

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. 2010-19

Deemed Dispositions by Individuals Emigrating from Canada

SECTION 1. PURPOSE

This revenue procedure provides guidance for individuals who emigrate from Canada and wish to make an election for U.S. federal income 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 alienation rules (the terms “alienation” and “disposition” are used interchangeably throughout this revenue procedure). This guidance is limited to the circumstances described in the revenue procedure and therefore does not address other situations in which the election under paragraph 7 of Article XIII may be available.

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 disposed of 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 disposition 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). 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 be liable for U.S. federal income tax on a deemed disposition of their property if they were not U.S. citizens immediately before they ceased to be residents of Canada and would not otherwise have been subject to U.S. federal income tax on a disposition of the property.

Article XIII(7) of the Treaty was amended by the 2007 Protocol (“new Article XIII(7)”) to provide that where, at any time, an individual is treated for purposes of taxation by one Contracting State as having disposed of 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, under new Article XIII(7) the election is now available to any individual who emigrates from Canada to the United States, without regard to whether the individual was a U.S. citizen immediately before ceasing to be a resident of Canada (or would otherwise have been subject to U.S. federal income tax on a disposition of property). If the individual is not subject to U.S. federal income tax at the time of emigration, the effect of the election will be to give the individual an adjusted basis in the relevant property for U.S. federal income tax purposes equal to the fair market value of the property as of the date of the deemed disposition in Canada, with the result that only post-emigration gain will be subject to U.S. federal income tax when there is a disposition of the property. As was the case prior to the changes made by the 2007 Protocol, if the Canadian resident is also a U.S. citizen at the time of his emigration from Canada or otherwise would be subject to taxation in the United States on a disposition of the property (e.g., the property is real property situated in the United States (within the meaning of Article XIII(3)(a) of the Treaty)), the individual may elect to be liable to tax in the United States in that year as if he had, immediately before the date of emigration, sold and repurchased such property for an amount equal to its fair market value (which means that the individual may elect to accelerate the U.S. federal income tax on the deemed disposition). In that case, relief from double taxation would be governed by the rules of Article XXIV of the Treaty.

The rule in new Article XIII(7) was publicly announced in simultaneous press releases issued on September 18, 2000, by the Department of Finance Canada and the U.S. 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 dispositions 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. SCOPE

This revenue procedure provides guidance for taxpayers making an election with respect to changes in residence for taxpayers who emigrate from Canada after September 17, 2000. Sections 4.01 and 4.02 provide procedures for taxpayers who emigrate from Canada on or after March 29, 2010. Sections 4.03 and 4.04 provide procedures for taxpayers who emigrated from Canada after September 17, 2000 and before March 29, 2010 and who are not time barred from making the election. Section 4.05 provides rules for deemed dispositions of multiple properties.

SECTION 4. ELECTION PROCEDURES AND EFFECT OF ELECTION

.01 Election for property of an individual emigrating from Canada on or after March 29, 2010, with respect to which a disposition of the property would have been taxable by the United States (“Prospective elections for property taxable by United States”)

(1) Subject to section 4.05 of this revenue procedure (Deemed disposition of multiple properties), the rules in this section 4.01 apply, in the case of a change in residence that occurs on or after March 29, 2010, to a Canadian emigrant’s property that was subject to Canadian departure tax under Canada’s deemed disposition rules and with respect to which a disposition immediately before the individual’s change of residence would have been subject to tax by the United States in accordance with the Treaty. Such property includes (but is not 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 a disposition 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 disposition) in the United States, with respect to which gain from a disposition would be taxable by the United States pursuant to Article XIII(2) of the Treaty, and

(c) property with respect to which gain from a disposition would be taxable by the United States pursuant to paragraph 2 of Article XXIX (Miscellaneous Rules) of the Treaty (i.e., the saving clause).

(2) If an individual with property that is subject to the rules of this section 4.01 makes an election pursuant to new Article XIII(7) to be treated as having disposed of and reacquired such property, the individual must recognize gain (and, if permitted by section 4.05 of this revenue procedure, loss) in the taxable year of the deemed disposition. If the individual is not a U.S. citizen at the time of the deemed disposition (but is still a resident of Canada), alleviation of double taxation is governed by paragraph 2 of Article XXIV (Elimination of Double Taxation) of the Treaty. If the individual is both a U.S. citizen and a resident of Canada at the time of the deemed disposition, however, alleviation of double taxation is governed by the rules of paragraph 4 of Article XXIV (Elimination of Double Taxation) of the Treaty.

(3) The individual must make the election by reporting the deemed disposition on the individual's timely filed U.S. federal income tax return for the individual's first taxable year ending after the individual's change of residence and attaching a Form 8833, Treaty Based Return Position Disclosure under section 6114 or 7701(b) of the Internal Revenue Code, stating that the individual is making an election to pay U.S. federal income tax on a deemed disposition of property pursuant to new Article XIII(7). The individual must attach documentation establishing the fair market value of the property, as determined under Canada's deemed disposition rules, and confirming that gain (and, if permitted by section 4.05 of this revenue procedure, loss) was recognized and properly reported for Canadian tax purposes for the taxable year of the deemed disposition. The individual must retain copies of the Form 8833 and accompanying documentation (including the information reported to Canada) as required pursuant to section 6001 of the Code and the regulations promulgated thereunder.

.02 Election for property of an individual emigrating from Canada on or after March 29, 2010, with respect to which a disposition of the property would not have been taxable by the United States (“Prospective elections for property not taxable by United States”)

(1) Subject to section 4.05 of this revenue procedure (Deemed disposition of multiple properties), in the case of a change of residence that takes place on or after March 29, 2010, the rules in this section 4.02 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 a disposition immediately before the individual's change of residence would not have been subject to U.S. federal income tax.

(2) If an individual with property that is subject to the rules of this section 4.02 elects for

U.S. federal income tax purposes to be treated as having disposed of and reacquired such property pursuant to new Article XIII(7), the individual takes an adjusted basis in such property for U.S. federal income tax purposes equal to the fair market value of the property as of the date of the deemed disposition under Canada's deemed disposition rules if the individual complies with the requirements of paragraph (3) of this section 4.02. An individual who makes this election will not be subject to U.S. federal income tax, solely as a result of the election, with respect to the deemed disposition of such property.

(3) The individual must make the election by reporting the deemed disposition on the individual's timely filed U.S. federal income tax return for the individual's first taxable year ending after the individual's change of residence and by attaching a Form 8833 to such return, indicating on the form that for U.S. federal income tax purposes the individual is electing pursuant to new Article XIII(7) to take an adjusted basis in the property equal to its fair market value as of the date of the deemed disposition under Canada's deemed disposition rules. The individual must attach the documentation described in section 4.01(3) of this revenue procedure and must retain copies of the Form 8833 and accompanying documentation (including the information reported to Canada) as required pursuant to section 6001 of the Code and the regulations promulgated thereunder.

.03 Election for property of an individual emigrating from Canada after September 17, 2000, and before March 29, 2010, with respect to which a disposition of the property would have been taxable by the United States (“Retroactive elections for property taxable by United States”)

(1) Subject to section 4.05 of this revenue procedure (Deemed disposition of multiple properties), in the case of a change of residence that took place after September 17, 2000, and before March 29, 2010, the rules in this section 4.03 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 a disposition immediately before the individual's change of residence would have been subject to tax by the United States in accordance with the Treaty. See section 4.01(1) of this revenue procedure for examples of such property.

(2) If an individual with property that is subject to the rules of this section 4.03 makes an election pursuant to new Article XIII(7) to be treated as having disposed of and reacquired such property immediately prior to emigration, the individual must recognize gain (and, if permitted by section 4.05 of this revenue procedure, loss) in the taxable year of the deemed disposition. If the individual was not a U.S. citizen at the time of the deemed disposition (but was still a resident of Canada), alleviation of double taxation is governed by paragraph 2 of Article XXIV (Elimination of Double Taxation) of the Treaty. If the individual was both a U.S. citizen and a resident of Canada at the time of the

deemed disposition, however, alleviation of double taxation is governed by the rules of paragraph 4 of Article XXIV (Elimination of Double Taxation) of the Treaty.

(3) The individual must make the election by reporting the deemed disposition on an amended federal income tax return for the open taxable year that includes the date of emigration and attaching a Form 8833 stating that the individual is making an election to pay U.S. tax on a deemed disposition of property in the taxable year that includes the date of emigration pursuant to new Article XIII(7). Thus, an individual may make an election with retroactive effect only if the statute of limitations under 6511 of the Internal Revenue Code is open. Appropriate adjustments must be made to avoid duplicate benefits in years with respect to which the statute of limitations on assessment and collection, as set out under section 6501 through 6504, is closed. If the statute of limitations is closed with respect to the year of the deemed disposition, then the individual is time barred from making an election with respect to such property (however, the individual may still be able to make the election with respect to property described in section 4.04 (Retroactive elections for property not taxable by United States), subject to section 4.05(2) of this revenue procedure (Deemed dispositions of multiple properties)). The individual must attach the documentation described in section 4.01(3) of this revenue procedure and must retain copies of the Form 8833 and accompanying documentation (including the information reported to Canada) as required pursuant to section 6001 of the Code and the regulations promulgated thereunder.

(4) If, prior to March 29, 2010, an individual who had property the disposition of which would have been subject to tax by the United States at the time of emigration made an election with respect to such property under Article XIII(7) by attaching a Form 8833 or similar statement to a timely filed federal income tax return for the taxable year that included the date of the deemed disposition, the IRS will not challenge such election (and the individual is not required to make a new election under this revenue procedure) provided that the election is not inconsistent with the principles set out in this revenue procedure and that the individual has filed all U.S. federal income tax returns and information returns consistent with such election.

.04 Election for property of an individual emigrating from Canada after September 17, 2000, and before March 29, 2010, with respect to which a disposition of the property would not have been taxable by the United States (“Retroactive elections for property not taxable by United States”)

(1) Subject to section 4.05 of this revenue procedure (Deemed dispositions of multiple properties), in the case of a change of residence that took place after September 17, 2000, and before March 29, 2010, the rules in this section 4.04 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 a disposition immediately before the

individual's change of residence would not have been taxable by the United States.

(2) If an individual with property that is subject to the rules of this section 4.04 elects for U.S. federal income tax purposes to be treated as having disposed of and reacquired such property pursuant to new Article XIII(7), the individual takes an adjusted basis in such property for U.S. federal income tax purposes equal to the fair market value of the property as of the date of the deemed disposition under Canada's deemed disposition rules, if he complies with the requirements of paragraph (3) of this section 4.04. An individual who makes this election will not be subject to U.S. federal income tax, solely as a result of the election, with respect to the deemed disposition of such property.

(3) If the individual had only property described in section 4.04(1) of this revenue procedure (and did not have property described in section 4.03(1) of this revenue procedure (Retroactive elections for property taxable by United States)), the individual must make the election by attaching a Form 8833 to the individual's first timely filed U.S. federal income tax return filed after March 29, 2010, indicating on the form that for U.S. federal income tax purposes the individual is electing pursuant to new Article XIII(7) to take an adjusted basis in the property equal to the fair market value of the property as of the date of the deemed disposition under Canada's deemed disposition rules. The individual must attach documentation establishing the fair market value of the property, as determined under Canada's deemed disposition rules, and confirming that gain (and, if permitted by section 4.05 of this revenue procedure, loss) was recognized and properly reported for Canadian tax purposes for the taxable year of the deemed disposition. The individual must attach the documentation described in section 4.01(3) of this revenue procedure and must retain copies of the Form 8833 and accompanying documentation (including the information reported to Canada) as required pursuant to section 6001 of the Internal Revenue Code and the regulations promulgated thereunder. The individual must file amended U.S. federal income tax returns for any prior taxable years with respect to which the statute of limitations on claiming a credit or refund, as set out under section 6511 of the Internal Revenue Code, is open and that are affected by the election (e.g., the year of disposition of property subject to the rules of this section 4.04). Appropriate adjustments must be made to avoid duplicate benefits in years with respect to which the statute of limitations on assessment and collection, as set out under section 6501 through 6504, is closed.

(4) If, in addition to property described in section 4.04(1) of this revenue procedure, the individual had property described in section 4.03(1) of this revenue procedure (Retroactive elections for property taxable by United States), the Form 8833 included with the election made in accordance with section 4.03(4) must include the property described in section 4.04(1), and no separate Form 8833 needs to be filed under this section 4.04(4).

(5) If an individual with property that is subject to the rules of this section 4.04 has

disposed of any such property prior to making the election provided in new Article XIII(7), that individual may make an election with retroactive effect and file an amended tax return to reflect the adjusted basis of such property, provided the statute of limitations under 6511 of the Internal Revenue Code is open for the year of the disposition. If the statute of limitations is closed with respect to the year of the disposition of the property, then the individual is time barred from making an election with respect to such property (however, the individual can still make the election with respect to the remaining property, subject to section 4.05(2) of this revenue procedure (Deemed dispositions of multiple properties)). If the disposition of properties described in section 4.04(1) in a year with respect to which the statute of limitations has closed resulted in a net loss for U.S. federal income tax purposes, the individual may make an election with respect to the individual's remaining property or properties described in section 4.04 only if the individual makes appropriate adjustments to the adjusted basis of the remaining property or properties to reflect the net loss that was taken into account in the year for which the statute of limitations is closed, using any reasonable method to allocate the adjustment. For example, the step up in basis for the gain properties will be reduced by the amount of loss that was recognized with respect to the property that was disposed of in the closed year.

(6) If, prior to March 29, 2010, an individual who had property the disposition of which would not have been subject to tax by the United States at the time of emigration made an election with respect to such property under Article XIII(7) by attaching a Form 8833 or similar statement to the first timely filed U.S. federal income tax return filed after the date of the deemed disposition, the IRS will not challenge such election (and the individual is not required to make a new election under this revenue procedure) provided that the election is not inconsistent with the principles set out in this revenue procedure and that the individual has filed all U.S. federal income tax returns and information returns consistent with such election.

.05 Deemed disposition of multiple properties

(1) If an individual is deemed under Canadian law to have disposed of 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 disposition, the individual may not make an election pursuant to new Article XIII(7) unless the deemed disposition of all such properties results in a net gain for Canadian tax purposes. If the deemed disposition of all such properties results in a net loss for Canadian tax purposes, 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. federal income tax purposes with respect to any of the properties nor recognize gain or loss for U.S. federal income tax purposes in the year of the deemed disposition in Canada with respect to any of the properties.

(2) If an individual is deemed under Canadian law to have disposed of multiple properties, any election under new Article XIII(7) must be made with respect to all such properties. The individual must prepare and file a Form 8833 listing each such property. In the case of property subject to the rules of section 4.04 (Retroactive elections for property not taxable by United States), if the individual has disposed of property with respect to which that individual is time barred from making the election because the statute of limitations under section 6511 of the Internal Revenue Code has closed, the individual may still make an election with respect to all of the individual's remaining property described in section 4.04, provided that appropriate adjustments are made to the adjusted basis of the remaining property as set forth under section 4.04(5). If an individual is time-barred from making an election with respect to property subject to the rules of section 4.03 (Retroactive elections for property taxable by the United States), the disposition of which would have resulted in a net loss at the time of emigration, and makes an election with respect to property subject to the rules of section 4.04 (Retroactive elections for property not taxable by the United States), the individual must make appropriate adjustments to the adjusted basis of the property that is subject to the rules of section 4.03.

.06 Irrevocability of election

An election made under this revenue procedure cannot be revoked except with the consent of the Commissioner.

SECTION 5. EFFECTIVE DATE

The effective date of this revenue procedure is March 29, 2010, the date of its publication in the Internal Revenue Bulletin.

SECTION 6. 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) and is reported on Form 8833 under control number 1545-1354.

SECTION 7. 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).