

Part III

Administrative, Procedural, and Miscellaneous

26 CFR 1.601.602: Tax forms and instructions.
(Also Part I, Section 894; Part II, United States-Canada Income Tax Convention)

Rev. Proc.

Deemed Dispositions by Canadian Emigrants

SECTION 1. PURPOSE

This revenue procedure provides guidance for individuals who emigrate from Canada to the United States and wish to make an election for U.S. tax purposes under paragraph 7 of Article XIII (Gains) of the Convention between the United States of America and Canada with Respect to Taxes on Income and on Capital, signed on September 26, 1980, as amended by Protocols signed on June 14, 1983, March 28, 1984, March 17, 1995, July 29, 1997, and September 21, 2007 (the "Treaty") with respect to property that is subject to Canadian departure tax under Canada's deemed disposition rules. This guidance does not address other situations in which this election may apply.

SECTION 2. BACKGROUND

Prior to amendment by the Protocol signed on September 21, 2007 (the "2007

Protocol”), Article XIII(7) of the Treaty provided that where, at any time, an individual was treated for purposes of taxation by one Contracting State as having alienated a property and was taxed in that State by reason thereof and the domestic law of the other Contracting State at such time deferred (but did not forgive) taxation, that individual could elect on his annual return of income for the year of such alienation to be liable to tax in the other Contracting State in that year as if he had, immediately before that time, sold and repurchased such property for an amount equal to its fair market value at that time.

Instances of double taxation arose under the prior version of Article XIII(7) because Canadian residents who emigrated from Canada to the United States and paid Canadian departure tax on a deemed disposition of their property could not elect to pay U.S. tax on a deemed disposition of their property if they were not U.S. citizens immediately before they ceased to be residents of Canada (or would not otherwise have been subject to U.S. tax on an actual disposition of the property).

Article XIII(7) of the Treaty, as amended by the 2007 Protocol (“new Article XIII(7)”), provides that where, at any time, an individual is treated for purposes of taxation by one Contracting State as having alienated a property and is taxed in that State by reason thereof, the individual may elect to be treated for the purposes of taxation in the other Contracting State, in the year that includes that time and all subsequent years, as if the individual had, immediately before that time, sold and repurchased the property for an amount equal to its fair market value at that time.

Thus, the election is now available to any individual who emigrates from Canada to the United States, without regard to whether the individual is a U.S. citizen immediately before ceasing to be a resident of Canada (or would otherwise have been subject to U.S. tax on an actual disposition of property). If the individual is not subject to U.S. tax at that time, the effect of the election will be to give the individual an adjusted basis for U.S. tax purposes equal to the fair market value of the property as of the date of the deemed alienation in Canada, with the result that only post-emigration gain will be subject to U.S. tax when there is an actual alienation. If the Canadian resident is also a U.S. citizen at the time of his emigration from Canada, then the new rule allows the U.S. citizen to accelerate the tax under U.S. tax law and allows tax credits to be used to avoid double taxation. This would also be the case if the individual is not a U.S. citizen but would be subject to taxation in the United States on a disposition of the property.

The new rule, as set out in paragraph 3 of Article 8 of the 2007 Protocol, was first publicly announced in simultaneous press releases issued on September 18, 2000 by the Department of Finance Canada and the Treasury Department. The press releases stated that the new rule, if approved, would apply to changes in residence that took place on and after September 18, 2000. Consistent with the press releases, paragraph

3(e) of Article 27 of the 2007 Protocol provides that new Article XIII(7) will have effect with respect to alienations of property that occur (including, for greater certainty, those that are deemed under the law of a Contracting State to occur) after September 17, 2000.

SECTION 3. ELECTION PROCEDURES AND CONSEQUENCES

.01 Property of a non-U.S. citizen with respect to which gain would not be taxable by the United States

(1) The rules in this section 3.01 of the revenue procedure apply to a Canadian emigrant's property that was subject to Canadian departure tax under Canada's deemed disposition rules but with respect to which an actual disposition immediately before the individual's change of residence would not have been taxable by the United States because the individual was not a U.S. citizen immediately before he ceased to be a resident of Canada and the property was not property described in section 3.02(1) of this revenue procedure.

(2) If an individual with property that is subject to the rules of this section 3.01 elects for U.S. income tax purposes to be treated as having disposed of and reacquired such property pursuant to new Article XIII(7), he will not be subject to U.S. tax with respect to the deemed alienation, but he may claim an adjusted basis for such property for U.S. tax purposes equal to the fair market value of the property as of the date of the deemed alienation in Canada if he complies with the requirements of section 3.01(3) or (5) of this revenue procedure, whichever is applicable.

(3) In the case of a change of residence that took place after September 17, 2000, and before the individual's taxable year beginning on or after January 1, 2009, the individual must make the election by attaching a Form 8833, Treaty Based Return Position Disclosure under section 6114 or 7701(b) of the Internal Revenue Code, to his U.S. income tax return for his first taxable year beginning on or after January 1, 2009 indicating that he is electing pursuant to new Article XIII(7) to take an adjusted basis for the property equal to its fair market value at the time of the deemed alienation in Canada. The individual must attach documentation establishing the fair market value of the property, as established for Canadian purposes, at the time of the deemed alienation and confirming that gain (or, if permitted by section 3.04 of this revenue procedure, loss) was recognized for Canadian tax purposes in the taxable year of the deemed alienation. The individual must retain copies of the Form 8833 and accompanying documentation until he ultimately disposes of the property.

(4) If an individual subject to the rules of this section 3.01 has already disposed of the property prior to making the election provided in new Article XIII(7), that individual may

nevertheless make a retroactive election and amend his or her tax return to reflect the adjusted basis provided that taxpayer make appropriate adjustments to eliminate double benefits in years where the statute of limitations on assessment and collection is already closed.

(5) In the case of a change of residence that takes place on or after January 1, 2009, the individual must make the election by attaching a Form 8833, Treaty Based Return Position Disclosure under section 6114 or 7701(b) of the Internal Revenue Code, to the first U.S. income tax return he files as a resident of the United States following his change of residence indicating that he is electing pursuant to new Article XIII(7) to take an adjusted basis for the property equal to its fair market value at the time of the deemed alienation in Canada. The individual must attach the documentation described in section 3.01(3) of this revenue procedure and must retain copies of the Form 8833 and accompanying documentation until he ultimately disposes of the property.

.02 Property of a non-U.S. citizen with respect to which gain would be taxable by the United States

(1) The rules in this section 3.02 of the revenue procedure apply to a Canadian emigrant's property that was subject to Canadian departure tax under Canada's deemed disposition rules and with respect to which an actual disposition immediately before the individual's change of residence would have been taxable by the United States because, although the individual was not a U.S. citizen immediately before he ceased to be a resident of Canada, the property was property of a type that could have been taxed by the United States in accordance with the Treaty. Such property includes (but is not necessarily limited to) the following:

- (a) real property situated in the United States (within the meaning of Article XIII(3)(a) of the Treaty) with respect to which gain from an actual alienation would be taxable by the United States pursuant to Article XIII(1) of the Treaty,
- (b) personal property forming part of the business property of a permanent establishment which a resident of Canada has or had (within the twelve-month period preceding the date of alienation) in the United States, with respect to which gain from an actual alienation would be taxable by the United States pursuant to Article XIII(2) of the Treaty,
- (c) in the case of a change in residence that took place prior to January 1, 2009, personal property pertaining to a fixed base in the United States that was available (within the preceding twelve-month period) to a resident of Canada for the purpose of performing independent personal services, including gain from the alienation of such a fixed base, with respect to which gain from an actual

alienation would have been taxable by the United States pursuant to Article XIII(2) of the Treaty, prior to amendment by the 2007 Protocol,

- (d) property owned by an individual who was a resident of the United States for at least 120 months during any period of 20 consecutive years preceding the deemed alienation in Canada and at any time during the ten years immediately preceding the deemed alienation in Canada, if such property (or property for which such property was substituted in an alienation the gain on which was not recognized for U.S. tax purposes) was owned by the individual at the time the individual ceased to be a resident of the United States, with respect to which gain from an actual alienation would be taxable by the United States pursuant to Article XIII(5) of the Treaty, and
- (e) property with respect to which gain from an actual alienation would be taxable by the United States pursuant to paragraph 2 of Article XXIX (Miscellaneous Rules) of the Treaty.

(2) If an individual with property that is subject to the rules of this section 3.02 makes an election pursuant to new Article XIII(7) to be treated as having disposed of and reacquired such property, the United States will require the individual to recognize gain (or, if permitted by section 3.04 of this revenue procedure, loss) in the taxable year of the deemed alienation. Because the individual will still be a resident of Canada at the time of the deemed alienation, Canada will generally provide a deduction from tax payable in Canada pursuant to paragraph 2 of Article XXIV (Elimination of Double Taxation) of the Treaty for the tax paid to the United States pursuant to new Article XIII(7). Except for gain from a deemed alienation of property with respect to which gain from an actual alienation would be taxable by the United States under Article XIII(5) of the Treaty, the gain will be deemed to arise in the United States pursuant to Article XXIV(3)(a) of the Treaty.

(3) In the case of a change of residence that takes place on or after January 1, 2009, the individual must make the election by reporting the deemed alienation on the first U.S. income tax return he files as a resident of the United States following his change of residence and attaching a Form 8833 stating that he is making an election to pay U.S. tax on a deemed alienation of property pursuant to new Article XIII(7). The individual must attach documentation establishing the fair market value of the property, as established for Canadian purposes, at the time of the deemed alienation in Canada and confirming that gain (or, if permitted by section 3.04 of this revenue procedure, loss) was recognized for Canadian tax purposes in the taxable year of the deemed alienation. The individual must retain copies of the Form 8833 and accompanying documentation until he ultimately disposes of the property.

.03 Property of a U.S. citizen

(1) The rules in this section 3.03 apply to a Canadian emigrant's property that was subject to Canadian departure tax under Canada's deemed disposition rules and with respect to which an actual disposition immediately before the individual's change of residence would have been taxable by the United States, provided the individual was a U.S. citizen immediately before he ceased to be a resident of Canada.

(2) If an individual with property that is subject to the rules of this section 3.03 makes an election pursuant to new Article XIII(7) to be treated as having disposed of and reacquired such property, the United States will require the individual to recognize gain (or, if permitted by section 3.04 of this revenue procedure, loss) in the taxable year of the deemed alienation. Because the individual was both a U.S. citizen and a resident of Canada at the time of the deemed alienation, double taxation will be alleviated under the rules of paragraph 4 of Article XXIV (Elimination of Double Taxation) of the Treaty. Thus, if gain on an actual disposition of the property would have been subject to U.S. tax even if the individual had not been a U.S. citizen, Canada will provide a deduction from tax payable in Canada pursuant to Article XXIV(4)(a) of the Treaty. If gain on an actual disposition of the property would have been subject to U.S. tax only because the individual was a U.S. citizen immediately before his change of residence, then the United States will allow a credit for Canada's deemed disposition tax pursuant to Article XXIV(4)(b) of the Treaty.

(3) In the case of a change of residence that takes place on or after January 1, 2009, the individual must make the election by following the procedure described in section 3.02(3) of this revenue procedure.

.04 Deemed alienation of multiple properties

If an individual is deemed under Canadian law to have alienated multiple properties immediately before ceasing to be a resident of Canada with respect to which gain or loss is recognized for Canadian tax purposes in the year of the deemed alienation, the individual may not make an election pursuant to new Article XIII(7) unless the deemed alienation of all such properties results in a net gain and the individual makes an election with respect to all such properties. The individual must prepare and file a separate Form 8833 for each such property.

If the deemed alienation of all properties described in the first sentence of the previous paragraph results in a net loss, the individual may not make any election under new Article XIII(7) with respect to any of the properties. Such an individual may neither claim an adjusted basis for U.S. tax purposes with respect to any of the properties nor recognize gain or loss for U.S. tax purposes in the year of the deemed alienation in

Canada with respect to any of the properties.

.05 Extension of time for making election

An extension of time for making an election under this revenue procedure may be available under the procedures applicable under sections 301.9100-1 and 301.9100-3 of the Procedure and Administration Regulations.

.06 Prospective change of election

An election once made cannot be revoked except with the consent of the Commissioner.

SECTION 4. EFFECTIVE DATE

This revenue procedure is effective with respect to Canadian residents who have emigrated, or will emigrate, from Canada to the United States after September 17, 2000.

SECTION 5. PAPERWORK REDUCTION ACT

The collection of information contained in this revenue procedure has been reviewed and approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act (44 U.S.C. 3507) under control number 1545-XXX.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number.

The collection of information in this revenue procedure is in sections 3.01(3) and (5), 3.02(3) and 3.03(3) of this revenue procedure. This information is required to establish and record the fair market value of the property at the time of the deemed alienation in Canada and confirming that built in gain (or loss if permitted) was recognized for Canadian tax purposes in the taxable year of the deemed alienation. This information will be used to confirm that such taxpayer, upon making the election in this notice, can get the appropriate adjustment to basis for U.S. tax purposes. The collection of information is required to obtain a benefit. The likely respondents are individuals.

The estimated total annual reporting and/or recordkeeping burden is 100 hours.

The estimated annual burden per respondent/recordkeeper varies from 1 to 2 hours, depending on individual circumstances, with an estimated average of 1 hour. The

estimated number of respondents and/or recordkeepers is 100 per year.

The estimated annual frequency of responses (used for reporting requirements only) is one.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

SECTION 6. DRAFTING INFORMATION

The principal authors of this revenue procedure are M. Grace Fleeman and Lara A. Banjanin of the Office of Associate Chief Counsel (International). For further information regarding this revenue procedure contact Lara A. Banjanin at (202) 622-3880 (not a toll free call).