

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

Shelf		Individual Outbound		
Volume	9	Jurisdiction to Tax	UIL Code	9431
Part	9.2	Taxation Based on Residency Status	Level 2 UIL	9431.02
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(g)
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## Process Overview


### Election Under IRC § 6013(g)

#### Process Description

The purpose of this unit is to determine whether a nonresident alien individual married to a U.S. citizen or resident alien properly made the election to be treated as a resident of the United States under IRC § 6013(g). This election applies to the first year in which the election is properly made and to all subsequent tax years until it is terminated or suspended.

The election under IRC § 6013(g) affords a nonresident alien married to a U.S. citizen or resident alien 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 this election, the nonresident alien 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. IRC Sections 6012, 6013, 6072, and 6091 address income tax return filing requirements. If an election is made under IRC § 6013(g), the worldwide income of both spouses is, in general, subject to U.S. income taxation. 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 non-resident alien or may have no U.S. tax return filing requirement at all, but may be subject to withholding on his or her U.S. source income.

 **CAUTION:** A nonresident alien is not treated as a resident alien under IRC § 6013(g) 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, along with his or her U.S. citizen or resident alien spouse, elected to be treated as a resident alien for U.S. income tax purposes during the year of the initial election and for all subsequent tax years

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## Determination of Process Applicability

### Election Under IRC § 6013(g)

An individual who makes the election under IRC § 6013(g) with his or her spouse is generally treated as a resident alien 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(g), several criteria must be met:               <ul style="list-style-type: none"> <li>– The individual must be a nonresident alien,</li> <li>– The individual must be married to a U.S. citizen or resident alien at the close of the taxable year for which the election is being made,</li> <li>– A statement making the election must be attached to a joint return,</li> <li>– The election must be made timely,</li> <li>– An election may not be made if an election under IRC § 6013(g) was previously terminated by either spouse.</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>▪ Form 1040</li> <li>▪ IRC § 6013(g)</li> <li>▪ IRC § 6511(a)</li> <li>▪ Treas. Reg. § 1.6013-6(a)(4)</li> </ul>	
<p>Once made, the election is in effect for all subsequent years except for years for which the election is suspended or terminated.</p>	<ul style="list-style-type: none"> <li>▪ IRC § 6013(g)(3)</li> <li>▪ Treas. Reg. § 1.6013-6(a)(1)(i)</li> <li>▪ Treas. Reg. § 1.6013-6(a)(1)(ii)</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. § 1.6013-6(a)(2)(v) and Ex. 1</li> </ul>	

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## Determination of Process Applicability

Election Under IRC § 6013(g)		
An individual who makes the election under IRC § 6013(g) with his or her spouse is generally treated as a resident alien 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
<p><b>NOTE:</b> If both spouses are nonresident aliens at the beginning of the year, the couple may still make an election under IRC § 6013(g) as long as one spouse becomes a U.S. resident during that year.</p>	<ul style="list-style-type: none"> <li>▪ Treas. Reg. § 1.6013-6(c), Ex.2</li> </ul>	

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## Summary of Process Steps

Election Under IRC § 6013(g)	
<a href="#"><u>Step 1</u></a>	Determine whether the individual was a nonresident alien who is married to a U.S. citizen or resident alien at the close of the taxable year for which the election is being made.
<a href="#"><u>Step 2</u></a>	Determine whether the individual and his or her spouse made a proper election under IRC § 6013(g).
<a href="#"><u>Step 3</u></a>	Determine the tax consequences of making the election.

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# Step 1

## Election Under IRC § 6013(g)

**Step 1: Determine whether the individual is a nonresident alien who is married to a U.S. citizen or resident.**



**DECISION POINT:** Was the individual a nonresident alien? Was the individual married to a U.S. citizen or resident at the close of the taxable year?

Considerations	Resources	6103 Protected Resources
<p>In order to make the 6013(g) election, the individual must be married to either a citizen of the United States or a resident of the United States at the close of the taxable year for which the election is being made. Whether two individuals are married at the close of the taxable year is determined under Treas. Reg. § 1.6013-4(a).</p> <ul style="list-style-type: none"> <li>▪ <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.</li> </ul>	<ul style="list-style-type: none"> <li>▪ IRC § 6013(g)</li> <li>▪ Treas. Reg. § 1.6013-6(a)(4)</li> <li>▪ Treas. Reg. § 1.6013-4(a)</li> <li>▪ IR-2013-72, August 29, 2013</li> </ul>	

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## Step 1 (cont'd)

### Election Under IRC § 6013(g)

**Step 1: Determine whether the individual is a nonresident alien who is married to a U.S. citizen or resident.**



**DECISION POINT:** Was the individual a nonresident alien? Was the individual married to a U.S. citizen or resident at the close of the taxable year?

Considerations	Resources	6103 Protected Resources
 <p><b>CAUTION:</b> The individual must be a nonresident alien under IRC § 7701(b)(1)(B) in order to make the election under IRC § 6013(g). An individual is not a nonresident 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).</p>	<ul style="list-style-type: none"> <li>▪ IRC § 6013(g)</li> <li>▪ IRC § 7701(b)(1)(A)(i)</li> <li>▪ IRC § 7701(b)(1)(A)(ii)</li> <li>▪ IRC § 7701(b)(3)</li> <li>▪ IRC § 7701(b)(4)</li> <li>▪ Treas. Reg. § 301.7701(b)-1(b)</li> <li>▪ Treas. Reg. § 301.7701(b)-1(c)</li> <li>▪ Treas. Reg. § 301.7701(b)-4(c)(3)</li> </ul>	



Volume	Part	Chapter	Sub-Chapter
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## Step 2

### Election Under IRC § 6013(g)

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



**DECISION POINT:** Did the individual and his or her spouse properly make a 6013(g) election?

Considerations	Resources	6103 Protected Resources
<p>There is no specific form used to make the election under IRC § 6013(g). 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>	

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## Step 2 (cont'd)

### Election Under IRC § 6013(g)

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



**DECISION POINT:** Did the individual and his or her spouse properly make a 6013(g) election?

Considerations	Resources	6103 Protected Resources
<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> <p>▪ <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.</p>	<ul style="list-style-type: none"> <li>▪ IRC § 6013(g)</li> <li>▪ IRC § 6511(a)</li> <li>▪ Treas. Reg. § 1.6013-6(a)(4)(i)</li> <li>▪ CCA 201329016</li> </ul>	

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## Step 3

### Election Under IRC § 6013(g)

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

If the election under IRC § 6013(g) is properly made, the nonresident alien individual is treated as a resident alien of the United States and the individual's worldwide income is, in general, subject to U.S. income tax for the entire taxable year.

Considerations	Resources	6103 Protected Resources
Once the election is made, it remains in effect for all subsequent taxable years except for years for which the election is suspended or terminated. The election is suspended for a taxable year if during that taxable year neither spouse is a U.S. citizen or resident.	<ul style="list-style-type: none"> <li>▪ IRC § 6013(g)(3)</li> <li>▪ Treas. Reg. § 1.6013-6(a)(1)</li> <li>▪ Treas. Reg. § 1.6013-6(a)(3)</li> </ul>	
<p>The election can be terminated at the earliest of either of the following:</p> <ul style="list-style-type: none"> <li>▪ Revocation made by either spouse by filing a statement of revocation on or before the last day on which the return for that year is due,</li> <li>▪ The death of either spouse, (such termination would only affect tax years after the year in which the spouse died),</li> <li>▪ Legal separation under a decree of divorce or separate maintenance (as of the beginning of the taxable year in which the divorce or separation occurs), or</li> </ul>	<ul style="list-style-type: none"> <li>▪ IRC § 6013(g)(4)</li> <li>▪ IRC § 6013(g)(5)</li> <li>▪ Treas. Reg. § 1.6013-6(b)</li> </ul>	

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## Step 3 (cont'd)

Election Under IRC § 6013(g)		
Step 3: Determine the tax consequences of making the election.		
If the election under IRC § 6013(g) is properly made, the nonresident alien individual is treated as a resident alien of the United States and the individual's worldwide income is, in general, subject to U.S. income tax for the entire taxable year.		
Considerations	Resources	6103 Protected Resources
<p>The election can be terminated at the earliest of either of the following:</p> <ul style="list-style-type: none"> <li>Termination by the Service if it determines that either spouse has failed to keep adequate records, failed to grant adequate access to such books or records, or failed to supply other such information</li> </ul>	<ul style="list-style-type: none"> <li>IRC § 6013(g)(4)</li> <li>IRC § 6013(g)(5)</li> <li>Treas. Reg. § 1.6013-6(b)</li> </ul>	

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## Step 3 (cont'd)

### Election Under IRC § 6013(g)


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

If the election under IRC § 6013(g) is properly made, the nonresident alien individual is treated as a resident alien of the United States and the individual's worldwide income is, in general, subject to U.S. income tax 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> <li>▪ IRC § 6020(b)</li> </ul>	
A Joint Return Election 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(g)		
Considerations	Resources	6103 Protected Resources
 <p><b>CAUTION:</b> A nonresident alien is not treated as a resident alien under IRC § 6013(g) 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>▪ IRC § 1411</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(h)	<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>