Viewpoint

在日米国商工会議所意見書

Eliminate Burdensome Individual Financial and Tax Reporting Requirements

Independent Business Committee
Legal Services Committee
Taxation Committee

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英語正文

在日米国商工会議所 / The American Chamber of Commerce in Japan

〒106-0041, 東京都港区麻布台 2-4-5, メソニック39MTビル10階
Masonic 39 MT Bldg. 10F, 2-4-5 Azabudai, Minato-ku, Tokyo 106-0041

Tel +81 3 3433 7358
Fax +81 3 3433 8454
external@accj.or.jp

http://www.accj.or.jp/viewpoints.html

ACCJ Viewpoint

RECOMMENDATIONS

To increase the competitiveness of American firms operating in Japan and to improve the positions of our members who are U.S. citizens or U.S. permanent residents by eliminating burdensome requirements and unfair costs, the American Chamber of Commerce in Japan (ACCJ) recommends:

1. That the United States review and adopt residence-based taxation (RBT), where taxation would be based on the residence (in this case Japan) rather than the citizenship (U.S.) of the taxpayer. Americans in Japan and elsewhere outside the United States would be taxed on the same basis as non-resident aliens, primarily through a system of taxes on passive U.S. sources of income (dividends, rents, pensions, etc.) and capital gains taxes on U.S. real estate; income earned in the United States would require filing a 1040NR. Americans abroad would remain subject to U.S. estate taxes on U.S. situs assets, including real estate and securities. A detailed RBT system would provide extensive and comprehensive anti-abuse measures together with a precise transition roadmap.
2. That the Foreign Account Tax Compliance Act (FATCA) of 2010 be amended to clarify the requirements and to eliminate the reporting requirements for categories of non-U.S. accounts that are routinely held by compliant, middle-income Americans in Japan and elsewhere to mitigate consequences unintended by the drafters of the legislation. At the very minimum, FATCA and the Report of Foreign Bank and Financial Accounts (FBAR) should exempt from reporting requirements retail banking, insurance and securities accounts that are held in the country where the taxpayer is resident.
3. That a comprehensive revision of FATCA and FBAR address real world examples of the unintended consequences of the Act and allow for such modifications as necessary to remove or greatly reduce the impact on American citizens and businesses in Japan, specifically, by including the reporting as a page of the annual tax return (if the Citizenship Based Test (CBT) remains).
4. Pending a more comprehensive revision, that the FBAR filing requirements and Form 8938, Statement of Specified Foreign Financial Assets, be clarified, dramatically simplified and made consistent with other criteria for reporting of accounts, in order to reduce the substantial risk of filing error resulting from confusion and misunderstanding by taxpayers believing in good faith that they have complied. Consolidating all required account reporting into a single page included with the tax return (with the same deadline for submission) would also reduce the burden.
5. That Congress and the U.S. Treasury reconsider the application of the Transition Tax and the Global Intangible Low-Taxed Income (“GILTI”) provisions introduced as part of the Tax Cut and Jobs Act of 2017 (the “Tax Act”) to U.S. individuals abroad and/or provide appropriate relief to such individuals to avoid financial hardships.

ISSUES

United States citizens and permanent residents living and working outside the United States are subject to the most cumbersome, costly and disproportionately punitive requirements relating to the reporting of income, the payment of tax and the reporting of financial accounts imposed by any industrialized country on its citizens working outside the home country.

Regrettably, the Tax Act, which addressed several issues that certain stakeholders believed had caused various inequities and distortions in the application of corporate income taxes in the past, did not address any of the issues raised in prior versions of this Viewpoint. The ACCJ appreciates the outreach by the Government Accountability Office and Congressional representatives on both sides of the aisle to understand (and, we hope, to address) our members’ concerns.

While we do not disagree with intent of the FATCA legislation, multiple aspects of FATCA are framed in a sufficiently broad and opaque fashion that a large number of American individuals and businesses operating in Japan will either be unable to comply or will find compliance to be overly costly and difficult to achieve.

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The current U.S. system of taxing its citizens based on citizenship rather than residence and of extensive reporting requirements relating to accounts which include those used for everyday purposes—and on which the account holder is already subject to significant host-country tax—imposes significant burdens on U.S. citizens and permanent residents living and working in Japan.

While we recognize the need to address tax evasion, the system provides little benefit to the U.S. Department of the Treasury because income earned by Americans in Japan is already taxed at a top marginal rate of over 50 percent by the Japanese tax authorities, and in most cases little or no U.S. income tax is payable. The preparation costs borne by the taxpayer in many cases exceeds the amount of U.S. tax to be paid. The cost, complexity and disproportionate sanctions imposed by the system on employees, employers and financial institutions create a disincentive by U.S. and other companies to hire American citizens.

It is critical in this age of rapid globalization to have American citizens able to gain frontline operational competencies in an increasingly sophisticated economy while serving U.S. interests day to day in markets around the world. The current tax requirements may indeed hinder U.S. competitiveness long-term as fewer and fewer Americans are able to gain the overseas frontline competencies necessary to effectively operate in a rapidly evolving world economy. U.S. competitiveness may well decline over time as key management and technical functions are outsourced and left to the will of others.

In 2015, the ACCJ surveyed its U.S. citizen and permanent resident members who live and work in Japan.

- 59 percent of respondents[1] earned less than $100 on their bank and securities accounts outside the United States.
- 72 percent paid more than $1,000 annually for U.S. tax return preparation, with 20 percent of respondents paying more than $5,000, and 66 percent of those pay all or part of the preparation cost themselves.
- Notwithstanding the double taxation treaty and Section 911, because of incomplete crediting, 49 percent reported paying more tax than they would have if they were subject only to the higher Japanese marginal tax rates (and not to both Japanese and U.S. reporting and taxation).
- 21 percent reported that the banks in the United States closed or refused to open accounts because the respondent lived outside the United States, and 38 percent reported that banks required them to use a U.S. address, which not all of our members have.
- 57 percent believed that U.S. employers view the tax and financial reporting requirements associated with U.S. citizenship and permanent residence as a negative in making employment decisions, and 60 percent and 64 percent, respectively, believe that Japanese and other non-U.S. employers do so.

As the compliance framework has, if anything, become less favorable to our US taxpayer members over the last year, we are certain that a survey conducted today would yield similar results.

BACKGROUND

Residence-Based Taxation

The United States currently adopts a citizenship-based taxation (CBT) approach. The United States is alone among industrialized countries in adopting this approach.

CBT is an ineffective mode of collecting tax revenue and imposes enormous costs and compliance burdens on Americans living and working in Japan and elsewhere abroad. CBT supplies little revenue to the Treasury (American Citizens Abroad estimates the amount at $3 to $6 billion annually) as most of the tax base is pre-empted by the taxation systems of the countries of residence. Under the current rules,

1 The percentage figures are calculated based upon the results of the ACCJ survey and are expressed as a percentage of respondents providing a specific response to the question, disregarding those who elected not to or did not respond to that question. Survey available at: http://www.accj.or.jp/uploads/4/9/3/4/49349571/accjsurvey.pdf

82 percent of overseas filers owe no U.S. tax[2] and, as the ACCJ survey linked below demonstrates, much of the tax paid is essentially double taxation. In a country with high marginal tax rates such as Japan, the typical middle-class American pays tax at a cumulative rate that is higher than the higher of the two rates, and over a period of years can accumulate an unusable tax "credit" (overpayment), of half or more of the taxpayer's gross income. For many U.S. taxpayers in Japan, tax preparation costs often exceed U.S. tax payable.

CBT is very complex and costly to administer for both the taxpayer and the Internal Revenue Services. CBT is unfair as Americans in Japan must file two tax returns and in many cases must engage two sets of professionals to prepare the returns. In return, the United States provides only limited services in areas such as education, infrastructure, healthcare and social security. Americans working in Japan already pay substantial Japanese national and local taxes to receive those services locally.

Seventy-five percent of survey respondents believe that they already pay more tax in the aggregate than they would on the same income in the U.S. Reform is essential because the tax revenue collected under the current CBT regime is insignificant in the U.S. budget while the negative consequences of CBT for U.S. businesses and for talented U.S. nationals working in Japan are significant.

The establishment of a residence-based taxation system for U.S. citizens and permanent residents, similar to that proposed in a December 14, 2014, report by the Republican staff of the Senate Finance Committee would result in a win-win solution which would:

- increase Treasury tax receipts, whether RBT is drafted as a voluntary program or the default tax system;[3]
- provide for fair, equitable and efficient taxation of Americans abroad, including in Japan;
- empower Americans in Japan and elsewhere outside the United States to sell U.S. goods and services overseas, boosting export performance, particularly by small and medium-sized companies;
- create better employment opportunities for Americans, both domestically and internationally;
- align U.S. law with that of virtually all other nations;
- free U.S. citizens and permanent residents in Japan from the enormous compliance and cost burden imposed by the combination of citizenship-based taxation, FATCA and FBAR reporting requirements

Issues and key provisions of FATCA

FATCA requires foreign financial institutions (FFI), including Japanese financial institutions, of broad scope—banks, stock brokers, hedge funds, pension funds, insurance companies, trusts—to report directly to the Internal Revenue Service (IRS) all clients' accounts owned by U.S. citizens.

From July 1, 2014, FATCA began requiring FFIs to provide annual reports to the IRS on the name and address of each U.S. client, as well as the largest account balance in the year and total debits and credits of any account owned by a U.S. person.

If an institution does not comply, the United States imposes a 30-percent withholding tax on all its transactions concerning U.S. securities including the proceeds of sale of securities.

In addition, FATCA requires any foreign company not listed on a stock exchange or any foreign partnership which has 10-percent U.S. ownership to report to the IRS the names and tax I.D. number (TIN) of any U.S. owner.

At the individual level, it also requires U.S. citizens and green card holders who are bona-fide residents living overseas who have foreign financial assets[4] more than $200,000 to complete a new Form 8938 to be filed with the 1040 tax return, starting with fiscal year 2011.

2 http://www.taxpayeradvocate.irs.gov/2012-Annual-Report/downloads/Most-Serious-Problems-International-Taxpayer-Issues.pdf
3 Estimated at $30 billion over ten years by American Citizens Abroad.
4 Which do not include real property assets.

Impact on competitiveness of U.S. firms and individuals operating in Japan resulting from FATCA

The FATCA threat of a 30-percent withholding tax and the potential exposure to transfer of personal data is incentivizing Japanese to divest their U.S. securities and investments. Some Japanese banks have already indicated their intention to do so and have advised their institutional and private clients accordingly.

In a 2012 public comment, the Japanese Bankers Association expressed serious concerns about the burdens to be imposed by FATCA compliance on the Japanese financial services industry. Concern was expressed that it would result in substantial confusion in the industry and could ultimately lead Japanese financial institutions to withdraw their investment from U.S. financial assets.

FATCA requires Japanese financial institutions to report to the IRS the names and assets of all clients who are U.S. persons. Consequently, Japanese financial institutions, banks, insurance companies and pension funds are already turning away American clients due to the costly IRS reporting requirements and the perceived significant legal and financial risks. There are multiple instances of Americans residing in Japan who have been unable to open securities accounts, had their bank accounts closed, been refused entry into a private pension fund, or been unable to enter into insurance contracts. It is practically impossible for Americans residing in Japan to survive and thrive or to have U.S. businesses operating in Japan develop naturally without access to Japanese banks, pension funds and insurance coverage. In many cases, American citizens in Japan have been unable to participate in company pension funds or conclude insurance contracts, and as a result are rendered unemployable by FATCA.

A solid majority of survey respondents, many of whom control hiring decisions in Japan, believe that employers view the tax and financial reporting obligations imposed on Americans as a negative in making employment decisions.

The 10-percent U.S. ownership rule

Section 1472, introduced into the Tax Code by FATCA, requires a withholding agent to withhold 30 percent on any payment made to a non-financial foreign entity unless the payee or the beneficial owner of the payment provides the withholding agent with either:

1) a certification that the foreign entity does not have a substantial U.S. owner (which is defined in FATCA as one holding 10% or more of the company) or,

2) the name and TIN of each substantial U.S. owner.

Additionally, the withholding agent must not know or have reason to know that the certification or information is incorrect, and the withholding agent must report the name, address, and TIN of each substantial U.S. owner.

Hence any privately held, non-listed foreign company which may have financial dealings with the United States must be prepared to declare through the withholding agent any U.S. ownership of 10 percent or more in the company. There are thousands of such companies throughout Japan.

Furthermore, American citizens are required to report on the new FATCA Form 8938, to be attached to the 1040, the names and addresses of all issuers of foreign shares or partnerships not held with a foreign financial institution as well as the value of the American citizens share of the capital. Hence, foreign (in this case, Japanese) companies and individuals will have their names appear in tax filings of U.S. citizens.

These reporting requirements are rapidly and effectively shutting American entrepreneurs out of business ventures in Japan.

Americans Living in Japan

FATCA requires any Americans who are bona-fide residents overseas on the last day of the year with more than $200,000 in foreign financial assets[5] (if filing as an individual) or $400,000 (if filing jointly), or more than $600,000 anytime during a year, to report the existence of these assets every year. With

5 Real property located outside the United States is not considered a foreign financial asset.

few exceptions, virtually all Japanese financial account assets, bank accounts, securities accounts, annuity contracts, rental properties, insurance contracts, pension plans, trusts and private investments in companies and partnerships are counted. This reporting requirement took effect for tax filing year 2011 (1040's to be filed by June 15, 2012) via Form 8938. This requirement is in addition to and for the most part duplicative to the FBAR reporting of foreign financial accounts already required by the Department of the Treasury.

Penalties for non-willful failure to report Form 8938 are high: 40 percent of any underpayment of taxes. The initial fine for not filing Form 8938 is $10,000, rapidly increasing to $60,000 for each fiscal year. Given the high degree of complexity and the breadth of this new reporting requirement as well as the uncertainties attached to Form 8938, there exists a substantial risk of filing error due to confusion and misunderstanding, particularly since the FBAR form uses different reporting criteria. This is in addition to the FBAR having its own separate set of penalties—if non-willful, up to $12,459 (subject to future adjustment for inflation); if willful, one or more of civil monetary penalties of up to the greater of $124,588 or 50 percent of account balances, being placed on criminal status and jail time.[6]

In terms of the complexity of the reporting requirement, the information required on Form 8938 includes the names of all financial institutions with which one has a foreign account, the account number, the maximum balance during the year (in U.S. dollars), the foreign currency rate at which foreign amounts were translated into U.S. dollars, the source of the foreign currency rate, whether the account was opened or closed during the tax year and a box to check if the account is jointly owned with spouse. Similar reporting is required for all other foreign assets. Part III of the form requires reporting of a summary of tax items attributable to specific foreign financial assets with reference to the form and line or schedule and line where the income or gain is reported. Compliance with this additional requirement is simply not realistic for a vast number of normally law-abiding American citizens unable to afford the expensive services of a professional tax advisor.

Finally, we note that the added level of complexity is making Americans an increased target for "phishers," as many Americans are not sure who may request the relevant forms or with whom forms should be filed. The IRS is aware of a number of such scams, which are referred to on the IRS's website. The scams may not be apparent to the unsuspecting recipient of an e-mail, who hastens to comply with the request to avoid incurring the draconian Form 8938 penalties.

FATCA in the Context of Existing Compliance Regulations

In addition, existing (and prior) requirements run concurrent with FATCA.

As an example of the complexity of these dual requirements, please refer to the existing IRS Form W-9. All US citizens with a bank, brokerage or insurance account held in the US are required to complete this form during the account opening process. Once completed, it is the financial institution's responsibility to report any taxable interest income, dividend income or sales of securities to the IRS on an annual basis.

With the additional requirement under FATCA, it is now the responsibility of an American citizen in Japan, as the account holder, to submit two annual reporting forms, if he or she has accounts in total value of above $10,000 and $200,000 respectively. The penalties for non-compliance on a per year basis are as high as a) the greater of $100,000 or 50 percent of account balances and b) $60,000, under the two requirements, respectively, for failure to report. Penalties are based not on whether any income was generated or any tax owed. They are based purely on not reporting the holding of existing assets.

In addition, for those who have ownership in privately held corporations a Form 5471 "Certain Foreign Corporations" form is also required annually. This form is comprehensive—asking for the Income Statements, Balance Sheets, Tax Accruals, Transfer of Monies between the owners and the company and a checklist of questions to uncover any ambiguous activities. The penalties are similarly harsh for non-compliance when compared with FATCA. It must be noted, however, that due to the nature of privately held corporations, it is effectively impossible for American citizens in Japan, as minority investors in such businesses, to obtain access to the information required to file Form 5471.

6 https://www.irs.gov/businesses/comparison-of-form-8938-and-fbar-requirements

By way of example, an entrepreneur living in Japan, owning a Kabushiki Kaisha valued at $1,000,000, having existing banking relationships and personal assets in Japan of $250,000 may have no U.S. tax exposure at all. Given the unintended complexity of compliance with FATCA, however, this entrepreneur can inadvertently and easily precipitate a threat of significant penalties. These penalties, with annual exposure, can greatly exceed the entire value of his or her personal holdings.

Transition Tax and GILTI Tax

The introduction of the Transition Tax and the GILTI provisions as part of the Tax Act primarily target U.S. multinational corporations. Unfortunately, and perhaps inadvertently, the provisions also apply to U.S. individuals operating a business through a foreign corporation, but without certain benefits that help U.S. corporations mitigate double taxation (e.g., an indirect foreign tax credit and certain deductions).

Both provisions tax the U.S. individual on earnings generated by the individually owned foreign subsidiary, with the Transition Tax being imposed on the past accumulated earnings through December 2017 and the GILTI being imposed annually on the current earnings starting in 2018, even if no distribution is made by the foreign corporation. These provisions can cause financial hardships for American small business owners abroad as they create phantom income (income that is not actually received by the individual purportedly receiving it), and likely many of these taxpayers will then be in a position with a significant tax liability but with limited personal funds on hand to pay such an obligation.

Therefore, ACCJ appeals to the U.S. to reconsider the application of these provisions to U.S. individuals abroad and/or provide appropriate relief to such individuals to avoid financial difficulties.

An option to alleviate these unintended consequences would be to link the GILTI/Transition Tax to Form 2555, which would allow any US citizen residing overseas meeting the Bona Fide Residence Test or the Physical Presence Test to qualify for certain exceptions. This approach would fall under an existing statute which is included under the 2555 guideline and a new statute would not be required.

CONCLUSION

The ACCJ believes that the negative implications of FATCA, FBAR, the Transition Tax and GILTI provisions and CBT unfairly penalize legitimate U.S. business interests and Americans living in Japan. Significantly increased compliance costs, lost business opportunities, and a disadvantageous competitive posture vis-a-vis our global counterparts are unintended but real consequences of the Act. Our survey indicates that the FATCA, FBAR and CBT reporting requirements and associated costs impose significant burdens on ACCJ members and impose an even more disproportionate burden on start-ups and SMEs.

For these reasons, the ACCJ encourages the U.S. Government to undertake a comprehensive reform of FATCA, FBAR (in particular, Form 8938), the Transition Tax and GILTI provisions and CBT with specific focus on those aspects that impact a large segment of American citizens and businesses operating in Japan.

We recommend that Americans with financial accounts outside the United States and their current host country be required to file only one form, attached to the tax return, which addresses all of the requirements of the IRS, FATCA, and so forth, for which same country bank and securities account information would no longer be required. The IRS would then distribute the information from that form to the other agencies that require it. This would simplify the administrative process for taxpayers, and at the same time reduce the likelihood of phishing attacks.