sponsoring employer only

# Example: Exempt Status

A foreign student (H) with F-1 Visa arrived in the US on 8/15/14. His wife (W)—not a student—came with him on an F-2 visa but then was sponsored by a US employer & received her Green Card on 6/15/16.

- H is NRA for 2014, 2015, 2016, 2017 & 2018  
In 2019, H becomes resident on 7/1 (passes the SPT on the 183<sup>rd</sup> day of the first non-exempt calendar year)
- W is an exempt individual while on F-2 visa for 2014 & 2015  
In 2016, W becomes a resident on 6/15 (although she passes the SPT on the 183<sup>rd</sup> day of the year, she receives her Green Card sooner in the same year)



before







## Polling Question # 2

Taxpayers who do not have permanent residency status and who have not been physically present in the US for at least 183 days are deemed to be non-resident aliens and are taxed on worldwide income.

- True
- False

# Dual Status Aliens

(a.k.a. Part-year Residents)

- Individuals who are residents for one part of the year and non-residents for another
- Occurs if individual...
  - enters US and passes SPT in year of arrival (must enter before July 1<sup>st</sup>)
  - leaves US after passing SPT in year of departure
  - loses exempt status during the year
- Residency begins on first day of presence in US or issuance of Green Card (whichever is *earlier*)



## Example: Dual-Status

Maria entered US on April 10<sup>th</sup> & was issued Green Card on July 15<sup>th</sup>...

- Maria's residency as per the Green Card Test begins July 15<sup>th</sup> (too late for SPT)

BUT...

- Because Maria was issued her Green Card in the *same year* as her arrival, her residency for tax purposes begins on April 10<sup>th</sup> AND so Maria meets the 183-day requirement for residency

# Dual-Status: Tax Issues

- Taxed only on US-sourced income during period of non-residency
- Denied benefits of joint filing, dependents, standard deduction & most credits
- May elect to be treated as resident...

TWO elections available

1. First-Year Election
2. Marriage Election





# First-Year Election

IRC §7701(b)(4)

NRA may back-date residency to arrival date if:

- present in US  $\geq$  31 consecutive days in year of arrival AND
- meets SPT for in year after arrival

## Example 1

Juan arrived in US on 11/1/17, stayed for all of November and then went back to Spain for 2 weeks on December 1<sup>st</sup>; he later returned to US on 12/15/17 and stayed during all of 2018

➔ Juan is a non-resident in 2017 but may elect to be treated as a resident

**ELECTION:** Attach statement to *original* timely-filed return



# First-Year Election Rules

- Alien must arrive before December 1 (to ensure min. of 31 *consecutive* days presence)
- Alien must remain in US for 75% of time after start of 31-day period

## Example 2

Juan arrived in US on 11/1/17, went back to Spain on 12/1/17, returned on 12/19/17

→ 31 days before US departure + 12 days after US return = 43 days in US

= only 70% of total 61 days in US

→ Juan may not elect to be treated as a resident

**SPECIAL ELECTION:** reclassify up to 5 days of absence as days of presence



## Example 3

→ 31 days before departure + 12 days after return + 5 days reclassified = 48 days in US = 78% of total 61 days in US

→ Juan may elect to be treated as a resident

# Marriage Election

IRC §6013(h)

NRA may be treated as resident if:

- non-resident at year-start and resident alien or citizen at year-end AND
- married at year-end to a US citizen or resident alien who agrees to file joint return



NRA is in US  
“h” for here

## RULES

- Spouses must attach signed statement to *original or amended* return
- Must file jointly in year of election but can file separately later
- Election is in effect until revoked by either or both spouses
- Election is automatically terminated by legal separation or death
- This is a once-in-a-lifetime election which cannot be made again, even if remarried

# Marriage Election In Reverse

IRC §6013(g)

Citizen or resident taxpayer may elect to treat non-resident spouse as resident – even if spouse lives abroad  
[must request TIN]



NRA is abroad  
“g” for gone

## Example 1

Bob is US resident with \$120K worldwide income  
Bob’s wife, who has no income, lives in Taiwan

→ Bob can file MFS or make election and file MFJ (to lower his tax liability)

## Example 2

Mathilda & her son live permanently in the US  
Husband Friedrich arrives from Germany during the year

→ Mathilda & Friedrich may elect to file MFJ or Mathilda may file HoH  
(since husband is an NRA)





# Marriage Election: Pros & Cons

- Do NOT make election if:
  - All NRA's income is foreign-source or less than Foreign Earned Inc Exclsn (since no tax liability)
  - NRA spouse has investment income (3.8% surtax does not apply to NRAs)
  - NRA has foreign accts & assets that would become subj to FBAR & FATCA reporting
  - Resident spouse can shelter investment by gifting cash or property to NRA (must hold as separate property)
  - Ownership of jointly-held entity can be transferred to NRA spouse (must be active in biz) → also avoid *Form 5471* foreign corp. FATCA filing
- Make election if:
  - NRA has significantly less income than resident spse (shift high-bracket inc into lower bracket)
  - NRA spouse has large itemized deductions (unable to claim on *Form 1040-NR*)
  - MFJ filing status offers rate, deduction and/or credit advantages over MFS
  - Resident spouse plans to gift/bequeath ppty to NRA (subj to limits if non-citizen)



## Polling Question # 3

An unmarried part-year non-resident may make an affirmative election to file as a resident if he can satisfy the time limits of the First Year Election rule and does not have any foreign-source income.

Yes

No

# Residents of US Possessions & Territories

FULL-year residents of American Samoa, Guam, Mariana Islands, Puerto Rico, US Virgin Islands may be treated as residents:

May exclude all territory-sourced income (a.k.a. Possession Exclusion)

Must include income earned as US government employees

May only claim US citizens as dependents

Must notify IRS [*Form 8898*] when Possession residency begins or ends

If worldwide income > \$75K

Do not attach to *Form 1040* or *1040-NR*

\$1K failure to file penalty

Possession Exclusion does not apply to Baker Islands, Howland Islands, Jarvis Island, Johnston Island, Kingman Reef, Midway, Palmyra Atoll & Wake Island

[Refer to Pub 570 for more info]

# Men without a Country

- US National: Born or has ties with US Possession
    - Owes allegiance to US but cannot vote
    - Can live & work in US
  - Marshall Islands (freely associated nation NOT Possession)
    - Site of 67 nuclear weapons tests (1946 – 58)
    - 1986 treaty allows islanders to enter US as “legal non-immigrants” in exchange for continued weapons testing
      - Can live & work in US → pay taxes
      - BUT get no Medicare, Social Security or other federal benefits
    - Pact expires 2023 (China is courting)
- QUIRK:** 27K Marshallese in US denied voting rights at home

# Tax Treatment



# Treatment of NRA's Income



- Taxed only on US-sourced (not worldwide) income
- Examples of income not considered US-sourced:
  - Interest paid by US corp if  $\geq 80\%$  of gross income is *derived from outside US*
  - Interest if funds are *deposited in a foreign branch* of US bank
  - Portfolio interest if  $< 10\%$  stock ownership
  - Revenues from sale of US-produced inventory *if sold abroad*
  - Gain on sale of personal property if *taxpayer's tax home is outside US*
  - US source wages if foreign company, pymt  $< \$3K$  & present in US  $< 90$  days
  - Personal service compensation received for *work performed outside US*

# Example: Personal Service Income

NRA is a professional hockey player (goalie) who received \$98,500 for 242 days of play during the year...

- Goalie played 194 days in US
- Goalie played 48 days in Canada

→ US-sourced income =  $(194 \div 242 \text{ days}) \times \$98,500 = \$78,963$

Use straight pro-ration



# Community Income

State & foreign community property laws are disregarded if one or both spouses are NRAs (unless Marriage Election claimed)

→ income is attributed to spouse who earned it



- Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington & Wisconsin
- Brazil, Chile, China, Costa Rica, Denmark, France, Italy, Mexico, Netherlands, Philippines, Russia, South Africa, Spain, Sweden, Switzerland & Ukraine





# No State Conformity

- States do not apply Green Card Test or SPT
- Most states consider taxpayers who live, work or are domiciled in-state to be “residents” **BEWARE:** Some states tax income of remote workers
- Resident taxpayers must report worldwide income on state tax returns even if not required to do so on federal return
- Most states require taxpayers to use federal filing status on state return  
→ NRAs file “Single” if unmarried and “MFS” if married
- The state tax liability is generally computed based on a ratio of state-sourced to worldwide taxable income

## Example

Married couple from Japan moved to California on 12/1; did not satisfy SPT

→ **FEDERAL:** Each spouse must file non-resident return using MFS status *or* file MFJ if First-Year Election made

→ **STATE:** Resident spouse may elect to file MFS if a non-resident spouse has no CA-sourced income (even if federal First-Year Election is made)

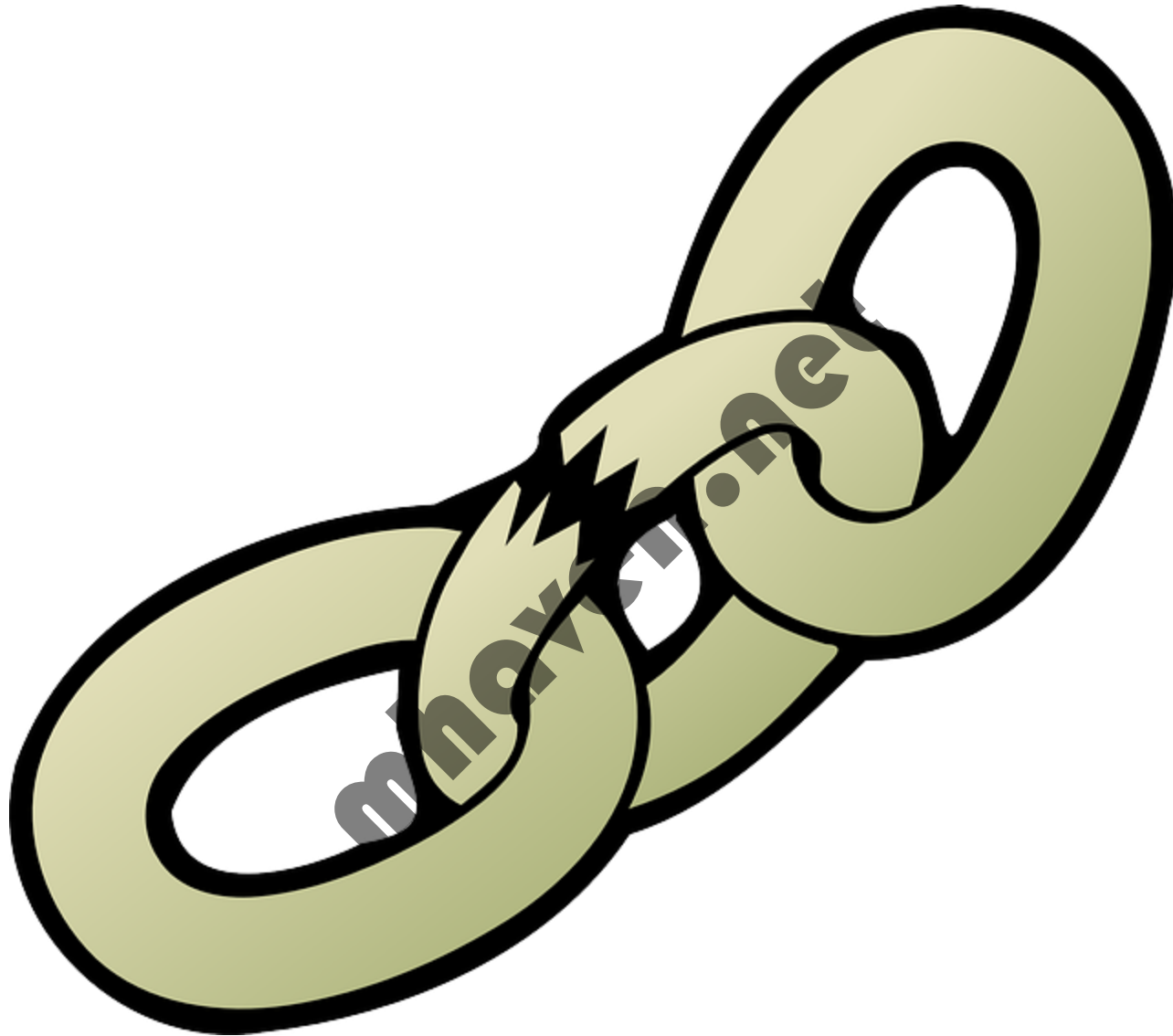


# Polling Question # 4

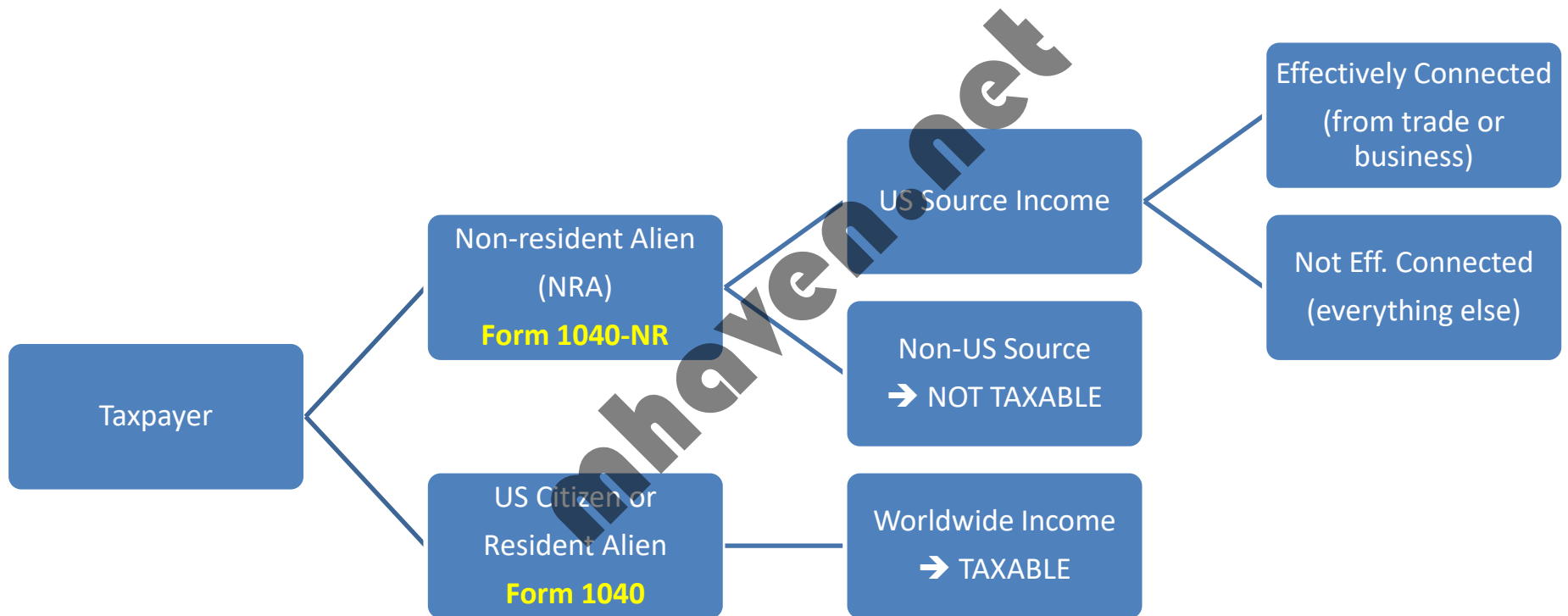
Most states conform to the federal Substantial Presence Test to determine residency for state tax purposes.

- True
- False

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# Flowchart: Source of Income



# Is it effectively connected?

- Effectively connected if derived from US trade or business
  - Can be reduced by itemized deductions
  - Taxed at graduated rates

- Not effectively connected

- Cannot be reduced by itemized deductions
- Subject to 30% flat tax (unless lower treaty rate applies)

**EXCEPTION:** Capital Gains that (unless effectively connected) are tax-exempt if NRA is in US < 183 days

Certain gains – regardless of 183-rule – are taxed at 30%

- Timber, coal, domestic iron ore
- Patents & copyrights
- Original issue discount obligations



# Effectively vs. Not Effectively

Effectively Connected (taxed at graduated rates)	Not Effectively Connected (taxed at 30% rate)
Wages <b>earned in US</b>	Interest income
Nonqualified scholarships	Dividends
Business income, incl. foreign-sourced income if fixed <b>place of business in US</b> and produced in ordinary course of business	Rental income
Partnership income	Royalty income
Gains on sale of <b>US</b> real estate and business assets	Capital gains <b>[exempt if SPT not met]</b>
Pension income	Social Security benefits <b>[85% includable unless exempt under treaty]</b>
Transportation income if fixed <b>place of business in US</b> and $\geq 90\%$ attributable to regularly scheduled transportation	Transportation income earned for travel that begins or ends in US but does not meet fixed place and 90% tests <b>[taxed at 4% flat rate]</b>

# Partnership Income

- Foreign partners in US partnership must file *Form 1040-NR* on allocated share of effectively connected income
- Foreign partnerships with effectively connected income must file *Form 1065* even if operating from abroad, unless:
  - US source income  $\leq$  \$20K &  $<$  1% of income allocable to US partners, OR
  - No US partners & all withholdings done at source



# Gambling Winnings

- NOT effectively connected
- Tax-exempt if
  - Blackjack, baccarat, craps, roulette, big 6-Wheel & certain horse- and dog-racing winnings
  - Treaty provision
- All other gambling subject to 30% tax on gross income
  - Winnings cannot be offset by losses **EXCEPT** Canadian residents







# Polling Question # 5

An NRAs gambling winnings are:

- Not effectively connected
- Tax-exempt
- Taxed net of gambling losses
- Subject to a 20% on gross winnings

# Rental Income

- NRA is taxed on the gross rental revenue
  - Considered not effectively connected
  - Cannot be reduced by deductions for maintenance and management
- NRA may *elect* to treat as effectively connected under §871(d)
  - Can offset income by allowable rental expenses
  - Taxed at graduated rates on net income



## Example

NRA rents out apartment for \$12K/year & has no other US-sourced income

- ➔ NRA has NO filing requirement if tenant reports 30% withholdings on gross rent [Form 1042-S]
- ➔ NRA may make §871(d) election to be taxed at graduated rates [Form 1040-NR + Schedule E & statement]

# Cost Basis

**GENERAL RULE:** NRA assets do NOT receive stepped-up basis when residency is obtained

## TAX PLANNING:

1. NRA sells US-sited asset → offshore entity (non-taxable transaction in US); then dispose of asset (with stepped-up basis) when NRA becomes resident
2. Covered expatriate gets basis step-up if subject to Exit Tax when renouncing US residency; later repatriates previously-taxed assets



# Example: Sale of Foreign Stock

- Taxpayer was transferred from foreign affiliate & works in US since 3/2/18...
  - ➔ treated as resident alien
- Taxpayer sells shares of Japanese stock received as gift from father...
  - ➔ carry-over basis from donor (w/o any adjustment for gift tax paid since not subject to US gift tax)
- §1202 exclusion of gain of small biz stock...
  - ➔ does not apply since shares must be issued by domestic corp.

# Treatment of Adjustments

Similar to US citizens

- May contribute to IRAs & other qualified retirement plans
- May deduct student loan interest
- May deduct penalties on early withdrawal of savings if interest income is effectively connected

SAME

# Treatment of Deductions

## Unlike US citizens

- NRA may not claim Standard Deduction **EXCEPT** students & apprentices from India
- Itemized Deductions must be related to effectively connected income
  - CAN deduct: State/local & property taxes, charitable contributions to US organizations
  - CANNOT deduct: Medical expenses and mortgage interest

Dual-status taxpayer cannot use Standard Deduction but may use *all* itemized deductions

# Treatment of Tax Credits

Name of Credit	Same as US citizen	Must file MFJ w/ US spouse	Special Rules
Adoption		✓	
Child & Dep. Care		✓	
Child Tax			Dependent must be US citizen or resident
Earned Income		✓	Qualifying child must be US citizen or resident
Education		✓	
Energy	✓		
Foreign Tax			Only on effectively connected income
Other Dependents			Available to US nationals, residents of Canada, Mexico & South Korea only
Prior Year Min. Tax	✓		
Retirement Savings	✓		



## Polling Question # 6

In general, non-resident alien assets do not receive a basis step-up at the time that the individual becomes a US resident.

- True
- False

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# Forms



# Tax Form

beginning \_\_\_\_\_, 20\_\_\_\_

Your first name and middle initial \_\_\_\_\_ Last name \_\_\_\_\_ Identifying number (see instructions) \_\_\_\_\_

Present home address (number and street or rural route). If you have a P.O. box, see instructions. Apt. no. \_\_\_\_\_ Check if:  Individual  
 Estate or Trust

Please print or type

- NRAs must use *Form 1040-NR*
  - May use *1040NR-EZ* if US-sourced income from wages and scholarships only
  - Must use *1040-NR* if any taxable interest & dividend income

Filing Status

Check only one box.

1  Reserved  
2  Single nonresident alien  
3  Reserved  
4  Reserved  
5  Married nonresident alien  
6  Qualifying widow(er) (see instructions)

Dependents

If more than four dependents, see instructions and check here.

7 Dependents: (see instructions)

Child's name ▶ \_\_\_\_\_

(2) \_\_\_\_\_ (3) Dependent's \_\_\_\_\_ (4)  If qualifies for (see instr.):  
Child tax credit \_\_\_\_\_ Credit for other dependents \_\_\_\_\_

- Dual-status Aliens – form depends on status at year-end:
  - If resident on 12/31, file *1040* labeled “Dual Status Return” & attach *1040-NR* labeled “Dual Status Statement”
  - If non-resident on 12/31, file *1040NR* labeled “Dual Status Return” & attach *1040* labeled “Dual Status Statement”

# Example: Forms for Dual-Status

Gerard arrived from France on 8/15/17; returned home permanently on 7/31/19; had US-sourced income until end of 2019

- 2017: Gerard does not pass SPT → file *1040-NR*  
OR make First-Year Election to be treated as resident beginning on date of arrival → file *1040*
- 2018: Gerard becomes resident alien when SPT satisfied → file *1040*  
(with *1040-NR* attached as statement)
- 2019: Gerard remains resident alien since termination date deemed to be 12/31 of the year of departure → file *1040*  
**UNLESS** Gerard is eligible for earlier termination with closer connection to foreign tax home (file *8840*)...  
he is dual-status → file *1040-NR* (with *1040* attached as a statement)

# Filing Status

- Unmarried NRA may only file S or QW
- Married NRA may only file MFS  
**UNLESS:** Marriage Election claimed
- Canada, Mexico or South Korea Residents  
Married NRA may file S if he did not live with spouse for last 6 months of tax year
- NRA cannot file HOH



Resident spouse may file HOH if married to an NRA who is not treated as a spouse for tax purposes

# Dependents

- TCJA suspended Personal Exemption (2018 – 2025)
- Dependents may still provide tax benefits for itemized deductions and tax credits
- Still...
  - Most NRAs cannot claim even “qualified” dependents
  - EXCEPT residents of American Samoa & Northern Mariana Islands, Canada, Mexico, South Korea, & students/apprentices from India
- Dependent must have SSN or ITIN [*Form W-7*]

# Example: Non-US citizen/resident Child

## Rules:

- Qualifying Child (QC) – based on Relationship, Age, Residency, Support & Joint Return
- Qualifying Relative (QR) – does not share same abode with taxpayer
- Child who is not US citizen or resident can only qualify as QR
  - Child living in Mexico or Canada is QC (**EXCEPTION**)
  - Dependent living in MX & CAN is QR

Child Tax Credit or EIC only available to NRA with QC

# Example: Dependent Living in CAN or MEX

- Taxpayer may claim dependent's education credits for QC or QR if qualified expenses paid to eligible institution

**NOTE:** Some foreign schools are eligible [check FAFSA website]



- Taxpayer cannot claim Dependent Care Credit since care expenses are not paid to allow taxpayer to work



- Taxpayer may claim dependent's medical expenses for QC or QR since eligible dependent



# Example: Parent lives in MEXICO or CANADA

Taxpayer may claim dependent parent as QR if taxpayer is:

- Unmarried and
- Pays  $> \frac{1}{2}$  of maintaining dependent's home

But...

NRA cannot file HOH



# Due Dates



- April 15<sup>th</sup> (plus extension)
- June 15<sup>th</sup> if NRA without wage income

Don't postpone filing to June 15<sup>th</sup> – file extension on April 15<sup>th</sup> to avoid risk of overlooking “unusual” deadline



# Polling Question # 7

Non-resident aliens may claim all of the same tax credits available to US citizens and resident aliens.

- Yes
- No

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# Tax Treaties

(Refer to IRS Publication 901 AND legal counsel)

Attach a separate Form 8833 for each treaty-based return position taken. Failure to disclose a treaty-based return position may result in a penalty of \$1,000 (\$10,000 in the case of a C corporation) (see section 6114).

Name	U.S. taxpayer identifying number	Reference ID number, if any (see instructions)
Address in country		
Check one or both of the following boxes as applicable: • The taxpayer is disclosing treaty-based return positions as required by section 6114. • The taxpayer is a dual-resident taxpayer and is disclosing a treaty-based return position as required by Regulations section 301.7701(b)-7.		
Note: If the taxpayer is a dual-resident taxpayer and a long-term resident, by electing to be treated as a resident of a foreign country for purposes of the tax treaty, the taxpayer is not required to disclose the treaty-based return position pursuant to section 877A. For more information, see the instructions.		
Check this box if the taxpayer is a U.S. citizen or resident who is incorporated in the United States.		
1	Enter the country name (if the treaty is not a U.S. citizen or resident, and address in the United States of the payor of the income (if fixed or determinable annual or periodical). See instructions.	
a	Treaty country	
b	Article(s)	
2	List the Internal Revenue Code provisions that are overruled or modified by the treaty-based return position.	

- Treaties reduce tax liability of NRA (not US citizen/resident)
- Treaties are often reciprocal
- **NOTE:** If no treaty, then income taxed as per 1040-NR instructions
- Treaty-based positions must be disclosed on Form 8833; failure to disclose subject to \$1,000 failure to file penalty
- **NOTE:** Must file tax return even if treaty eliminates all tax liability
- Not all states conform to treaty provisions

Green Card holder who elects to be treated as non-resident under tax treaty is still subject to FBAR filing requirements

# Example: Tax Treaty

- NRA is resident of foreign country that has tax treaty with US
- 2019 earnings from US sources include \$24,100 compensation for personal services and \$1,400 dividends (on which tax is limited to 15% by treaty)...

Personal service compensation	\$24,100
LESS: Personal Exemption (\$0 as per TCJA)	<u>0</u>
Taxable income	\$24,100
Tax as per tax table for Single	\$2,701
PLUS: Tax on gross dividends	<u>210</u>
Total Tax Due	\$2,911

# Special Reporting Rules

- Calendar year: If different tax year used abroad, NRA must allocate income/expenses
- Foreign Currency: If income received in foreign currency, NRA must convert to US dollars at prevailing rate on date received
- Capital Gains: May be taxed on unrealized gains due to exchange rates in effect on dates of purchase & sale
- Depreciation: Use SL (over 40 years) for *foreign* real property

## TCJA Changes:

- 30 years for residential property
- 40 years for commercial property
- 12 years for personal property

# Additional Disclosures

- *Form 3520* – for gifts & inheritances received from abroad > \$100,000
- *Forms 5471, 8858, 8865 and 8891* - for owners of foreign entities, if applicable
- *Form 926* – for certain transfers of property to foreign corporations



# Net Investment Income Tax

- Does *not* apply to NRAs
- US citizens & residents married to NRA must file MFS
  - MAGI threshold reduced to \$125K [instead of 200K for S]
  - If Marriage Election claimed, then MAGI threshold increased to \$250K for MFJ



# Mandatory Healthcare Coverage

- Does *not* apply to NRAs
- Citizens & resident aliens must have insurance or pay Shared Responsibility Penalty [repealed by TCJA for beginning 1/1/19]
- Exempt from ACA Mandate:
  - Citizens living abroad for > 330 days w/i 12-month
  - Residents of US territories
  - Foreign nationals who have not satisfied SPT



# ES Payments

- NRAs are subject to same rules as US citizens & residents

## EXCEPT:

NRA may skip ES # 1 (due 4/15) if no wage income subject to withholdings, but must pay  $\frac{1}{2}$  of aggregate annual ES liability by June 15<sup>th</sup>

# Withholdings

▶ Go to [www.irs.gov/Form8233](http://www.irs.gov/Form8233) for instructions and the latest information. ▶ See separate instructions.

**Who Should Use**

- NRA must submit *Form W-4* & claim “Single & 0” [instructions in Notice 1392]

**Note:** For definitions of terms used in this section and detailed instructions on required withholding for each type of income, see *Definitions* in the instructions.

- No withholdings required if pay < \$3K and employee in US < 90 days

- NRA is subject to FICA unless:

- Student (F-1 or J-1 visa) performing only certain on-campus work
- Exempt by treaty [file *Form 8233* with employer]

- No SE Tax unless resident of Guam, Mariana Islands, Puerto Rico or US Virgin Islands

- If Totalization Agreement [currently 30 countries], then employee pays SS tax only to country in which employed

NRA may be required to pay *into* system but may not be able to collect *from* SSA

# Withholdings (cont'd)

- Pension Income:
  - Automatic 30% withholding
  - Unless elect to be treated as effectively connected  
→ taxed at graduated rates
  - Use *Form W-8ECI*
- **Real Estate Transactions:**
  - Automatic 30% withholding on gross proceeds
  - Use *Form W-8BEN* to request treaty-based exemption (if available)





# Polling Question # 8

Dual status aliens must always file Form 1040.

- True
- False

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# Estate Tax

- Domicile (intent) ≠ Residency (Green Card or SPT)
- US-domiciled NRA is subject to US estate tax, even if he only lived in US briefly
- Foreign estates are taxed only on US-sourced or effectively connected income
  - US citizens living permanently abroad
  - Assets located entirely abroad
  - Administered by foreign fiduciaries

Estate of nonresident not a citizen of the United States

(Rev. June 2019)

Department of the Treasury  
Internal Revenue ServiceTo be filed by the decedent's surviving spouse on or before 9 months after the date of the decedent's death.  
Go to [www.irs.gov](http://www.irs.gov) for test information.

OMB No. 1545-0531

# Taxable Estate

▶ File Form 706-NA at the following address:

Department of the Treasury, Internal Revenue Service Center, Kansas City, MO 64999.

Attach supplemental documents and translations. Show amounts in U.S. dollars.

**Part I** • Gross estate = all tangible & intangible property in US

1a Decedent's first (given) name and middle initial      b Decedent's last (family) name      2 U.S. taxpayer ID number (if any)

3 Place of birth • Deduction for administrative expenses limited by ratio of US to worldwide gross estate

7a Date of birth      b Place of birth      d Business or occupation

9a Name of executor • Marital deduction = \$164K in 2022

b Address (city or town, state or province, country, and ZIP or foreign postal code) Unlimited only if:

c Telephone number      d Fax number      e Email address

10a Name of attorney for estate

b Address (city or town, state or province, country, and ZIP or foreign postal code)

c Telephone number      d Fax number      e Email address

• \$60K (not \$12.06 million) estate exclusion

• No portability of unused exclusion



# Gift Tax

Part 1 — General Information

1 Donor's first name and middle initial	2 Donor's last name	3 Donor's social security number
4 Address	5 Legal residence (domicile)	
6 City or town, state, and ZIP code	7 Citizenship (see instructions)	
8 If the donor died during the year, check here <input type="checkbox"/> and enter date of death	Yes	No
9 If you extended the time to file this Form 709, check here <input type="checkbox"/>		
10 Enter the total number of donees listed on Schedule A. Count each person only once		
11a Have you (the donor) previously filed a Form 709 (or 709-A) for any other year? If "No," skip line 11b		
11b Have you (the donor) previously filed Form 709 (or 709-A)?		
12 Gifts by husband or wife to third parties. Do you consent to having gifts (including generation-skipping transfers) made by you and by your spouse to third parties during the calendar year considered as made one-half by each of you? (See instructions. If the answer is "Yes," the following information must be furnished and your spouse must sign the consent shown below. If the answer is "No," skip lines 13–18.)		
13 Name of consenting spouse	14 SSN	
15 Were you married to one another during the calendar year? See instructions		
16 If line 15 is "No," check the appropriate box: <input type="checkbox"/> You were never married. <input type="checkbox"/> You were married but divorced or widowed during the calendar year.		
17 Will a gift tax return for this year be filed by your spouse? If "Yes," mail both returns in the same envelope		
18 Consent of Spouse. I consent to have the gifts made by me and by my spouse to third parties during the calendar year considered as made one-half by each of us.		

Gift of stock in US corp. is exempt from Gift Tax but subject to Estate Tax

• NRAS are subject to tax on gifts of:

- US-sited real and tangible personal property
- Cash or foreign currency within US

• Exempt gifts include:

- Intangibles (e.g., stocks, bonds, CDs, patents & trademarks) regardless of where sited

• NRAs may use annual gift tax exclusion [\$16K in 2022] but may not elect gift-splitting



# Leaving the US

- Resident and non-resident aliens must pay all tax due before departure & obtain tax clearance document
  - File *Form 1040-C* if reporting taxable income
  - File *Form 2063* if no taxable income to report
- Must still timely file requisite income tax returns
  - Forms *1040* or *1040-NR*
- Some aliens are not required to file for exit permit, including:
  - Foreign government diplomats
  - Students with no US-source income
  - NRA only temporarily in US without taxable income
  - Residents of Canada/Mexico who commute to US & earn US wages subject to withholding



# Summary of Tax Treatment

	U.S. Citizen & Resident	Non-resident Alien (NRA)	Dual-Status Alien	Exempt (Teachers/Students)	Illegal Alien
Lives in U.S.?	Yes	No	Part-Year	Yes	Yes
Which form?	1040	1040-NR	<ul style="list-style-type: none"> <li>• 1040 if resident on 12/31</li> <li>• 1040NR if non-resident on 12/31</li> </ul>	1040-NR	1040
Taxable Income?	Worldwide	US-sourced	<ul style="list-style-type: none"> <li>• US-sourced while NRA</li> <li>• Worldwide while resident</li> </ul>	US-sourced	Worldwide
Tax Rules	All familiar rules apply	<ul style="list-style-type: none"> <li>• Cannot file MFJ unless Marriage Election made</li> <li>• Generally no dependency exemptions</li> <li>• Cannot claim standard deduction</li> <li>• Only limited itemized deductions allowed</li> </ul>	<ul style="list-style-type: none"> <li>• Cannot file MFJ unless full year residence or Marriage Election made</li> <li>• Cannot file HOH</li> <li>• Cannot claim standard deduction</li> <li>• Can claim all allowable itemized deductions</li> </ul>	<ul style="list-style-type: none"> <li>• Cannot file MFJ unless Marriage Election made</li> <li>• Generally no dependency exemptions</li> <li>• Cannot claim standard deduction</li> <li>• Only limited itemized deductions allowed</li> </ul>	All familiar rules apply



# Available Elections

- First-Year (IRC §7701): Dual-status NRA may choose to back-date residency
- Marriage (IRC §6013): NRA w/ citizen spouse may choose to file jointly  
→ eligible for certain credits & higher MAGI threshold for NIIT
- Rental Income (IRC §871): May choose to treat as effectively connected & deduct associated expenses
- Filing Status (Treaty): Married NRA may file a “Single” if from Canada, Mexico or South Korea
- Pension Income (IRC §1445): May elect to treat as effectively connected to avoid automatic 30% w/h
- Real Estate Sale (IRC §1441): may claim treaty position to reduce automatic 30% w/h



# Glossary

<b>Abode</b>	Taxpayer's domestic home where he maintains his family, social & political ties
<b>Accidental American</b>	A citizen of a country other than the US who may also be considered a US citizen or eligible for US citizenship but is not aware of having such status which may lead to inadvertent residency for tax purposes
<b>Domicile</b>	Permanent home to which the taxpayer intends to eventually return
<b>Tax Home</b>	The taxpayer's place of business or employment
<b>Alien</b>	A non-US citizen who does not satisfy the Substantial Presence Test for tax purposes
<b>Dual-status Alien</b>	A part-year US resident who must file <i>Form 1040 &amp; 1040-NR</i>
<b>Dual Citizen</b>	A national of more than one country
<b>Immigrant</b>	An alien who has been granted the right by the USCIS to reside & work in the US
<b>Non-immigrant</b>	An alien who has been granted the right to reside temporarily in the US
<b>Illegal Alien</b>	An undocumented alien who entered the US without authorization
<b>Long-term US Resident</b>	A lawful permanent resident of the US for $\geq 8$ of 15 years & is subject to Expatriation Tax
<b>US National</b>	A resident of American Samoa or N. Mariana Islands who has sworn allegiance to the US

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