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From: [redacted]
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To: [redacted]
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Bcc:
Subject: [redacted]

[redacted]:

As we understand it: (i) the taxpayer held a green card continuously (i.e., had the status of a lawful permanent resident of the United States for immigration purposes at all times) from and has indicated that he abandoned the green card in (although no evidence of a judicial or administrative determination of abandonment has been provided); (ii) he left the United States in and has not returned; (iii) he did not timely file income tax returns for the years at issue ( ), but in he submitted nonresident returns for ; and (iv) he has attached a Form 8833 to each such return filed in , claiming to be a resident for purposes of the income tax treaty. Thus, his claim is that he commenced treatment as a resident for purposes of the treaty no later than .

A resident alien is defined to include an individual who is a lawful permanent resident of the United States. Section 7701(b)(1)(A). An individual is a lawful permanent resident of the United States if he has been lawfully accorded such status under U.S. immigration laws and such status has not been revoked (and has not been administratively or judicially determined to have been abandoned). Section 7701(b)(6). Under the flush language of section 7701(b)(6), 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.

The Heroes Earnings Assistance and Relief Tax Act of 2008 (the "HEART Act"), P.L. No. 110-245, added section 877A to the Code as part of a new regime for the taxation of expatriates, and added the above-described flush language to section 7701(b)(6) as a conforming amendment. The HEART Act also provides in section 301(g)(1) that the new flush language in section 7701(b)(6) "shall apply to any individual whose expatriation date [as defined in section 877A(g)(3)] . . . is on or after the date of the

enactment of [the HEART Act]," i.e., June 17, 2008. Section 877A(g)(3) defines the expatriation date as "the date an individual relinquishes United States citizenship" or "in the case of a long-term resident of the United States, the date on which the individual ceases to be a lawful permanent resident of the United States (within the meaning of section 7701(b)(6))." Accordingly, the flush language applies only to an individual who is a long-term resident and then only if application of the flush language would cause him to cease to be treated as a lawful permanent resident on or after June 17, 2008, and thus potentially subject to the exit tax under section 877A. An individual is a "long-term resident" if he was a lawful permanent resident in at least 8 of the last 15 tax years ending with the taxable year of his expatriation date, excluding years in which the individual was treated as a foreign resident under a treaty. Sections 877A(g)(5) and 877(e)(2).

Here, the taxpayer is claiming that he commenced to be treated as a foreign resident under the income tax treaty no later than . At that point, he had not been a lawful permanent resident long enough to be treated as a long-term resident, and his subsequent tax years as a lawful permanent resident are excluded for purposes of this determination because he was treated as a foreign resident under the treaty. Because he was not a long-term resident and, even if he had been, did not have an expatriation date on or after June 17, 2008, the flush language does not apply to him. Accordingly, he could not cease to be treated as a resident of the United States, and was thus a U.S. person for federal income tax purposes until the time (if any) that his immigration law status was administratively or judicially determined to have been abandoned.

Thanks.

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