

## LB&I International Practice Service Process Unit – Audit

Shelf		Individual Outbound		
Volume	9	Jurisdiction to Tax	UIL Code	9431
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Chapter	9.2.6	Joint Return Election (IRC 6013(g) and (h))	Level 3 UIL	9431.02-06
Sub-Chapter	N/A	N/A		

<b>Unit Name</b>	Election Under IRC § 6013(h)
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## Process Overview


### Election Under IRC § 6013(h)

#### Process Description

The purpose of this unit is to determine whether an individual who is a nonresident alien at the beginning of the taxable year and who is a U.S. resident married to a U.S. citizen or resident at the close of the taxable year, properly made the election to be treated as a resident of the United States for the entire taxable year under IRC § 6013(h). This is a one-time election valid only for the year in which the nonresident alien spouse becomes a U.S. resident under one of the standard tests for U.S. residency.

The election under IRC § 6013(h) affords a nonresident alien who is married to a U.S. citizen or resident alien, and who becomes a U.S. resident by the end of the tax year, the ability to be treated as a U.S. resident for purposes of Chapter 1 and Chapter 24 and sections 6012, 6013, 6072 and 6091 of the Code for the entire taxable year. By making the election, the individual and his spouse may file a joint U.S. income tax return. Chapter 1 of the Code covers most, but not all, income taxes. Chapter 24 governs income tax withholding at source. Sections 6012, 6013, 6072 and 6091 address income tax return filing requirements. If the election is made, then the worldwide income of both spouses is, in general, subject to U.S. income taxation for the entire taxable year. Generally, this election precludes individuals from claiming any benefits under an income tax treaty.

It is important to note that this is an election that both spouses must make of their own accord, and not an election that the Service can compel them to make. Additionally, absent this election, the U.S. spouse would have to file as married filing separate (with higher tax rates and more limited deductions) and the alien spouse would have to file as a dual status citizen.

 **CAUTION:** A nonresident alien is not treated as a resident alien under IRC § 6013(h) for purposes of certain U.S. taxes on income, e.g. self-employment tax and the tax imposed by IRC § 1411. Nevertheless, a nonresident alien can make a separate election to be treated as a resident alien for purposes of IRC § 1411 under the regulations promulgated under that section.

#### Example Circumstances Under Which Process Applies

- An examiner receives a case involving an individual who became a U.S. resident during the year and elected with his or her U.S. citizen or resident alien spouse to be treated as a U.S. resident alien for U.S. tax purposes for the entire year.

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## Determination of Process Applicability

### Election Under IRC § 6013(h)

An individual who makes the election under IRC § 6013(h) with his or her spouse is generally treated as a U.S. resident for purposes of Chapter 1 and Chapter 24, and sections 6012, 6013, 6072, and 6091 of the Code for the entire taxable year.

Criteria	Resources	6103 Protected Resources
<ul style="list-style-type: none"> <li>▪ In order to properly make the election under IRC § 6013(h):               <ul style="list-style-type: none"> <li>– The individual must be a nonresident alien at the beginning of the tax year,</li> <li>– The individual must be a U.S. resident at the end of the tax year,</li> <li>– The individual must be married to a U.S. citizen or resident alien at the end of the tax year for which the election is being made,</li> <li>– A statement making the election must be attached to a joint return, and</li> <li>– The election must be made timely.</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>▪ Form 1040</li> <li>▪ IRC § 6013(h)(1)</li> </ul>	
<p>If the election is made, neither of the two individuals making the election can make the election for any subsequent taxable year. Thus, neither spouse may, upon remarriage, ever make an IRC § 6013(h) election with a new spouse.</p>	<ul style="list-style-type: none"> <li>▪ IRC § 6013(h)(2)</li> <li>▪ Treas. Reg. § 1.6013-7(a)(1)</li> </ul>	
<p><b>T</b> <b>TREATY IMPLICATION:</b> Individuals making this election are generally prohibited from claiming benefits under a U.S. income tax treaty as a resident of a treaty country.</p>	<ul style="list-style-type: none"> <li>▪ Treas. Reg. § 1.6013-7(a)(2)</li> <li>▪ Treas. Reg. § 1.6013-6(a)(2)(v) and Ex. 1</li> </ul>	
<p><b>NOTE:</b> A nonresident alien who does not become a U.S. resident during the year in question and is married to a U.S. citizen or resident alien at the end of the taxable year, may elect with his or her spouse to file a joint Form 1040 and be treated as a U.S. resident for income tax purposes for that year under IRC § 6013(g).</p>	<ul style="list-style-type: none"> <li>▪ Form 1040 and/or Form 1040NR</li> <li>▪ IRC § 6013(g)</li> <li>▪ Treas. Reg. § 1.6013-6</li> </ul>	

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## Summary of Process Steps

Election Under IRC § 6013(h)	
<a href="#">Step 1</a>	Determine whether the individual meets the criteria for making the election under IRC § 6013(h).
<a href="#">Step 2</a>	Determine whether the individual and his or her spouse made a proper election under IRC § 6013(h).
<a href="#">Step 3</a>	Determine the tax consequences of making the election.

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# Step 1

## Election Under IRC § 6013(h)

**Step 1: Determine whether the individual meets the criteria for making the election under IRC § 6013(h).**



**DECISION POINT:** Did the individual meet the criteria for making the election under IRC § 6013(h)?

Considerations	Resources	6103 Protected Resources
<p>In order to make the election under IRC § 6013(h), there are several criteria that the individual must meet. The individual must be:</p> <ul style="list-style-type: none"> <li>▪ a nonresident alien at the beginning of the tax year,</li> <li>▪ a U.S. citizen or resident alien at the end of the tax year, and</li> <li>▪ married to a U.S. citizen or resident alien at the end of the tax year.</li> </ul> <p><b>NOTE:</b> Same-sex couples that are legally married in jurisdictions that recognize their marriages, will be treated as married for ALL federal tax purposes even if they currently live in a jurisdiction that does not recognize the marriage as valid. Any same-sex marriage legally entered into in one of the 50 states, District of Columbia, a U.S. territory or a foreign country is covered by the ruling.</p>	<ul style="list-style-type: none"> <li>▪ IRC § 6013(h)(1)</li> </ul>	
 <p><b>CAUTION:</b> If an election under IRC § 6013(g) is in effect for the taxable year in which the individual and his or her spouse meet the criteria above, they do not need to make the election under IRC § 6013(h).</p>	<ul style="list-style-type: none"> <li>▪ Treas. Reg. § 1.6013-7(b)</li> </ul>	

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## Step 1 (cont'd)

### Election Under IRC § 6013(h)

**Step 1: Determine whether the individual meets the criteria for making the election under IRC § 6013(h).**



**DECISION POINT:** Did the individual meet the criteria for making the election under IRC § 6013(h)?


Considerations	Resources	6103 Protected Resources
<p>An individual is a resident alien if the individual is a lawful permanent resident (LPR), met the Substantial Presence Test (SPT) under IRC § 7701(b)(3), or made a First-Year Election under IRC § 7701(b)(4). Whether two individuals are married at the close of the taxable year is determined under Treas. Reg. § 1.6013-4(a).</p> <p><b>NOTE:</b> Even if both the individual and his or her spouse are nonresident aliens at the beginning of the tax year and both were resident aliens at the end of the tax year, the election under IRC § 6013(h) can still be made. However, if an individual is single at the end of the tax year, this election cannot be made.</p>	<ul style="list-style-type: none"> <li>▪ IRC § 6013(h)(1)</li> <li>▪ IRC § 7701(b)(1)(A)</li> <li>▪ Treas. Reg. § 1.6013-4(a)</li> <li>▪ Treas. Reg. § 1.6013-7</li> <li>▪ IR-2013-72, August 29, 2013</li> </ul>	

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## Step 2

### Election Under IRC § 6013(h)

**Step 2: Determine whether the individual and his or her spouse made a proper 6013(h) election.**

 **DECISION POINT:** Did the individual and his or her spouse make a proper election under IRC § 6013(h)?

Considerations	Resources	6103 Protected Resources
The election under IRC § 6013(h) must be made in accordance with the time and manner specified for making an election under IRC § 6013(g).	<ul style="list-style-type: none"> <li>▪ Treas. Reg. § 1.6013-7(a)(3)</li> </ul>	
<p>There is no specific form used to make the election under IRC § 6013(h). The election is made by attaching a statement to a joint Form 1040 for the first taxable year in which the election is to be in effect. The statement should include:</p> <ul style="list-style-type: none"> <li>▪ A declaration that the election is being made and that the individuals meet the necessary requirements (e.g., that one spouse is a U.S. citizen or resident)</li> <li>▪ The name, address, and taxpayer identification number (TIN) of each spouse; if one spouse is deceased, the executor's or administrator's information is required.</li> <li>▪ Two signatures; the statement must be signed by both persons making the election.</li> </ul>	<ul style="list-style-type: none"> <li>▪ Form 1040 or Form 1040A</li> <li>▪ Treas. Reg. § 1.6013-6(a)(4)(ii)</li> </ul>	
<p>The election must be made before the time period for making a claim for refund expires – generally, the later of 3 years from the time the return was filed or 2 years from the time the tax was paid.</p> <ul style="list-style-type: none"> <li>▪ <b>NOTE:</b> If the election is made with a joint amended return, the amended return should be made on Form 1040 or 1040A, and the word 'Amended' should be written clearly on the front of the return. Amended returns also need to be filed for any subsequent year in which either of the spouses filed a return.</li> </ul>	<ul style="list-style-type: none"> <li>▪ IRC § 6013(h)</li> <li>▪ IRC § 6511(a)</li> <li>▪ Treas. Reg. § 1.6013-6(a)(4)(i)</li> </ul>	



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## Step 3

### Election Under IRC § 6013(h)


#### Step 3: Determine the tax consequences of making the election.

If the election is properly made, the individual is treated as a resident of the United States and the worldwide income of both spouses is, in general, subject to U.S. income taxation for the entire taxable year.

Considerations	Resources	6103 Protected Resources
With a proper election in place, the individual and his U.S. citizen or resident spouse can properly file a joint U.S. income tax return.	<ul style="list-style-type: none"> <li>▪ IRC § 6013(a)</li> </ul>	
An election to file a joint return cannot be made, however, if the Service has issued a Statutory Notice of Deficiency and the individuals have timely petitioned the Tax Court.	<ul style="list-style-type: none"> <li>▪ IRC § 6013(b)(2)(B)</li> <li>▪ <i>Olson v. Commissioner</i>, T.C. Memo. 1987-543</li> <li>▪ <i>Kitcher v. Commissioner</i>, T.C. Memo 1986-41</li> <li>▪ <i>Mazanek v. Commissioner</i>, T.C. Memo 1984-633.</li> </ul>	
This prohibition does not apply if the individuals have not previously filed a separate return (e.g., in cases where the Statutory Notice of Deficiency is based on a Substitute for Return under IRC § 6020(b)).	<ul style="list-style-type: none"> <li>▪ <i>Millsap v. Commissioner</i>, 91 T.C. 926(1988)</li> <li>▪ <i>Phillips v. Commissioner</i>, 851 F.2d 1492 (D.C. Cir. 1988)</li> </ul>	

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## Other Considerations / Impact to Audit

Election Under IRC § 6013(h)		
Considerations	Resources	6103 Protected Resources
 <p><b>CAUTION:</b> A nonresident alien is not treated as a resident alien under IRC § 6013(h) for purposes of certain U.S. taxes on income, e.g. self-employment tax and the tax imposed by IRC § 1411. Nevertheless, a nonresident alien can make a separate election to be treated as a resident alien for purposes of IRC § 1411 under the regulations promulgated under that section. Also, the nonresident alien could be subject to U.S. self-employment tax under a Totalization Agreement.</p>	<ul style="list-style-type: none"> <li>▪ IRC § 1402(b)</li> <li>▪ Treas. Reg. § 1.1411-2(a)(2)(iii)(B)</li> <li>▪ SSA § 233</li> <li>▪ Social Security Administration list of countries with which the United States has entered into a Totalization Agreement.</li> </ul>	

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## Training and Additional Resources

### Chapter 9.2.6 Joint Return Election (IRC 6013(g) and (h))

Type of Resource	Description(s) and/or Instructions for Accessing	References
Other Training Materials	U.S. Tax Guide for Aliens	<ul style="list-style-type: none"> <li>▪ IRS Publication 519</li> </ul>

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## Glossary of Terms and Acronyms

Acronym	Definition
CCA	Chief Counsel Advisory
DCN	Document Control Number
IPN	Issue Practice Network
IPS	International Practice Service
LPR	Lawful Permanent Resident
SPT	Substantial Presence Test
TIN	Taxpayer Identification Number
UIL	Uniform Issue List

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## Index of Related Issues

Issue	Associated UIL(s)	References
First-Year Election	<ul style="list-style-type: none"> <li>▪ 9431.02</li> </ul>	<ul style="list-style-type: none"> <li>▪ IPS Unit Document Control Number (DCN) JTO/9431.02_11(2014)</li> <li>▪ Unit Under Construction</li> </ul>
Election under IRC § 6013(g)	<ul style="list-style-type: none"> <li>▪ 9431.02</li> </ul>	<ul style="list-style-type: none"> <li>▪ IPS Unit Document Control Number (DCN) JTO/9431.02_10(2014)</li> <li>▪ Unit Under Construction</li> </ul>
Residency Status of Lawful Permanent Residents	<ul style="list-style-type: none"> <li>▪ 9431-01</li> </ul>	<ul style="list-style-type: none"> <li>▪ IPS Unit Document Control Number (DCN) JTO/9431.01_02(2013)</li> </ul>
Determining an Individual's Residency for Treaty Purposes	<ul style="list-style-type: none"> <li>▪ 9450.05</li> </ul>	<ul style="list-style-type: none"> <li>▪ IPS Unit Document Control Number (DCN) TRE/9450.05_XX(2014)</li> <li>▪ Unit Under Construction</li> </ul>
Substantial Presence Test	<ul style="list-style-type: none"> <li>▪ 9431.01</li> </ul>	<ul style="list-style-type: none"> <li>▪ IPS Unit Document Control Number (DCN) JTO/9431.01_03(2013)</li> </ul>
U.S. Persons Residing Abroad Claiming Additional Child Tax Credit	<ul style="list-style-type: none"> <li>▪ 9431.06</li> </ul>	<ul style="list-style-type: none"> <li>▪ IPS Unit Document Control Number (DCN) JTO/9431.06_01(2013)</li> </ul>
Tax Home for Purposes of IRC § 911	<ul style="list-style-type: none"> <li>▪ 9431.06</li> </ul>	<ul style="list-style-type: none"> <li>▪ IPS Unit Document Control Number (DCN) JTO/CU/P_9.6_05(2013)</li> </ul>