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'76 Act provisions affecting nonresident aliens

In addition to some of the better known changes made by the Tax Reform Act of 1976 (the '76 Act)[1] in the international area,[2] there were also changes substantially affecting the U.S. tax treatment of certain foreign taxpayers who are married.[3] This article will discuss those changes.

The new election to file joint returns

During recent years, as in the past,[4] strong emotions have been developing in some quarters over the equity of the distinctions drawn by the tax law between married and single persons. For many years, married individuals have enjoyed the privilege of filing joint returns, thereby obtaining the benefit of income splitting which generally results in a lower effective tax rate than that for single persons. This relative benefit was reduced when the degree of progression in the rates applicable to single persons was reduced. However, married persons were not permitted to obtain the benefit of new lower effective rates by filing separately.[5] Having granted to married persons the privilege of filing joint returns, Congress apparently felt strongly that a married taxpayer should not be encouraged to forgo this privilege.[6] In 1969, fuel was added to the fire with the enactment of Sec. 1348 providing for the maximum tax on "earned income."[7] This important benefit was not allowed to married persons who do not file joint returns.[8]

Although the storm continues to grow over whether single persons are unfairly treated as compared to married persons who have the right to file joint returns, it appears more appropriate to first pity those married persons who are prohibited from filing joint returns. Not only are they generally precluded from obtaining the benefits of income splitting, but they are also precluded from using the lower rate tables applicable to single persons and from obtaining the benefits of the maximum tax. Included in that class are nonresident aliens, and even—before the '76 Act—citizens or residents married to nonresident aliens.

Prior law. Prior to the Act, it had long been the rule that a joint return could not be filed if either

[1] P.L. 94-455 (10/4/76).

[2] E.g., Secs. 367, 1491, 1057, 679, 904, 907 (all statutory references herein are to the 1954 Code, as amended). Certain of these changes have been discussed elsewhere. See, e.g., Alpert and Feingold, "Tax Reform Act Toughens Foreign Transfer Provisions of 1491 and Liberalizes 367," 46 *J. Taxation* 1 (1977).

[3] Secs. 6013(g) and (h) and 879.

[4] See Surrey and Warren, *Federal Income Taxation: Cases and Materials*, 1048-49 (Foundation Press, 1962).

[5] Sec. 1(d).

[6] Other benefits provided in the Code likewise are made unavailable to married persons filing separately. Secs. 44(b)(3), 48(c)(2)(B), 50A(a)(4), 51(a)(2)(B), 141(b), 141(c)(3), 161(b), 163(d)(1)(A), 165(c)(3), 217(b)(3)(B), and 1211(b)(2); see also Sec. 121(d)(1)(B).

[7] The term "earned income" has now been changed to "personal service income" in conjunction with certain changes in Sec. 1348 made by the Act.

[8] Sec. 1348(c).

spouse was a nonresident alien at any time during the taxable year.[9] That apparently was grounded on the policy that the benefit of income splitting (i.e., a lower effective tax rate) should not be extended to a couple when one or both of the spouses was not subject to progressive rates of taxation on worldwide income. Moreover, notwithstanding regimes of taxation generally are not applied on an annual basis,[10] the same is not true regarding the right to file joint returns. Thus, a joint return was precluded if either spouse was a nonresident alien at any time during the year.[11]

Whatever may be the justification in the domestic area for penalizing a married couple who does not file a joint return, such justification could not extend to cases where one of the spouses is a nonresident alien. It hardly seems appropriate to impose a penalty in such case simply because the taxpayer does not do what he is precluded from doing. Consider the case of two nonresident aliens who participate together in performing services in the United States. If one of them is married and the other is not, the tax liability will vary greatly even though their circumstances are identical in all other respects. Thus, if the taxable income of each of the nonresident aliens is $200,000, the tax liability of the single taxpayer (taking into account the effect of the maximum tax) would be $94,290, and the tax liability of the married taxpayer would be $125,490. Moreover, this is not limited to taxpayers earning such substantial amounts. A visiting professor from overseas with taxable income of $25,000 from teaching in the United States (not otherwise exempt under a treaty) would have a tax bill of $7,190 if he were single, and $8,530 if he were married.

It is difficult to believe that the results described above were intended. More likely, the draftsmen of these provisions never considered the effect on nonresident aliens. In light of the above, one might have hoped that the Treasury would have at least interpreted Secs. 1 and 1348 to limit the penalty on married nonresident aliens filing separately to those cases in which joint returns are permitted. In fact, for a while it seemed that the Treasury had done exactly that: the instructions to Form 1040NR for 1971 advised all nonresident aliens to use the table applicable to single persons. Unfortunately, however, those instructions were suddenly withdrawn[12] and the regulations were modified to specifically provide that nonresident aliens who are married must pay their tax in accordance with the highest rate table.[13] It is also understood that the IRS has been taking the position on audit that a married nonresident alien is not entitled to the benefits of Sec. 1348.

The above-described problems perhaps might have been cured simply by adding to the Code a provision to the effect that if either spouse is a nonresident alien at any time during the taxable year, both spouses would be treated as single for purposes of Secs. 1 and 1348 (and perhaps other sections).[14] However, while the Senate and House Committee Reports indicate an awareness of the entire problem, Congress chose to deal with the problem in a much more limited and seemingly more complicated manner.

Resident treatment. For taxable years ending on or after Dec. 31, 1975, a U.S. citizen and his or her nonresident alien spouse can jointly elect to have the nonresident alien spouse treated as a U.S. resident and to be taxed on their worldwide income.[15] That has the effect of qualifying the married couple for filing a joint return, and indeed, the provision is included in Sec. 6013 which authorizes the filing of joint returns.[16] However, the statute does not literally require that joint returns actually be filed for the election to be effective; and it is conceivable that, under certain circumstances, it may be beneficial for the election to be made for other reasons.[17]

Two elections. The new provisions actually provide for two different elections.[18] The first covers the situation where, at the time the election is made, a U.S. citizen or resident is married[19] to a nonresident alien.[20] Once made, the election remains in effect for all subsequent years until ter-

[9] Sec. 6013(a)(1).

[10] When there has been a change of status during a taxable year, the periods before and after the change are governed by the particular rules applicable to the status during those periods. Regs. Sec. 1.871-13; cf. Regs. Sec. 1.871-8(c)(1). See, e.g., J. E. More, 66 TC 27 (1976); W. N. Dillin, 56 TC 228 (1971).

[11] Sec. 6013(a)(1).

[12] See TIR-1163 (8/14/72).

[13] Regs. Sec. 1.1(a)(2)(ii).

[14] Perhaps this might even be appropriate for all married taxpayers who are precluded from filing joint returns. Cf. Sec. 6012(a)(1)(A)(iii).

[15] Section 1012(d) of the '76 Act.

[16] Sec. 6013(g) and (h) literally provide an election to be treated as a U.S. resident "for purposes of Chapter 1." Questions may arise, therefore, as to when classification as a "resident" will also apply for purposes of the other chapters of the Code. Since Sec. 6013 itself is not part of Chapter 1, it is obvious that at least some of those sections were intended to be covered. In addition, it would seem an odd result indeed if the withholding provisions of Sec. 1441 were to apply.

[17] For example, to qualify for taxation on a "net" basis when the nonresident alien spouse has relatively small *net* income, but receives substantial amounts of U.S. source dividends and interest that would otherwise be taxable at 30% of the gross amounts received.

[18] In either case, the election must be made by both spouses. Sec. 6013(g)(2) and (h)(1)(C).

[19] Marital status is determined under Sec. 143(a); see Sec. 879(c)(3).

[20] Sec. 6013(g)(2).

minated by a revocation by either spouse,[21] by the death of either spouse,[22] by the legal separation of the couple under a decree of divorce or separate maintenance,[23] or by a determination by the IRS that either spouse has failed to keep sufficient books and records, grant access to such books and records, or supply such other information necessary to determine the tax liability of either spouse.[24] If the election is terminated, neither spouse is permitted to make another election for a subsequent year.[25] If neither spouse is a U.S. citizen or resident at any time during the year, the election is not terminated, but merely becomes inapplicable for that year.[26] Thus, the election is automatically reinstated for any subsequent taxable year in which either spouse once again becomes a citizen or resident.

The second election applies when a nonresident alien has become a U.S. resident during the year. If that person is married to a U.S. citizen or resident at the end of the taxable year in which the change of status has occurred, the couple can elect to treat that person as a U.S. resident for the entire year.[27] The election is effective only for the year of the change of status, and taxpayers who make the election cannot make a similar election a second time.[28]

Scope of relief. The narrow scope of the relief provided by the new provision is immediately apparent. First, it is limited to those situations in which one of the spouses is a citizen or resident. The many nonresident alien taxpayers who, not unnaturally, are married to other nonresident alien taxpayers are still left wondering why their U.S. tax bill is so much higher merely because they are married. Certainly the emotional reaction to be expected will not be such as to promote respect on their part for the integrity of the U.S. tax system.

The extent to which Congress intended to achieve only this result is not at all clear. As passed by the Senate, the '76 Act would have amended the maximum tax provision by making the joint return requirement of Sec. 1348(c) inapplicable to a person married to a nonresident alien.[29] One can only speculate about why the Senate amendment was so limited. Thus, a United Kingdom national receiving earned income from the U.S. would still have been penalized if he happened to be married to a U.S. citizen. Possibly the Senate felt that such a person should not be permitted to benefit from his refusal to exercise the privilege of electing to be treated as a U.S. resident and paying U.S. tax on his income earned in the U.K. (even though the U.S. tax on his U.K. income would not be creditable in the U.K.). In any case, the provision was deleted in the final Act, the Conference Report merely indicating that the deletion was a "technical modification."[30]

Possible consequences. In addition to subjecting a nonresident alien spouse to taxation on worldwide income, electing to have that spouse treated as a resident has other more subtle consequences which may even affect third parties. For example, it could cause a change in the application of certain attribution rules,[31] with the result that a corporation might be classified as a controlled foreign corporation subject to Subpart F.[32] Similarly, a foreign corporation's status under the personal holding company provisions might be changed by reason of Sec. 542(c)(7) becoming inapplicable.[33] Indeed, making the election without careful planning could prove to be a high price to pay to avoid the penalties otherwise imposed. On the other hand, one may ask (perhaps with tongue in cheek, and then again perhaps not) whether the IRS would attempt to apply Sec. 269 if, in anticipation of an election, a nonresident alien spouse's foreign financial affairs were rearranged to accommodate to the new status.

Treaty questions. Perhaps some of the most interesting unanswered questions are those arising under the various tax treaties to which the U.S. is a party, particularly the newer ones which have adopted the "Fiscal Domicile" article of the Organization for Economic Cooperation and Development (OECD) Convention.[34] A "resident" of one of the contracting states is defined as a person who is resident in that state for purposes of that

[21] Sec. 6013(g)(4)(A). The termination is effective for the first taxable year for which the return is not yet due.

[22] Sec. 6013(g)(4)(B). The termination is effective beginning with the first taxable year for which the surviving spouse is not permitted to use the joint return tax tables.

[23] Sec. 6013(g)(4)(C). The termination is effective retroactively beginning with the year in which the separation or divorce occurs.

[24] Sec. 6013(g)(4)(D) and (g)(5). Termination by the IRS may be retroactive; it is effective for any year for which the IRS makes such a determination.

[25] Sec. 6013(g)(6).

[26] Sec. 6013(g)(3).

[27] Sec. 6013(h)(1).

[28] Sec. 6013(h)(2).

[29] Section 302(a), Tax Reform Act of 1976 as passed by the Senate (August 6, 1976).

[30] Conf. Rep. on H.R. 10612, H. Rep. No. 94-1515, 94th Cong., 2nd Sess. 428 (1976).

[31] Sec. 958(b)(4).

[32] It may also affect the classification of a foreign corporation as a "foreign personal holding company." Sec. 552(a)(2).

[33] See also Sec. 545(a).

[34] See the revised text of Article 4 of the 1963 Draft Double Taxation Convention on Income and Capital, Report of the OECD Fiscal Committee; Article 4 of the United States Model Tax Convention, CCH Tax Treaties ¶9767, Treasury Department News Release, WS-861, May 18, 1976; see also, e.g., Article 4, Convention Between the U.S. and the Kingdom of Belgium for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income (the "United States-Belgium treaty").

state's tax.[35] When, by reason of that definition, an individual is a resident of both contracting states, he is deemed for purposes of the treaty to be resident in one or the other of the states, depending on the application of specific rules.[36] For example, suppose that a U.S. person and his alien spouse (the latter being resident in Belgium for purpose of the Belgium tax) make an election under Sec. 6013(g) and file a joint return in which they obtain benefits not otherwise allowed. If that electing alien has a permanent home in Belgium (and does not have one in the U.S.), she would still be treated as a resident of Belgium for purposes of the United States-Belgium treaty[37] and, therefore, would appear to be entitled to the exemptions from, or reduced rates of, U.S. tax provided for by the treaty. Would the alien be estopped from claiming those treaty benefits? There does not appear to be any direct authority on this point.[38]

Suppose the alien in the above example received income from a third country with which the U.S. has a treaty, e.g., France. Since the election has the effect of treating the alien as a resident of the U.S. for purposes of Chapter 1 of the Code, the alien would appear to be a "resident of the United States" within the meaning of the United States-France treaty.[39] As such, the electing nonresident alien literally would appear to be entitled to the benefits of the treaty, although it is questionable whether the French would agree that this was intended.

Nondiscrimination problems. For nonresident aliens who do not qualify to make the election (and possibly also for those who qualify but choose not to do so), a more basic treaty question remains. Under the typical "nondiscrimination" article of our treaties, the income attributable to a permanent establishment in the U.S. maintained by a resident of the other contracting state cannot more burdensomely be taxed by the U.S. than would be the income of residents carrying on the same activities.[40] It would appear that the same rule also applies, at least under the more recent U.S. treaties, to income attributable to a "fixed base" maintained in the U.S. Thus, if a resident of a treaty country were carrying on personal service activities in the U.S. through a fixed base, presumably the U.S. would be prohibited from imposing more burdensome taxation on him than would be imposed if he were a resident.

Just what would be considered more burdensome taxation is not entirely clear. It is arguable that the failure to permit filing of a joint return, in itself, would not come within the scope of the nondiscrimination provisions.[41] However, if benefits accorded to resident married couples are not extended to nonresident aliens, then it would appear that the nondiscrimination clause would require that they be treated no worse than single residents.[42]

Under the '76 Act, certain nonresidents are granted the right to file joint returns, thereby enabling them to take advantage of the maximum tax. However, to do so, they have to pay a price: subject themselves to taxation on a worldwide basis in the same manner as any other resident.[43] Does this eliminate the nondiscrimination argument? Again the answer is not clear, but it is at least arguable that the proscribed discrimination would continue to exist.[44] Assuming, however, that the availability of the election solves the nondis-

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[35] OECD Model Article 4(1).

[36] OECD Model Article 4(2).

[37] Article 4(2)(a) of the United States-Belgium treaty.

[38] Similarly, the inverse of this is not entirely clear. The "preservation of benefits" clause (e.g., Article 28(2) of the Belgium treaty) apparently would preclude the denial to the alien of the right to make the election under Sec. 6013. However, the election to be effective must be made by both spouses, and while it may violate the spirit of the "preservation of benefits" clause, such clause literally would not protect the U.S. spouse.

[39] Article 3(2)(b), Convention Between the United States and the French Republic with Respect to Taxes on Income and Property (the "United States-France treaty").

[40] See, e.g., OECD Model Draft Article 24(3). The OECD model draft also contains another provision that would be relevant. Thus, nationals of a contracting state, *whether or not resident in one of the contracting states,* are entitled to treatment no more burdensome than the treatment accorded to nationals of the other contracting state in the same circumstances. OECD Model Article 24(1). U.S. treaties, however, generally do not follow this provision but instead limit protection to a national of one contracting state who is resident in the other contracting state. See, e.g., Article 7, Convention Between the United States and Japan for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income (the "United States-Japan treaty").

[41] Cf. OECD Model Article 24(3), second paragraph and OECD Commentary thereon.

[42] It has been ruled that the mere denial to nonresident aliens of the use of the optional tax tables does not violate the nondiscrimination clause. Rev. Rul. 74-239, 1974-1 CB 272. However, that would seem to merely reflect the right of a contracting state to deny to nonresidents family and personal allowances; it does not mean that a higher rate of tax can be imposed.

[43] Note that by being treated as a resident, as opposed to being treated as a citizen, the electing nonresident alien would not be entitled to the benefits of Sec. 911, unless he were a citizen of a treaty country. It has been ruled that denial of the benefits of Sec. 911 to alien residents violates the nondiscrimination clause. Rev. Rul. 72-330, 1972-2 CB 444, amplified in Rev. Rul. 72-598, 1972-2 CB 451.

[44] While taking into account worldwide income for purposes of determining the rate of tax would appear to be permissible (see paragraph 35 of the OECD Commentary on Article 24), the actual taxation of the non-U.S. income would seem to be a different matter.

crimination problem, the effect of the '76 Act is interesting. For example, take the case of a Belgium resident married to a U.S. citizen. Prior to the '76 Act, he had no right to file a joint return. If he were a U.S. resident, however, he would have had that right. Thus, even under the foregoing assumption, there would have been a violation of the nondiscrimination clause. However, that is no longer true after the '76 Act, since he now has available the election to file a joint return.

On the other hand, suppose that the Belgium resident were married to a nonresident alien. Prior to the '76 Act, an argument might have been made that there was no discrimination; the same result would have obtained if the taxpayer were a U.S. resident married to a nonresident alien. That assumes that in testing whether there is discrimination, we need only look to the status of the taxpayer and may assume that *all* other facts remain the same. It seems arguable that this is not an appropriate analogy; rather, the comparison should be made between a nonresident couple and a resident couple. In any case, the '76 Act seems to make this question moot, since a nonresident alien married to a resident can obtain the benefit of the maximum tax (by making the election under Sec. 6013) while a nonresident alien married to another nonresident alien still is precluded from using the maximum tax.

Community property under new Sec. 879

Under community property laws, a nonearning, nonpropertied spouse has a legal stake in marital accretions to wealth on the basis that each spouse is part of and contributes to the marital community. Thus, under such laws and with certain exceptions, income earned during marriage belongs to the marital community.[45] Moreover, if under the applicable community property laws, the interest of the nonearning spouse in the income generated by the other spouse is a "vested" one, rather than a mere "expectancy," it has long been the rule that each spouse is to be treated for tax purposes as the owner of one-half of that income.[46] Thus, prior to the income splitting permitted on joint returns, spouses domiciled in a community property jurisdiction could avail themselves of income splitting even though spouses who were resident in other jurisdictions could not.[47]

Because of that dichotomy of treatment, a number of states investigated the enactment of community property laws, others actually enacted laws that enabled their residents to obtain the tax benefits of income splitting,[48] and still others promulgated laws to negate the possibility of income splitting among family members.[49] Concurrently, a number of proposals were introduced at the national level to override the effect of the community property laws of the various states.[50] The congressional proposals were never enacted, presumably because the Supreme Court struck down, as violative of due process, an analogous Wisconsin statute.[51]

While the domestic uproar caused by the effect of community property laws on the splitting of income subsided upon the enactment of the split-income concept of joint returns, always lurking in the background was the effect of community property laws in the international area. Following the rules of the early Supreme Court decisions, a U.S. citizen breadwinner married to a nonresident alien and domiciled in a community property jurisdiction was generally required to report as his income only one-half of his earnings, his spouse being treated as the taxpayer with regard to the other half.[52] If the breadwinner derived his income from the U.S., his spouse would generally be subject to U.S. tax at the regular rates on the portion of such earnings in which she had a vested interest.[53] If, however, the breadwinner realized U.S.-source compensation in a year in which neither spouse was engaged in trade or business within the U.S., although the nonresident alien spouse was still subject to U.S. tax on her share of the community income, her tax rate would be a flat 30% without regard to any deductions.[54]

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[45] Local law determines which property is community property and which remains the separate property of each spouse. *W. N. Dillin*, note 10, acq.; cf. H. J. Bosch, 387 US 456 (1967) (19 AFTR2d 1891, 67-2 USTC ¶12,472).

[46] H. G. Seaborn, 282 US 101 (1930) (9 AFTR 576, 2 USTC ¶611); I. B. Koch, 282 US 118 (1930) (9 AFTR 580, 2 USTC ¶612); W. Pfaff, 282 US 127 (1930) (9 AFTR 582, 2 USTC ¶614); see also, e.g., K. J. Parsons, 43 TC 331 (1964); Rev. Rul. 68-81, 1968-2 CB 40.

[47] Id.

[48] See note 4.

[49] For example, the Wisconsin statute required that in computing the taxes payable by persons residing together as a family, the income of the wife and each child under 18 was to be added to that of the husband or father. The taxes levied were payable by the husband or father but could be enforced against other family members whose income was included in the computation. §71.05(2)(d), 1929 Stats. Wisc.

[50] Hearings on Revenue Revision, 1934, Committee on Ways and Means, 73rd Cong., 2nd Sess. 112-132, 538-549 (1934) (hereinafter "1934 Hearings"); H. Rep. No. 1040, 77th Cong., 1st Sess. (1941), accompanying proposed Revenue Act of 1941, reprinted in part in Surrey & Warren, note 4, at 1051-1054.

[51] A. A. Hoeper, 284 US 206 (1931) (10 AFTR 468); Hearings on Community Property and Family Partnerships, Part 2, Committee on Ways and Means, 80th Cong., 1st Sess., Statement of J. Paul Jackson 759-760 (1948); but see 1934 Hearings, note 50, at 113.

[52] Rev. Rul. 68-81, 1968-1 CB 40.

[53] E. Rosenkranz, 65 TC 993 (1976); A. Zaffaroni, 65 TC 982 (1976) (both cases were decided under the law in effect prior to the Foreign Investors Tax Act of 1966).

[54] Secs. 871(a)(1)(A), 864(c)(1)(B); cf. *W. N. Dillin*, note 10.

In contrast are situations such as those in the *Parsons* case[55] in which a U.S. citizen domiciled in a community property country was married to a nonresident alien breadwinner. In *Parsons*, the U.S. wife was subjected to U.S. tax on her portion of the income her nonresident alien spouse earned abroad. It made no difference that under the applicable local law she might not be able to require her husband to give her sufficient funds to satisfy her tax liability.

Sec. 981 remedy. Sec. 981 was enacted to deal with the hardship posed by the result in *Parsons*.[56] It provided that a U.S. citizen who was a resident of a foreign country and who was married to a nonresident alien could elect in effect to ignore certain foreign community property rules. While Sec. 981 permitted a taxpayer like the one in *Parsons* to elect to have her husband's earned income treated as his alone, irrespective of the community property law of the foreign jurisdiction,[57] it was singularly unattractive to the U.S. citizen earner. Moreover, Sec. 981 did not cure all the ills arising from the interaction of foreign community property law and U.S. tax law. For example, a U.S. citizen who was not a resident of a particular foreign country was not eligible for the election and so would continue to be subject to tax on the portion of his or her spouse's earnings deemed to be his or hers under community property laws. Moreover, only foreign community property laws were subject to the election.

New rules. The '76 Act repealed Sec. 981,[58] replacing it with new Sec. 879. The new provision is applicable to any citizen or resident of the U.S. married to a nonresident alien, rather than only to a citizen who is a resident of a foreign country, as was the case with Sec. 981.[59] Furthermore, the new provision is applicable even if the spouse is not a nonresident alien for the entire taxable year.[60] Moreover, the new rules apply to all community income; Sec. 981 applied only to community income under foreign community property laws.[61]

In general, the effect of Sec. 879 is to make the provisions of old Sec. 981 nonelective and to apply them to a larger number of taxpayers.[62] Under Sec. 879, a U.S. citizen or resident who is married to a nonresident alien, and who has income that under applicable community property laws is community income, is treated in the following manner:

- Earned income,[63] other than trade or business income and a partner's distributive share of partnership income, is treated as the income of the spouse who rendered the personal services.[64]
- Trade or business income and a partner's distributive share of partnership income is treated as provided in Sec. 1402(a)(5), namely:

—community income derived from a trade or business (other than a trade or business carried on by a partnership) and deductions attributable to the trade or business are treated[65] as the gross income and the deductions of the husband, unless the wife exercises substantially all of the management and control of the trade or business, in which case all of the gross income and deductions are treated as the gross income and deductions of the wife; and

—the portion of a partner's distributive share of partnership income that is community income is included in determining the net earnings from self employment of that partner; and no part of that income is taken into account in computing the net earnings of the spouse of the partner.

- Community income not described above that is derived from the separate property of one spouse is treated as the income of that spouse.[66]
- All other community income is treated in the manner provided for by the applicable community property law.[67]

Possible problems. Since the new provisions *require* the disregard of property rights created under the applicable community property laws,

[55] *K. J. Parsons*, note 46.

[56] S. Rep. No. 1707, 89th Cong., 2nd Sess. 42, 1966-2 CB 1088 (1966); H. Rep. No. 1450, 89th Cong., 2nd Sess. 35, 1966-2 CB 991 (1966).

[57] Sec. 981(b)(1).

[58] Effective for taxable years beginning after Dec. 31, 1976. Section 1012(d) of the '76 Act.

[59] Sec. 879(a).

[60] Compare Sec. 981(a)(1). While Sec. 981 either applied or did not apply for a taxable year, literally Sec. 879(a) could apply to a period during a taxable year in which one spouse was a citizen or resident of the U.S. and the other spouse was a nonresident alien. Thus, it would not apply to a period during a taxable year when both spouses were citizens or residents of the U.S. or nonresident aliens as to the U.S.

[61] Compare Sec. 879(c)(2) with Sec. 981(b).

[62] It is not clear what Congress may have intended by including the express exception contained in Sec. 879(b). Sec. 879(b) provides that Sec. 879 does not apply if an election under Sec. 6013(g) or (h) is in effect. However, the inclusion of Sec. 879(b) appears unnecessary; with respect to any year for which an election under Sec. 6013(g) or (h) is in effect, Sec. 879 is inapplicable by its terms. Perhaps Congress felt Sec. 879 would ordinarily be applicable to a year or part thereof for which an election under Sec. 6013 could be made. S. Rep. No. 94-938, 94th Cong., 2nd Sess. 214 (1976). However, it appears that there may be circumstances where Sec. 879 would be applicable to a part of the year even though an election under Sec. 6013(g) or (h) would not be available.

[63] As defined in Sec. 911(b).

[64] Sec. 879(a)(1).

[65] Sec. 879(a)(2).

[66] Sec. 879(a)(3). The extent to which property is to be treated as the separate property of a spouse is to be determined under the applicable community property law.

[67] Sec. 879(a)(4).

they possibly may raise a constitutional issue.[68] On the other hand, the new provisions seem to find support in the well-established principle that income may be taxed to the person who earned it.[69]

Apart from the constitutional issue, a number of problems may arise in the application of a provision of U.S. tax law, such as Sec. 879, that by its terms mandates rules that may differ from the treatment accorded a nonresident alien spouse under the tax laws of a foreign jurisdiction. For example, assume that a U.S. citizen and his nonresident alien wife are domiciled in a foreign community property country and that the foreign country imposes a tax at a rate comparable to that of the U.S. Assume further that the U.S. citizen spouse earns compensation abroad and that his nonresident alien spouse has no earnings for the period. Under Sec. 879(a)(1), the U.S. citizen spouse will be subject to U.S. tax on all of the income. Unlike the Wisconsin statute struck down in *Hoeper*, it appears that the nonresident alien spouse will neither be primarily nor secondarily liable for U.S. tax on the part of the income in which she has a vested interest.[70] If we assume that the foreign jurisdiction attributes half of the community income to each spouse and imposes its tax on each spouse on the amount of income that each is entitled to under the community property law, it would appear that half of the income would suffer a double tax.

Reasonable treatment requires that if all the income is attributable to one spouse for U.S. tax purposes, that spouse should be treated as the technical taxpayer of his wife's share of foreign taxes paid. Unfortunately, the law appears to be to the contrary.[71] Accordingly, unless Congress adjusts the foreign tax credit provisions, U.S. citizens married to nonresident aliens in the situation posited appear to bear yet another burden.[72]

By its terms, Sec. 879 does not apply if both spouses are residents of the U.S. That raises an issue of the possible application of the nondiscrimination clause of tax treaties to a nonresident alien who is a resident of a treaty country and is the spouse of a U.S. citizen-earner. That issue has been dealt with earlier in this article.

Our discussion has raised several problems that come to mind concerning the application of Sec. 879. There likely will be others that will come into clearer focus only upon the application of Sec. 879 to particular situations. While these problems or others of equal or greater concern may very well have arisen under the law before the enactment of Sec. 879 because of the treatment accorded under foreign law, the enactment of the mandatory provisions of Sec. 879 highlights the existing problems under U.S. law.

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[68] *A. A. Hoeper*, note 51. The Treasury argued before the Ways and Means Committee during the 1934 Hearings concerning proposed legislation somewhat similar in effect to, although perhaps broader in scope than, Sec. 879 that *Hoeper* was not controlling in the case of a federal revenue statute, because the federal government is not under the same constitutional restrictions as the states. 1934 Hearings, note 50, at 113. However, at least two Supreme Court cases have recognized the applicability of the *Hoeper* case to federal legislation in the area of taxation. City Bank Farmers Trust Co., 296 US 85 (1935) (16 AFTR 981, 36-1 USTC ¶9001); J. H. Donnan, 285 US 312 (1932) (10 AFTR 1609, 3 USTC ¶913); cf. W. B. Weiner, 326 US 340 (1945) (34 AFTR 276, 45-2 USTC ¶10,239). Of course, no constitutional objection could be made to an elective provision such as Sec. 981. It is the nonelective aspect of Sec. 879 that appears to raise the constitutional concern. *J. H. Donnan*, above.

[69] In certain cases under Sec. 879, income may be taxed to the nonearner. See Sec. 879(a)(2). Those cases may present more of a constitutional concern. *J. H. Donnan*, note 68.

[70] See the discussion in *H. G. Seaborn*, note 46. Perhaps an initial question is to what extent can the U.S. citizen spouse legally use community property to satisfy what is his personal U.S. tax obligation. The corollary issue is to what extent can the nonresident alien spouse seek the return of community property so used to discharge the personal U.S. tax obligation of her spouse without her consent.

[71] F. B. Rexach, 200 F Supp 494 (DC P.R. 1961) (9 AFTR2d 345, 62-1 USTC ¶9199). It is not clear how or to what extent the foreign jurisdiction would permit a credit for U.S. taxes paid if the income were earned in the U.S. or provide an exemption from its tax for U.S.-source income subjected to U.S. tax, but the possibility of double taxation should not be overlooked in that situation either.

[72] Suppose in the case given above the U.S. citizen spouse-earner was married to a nonresident alien and was domiciled in a community property state, but worked in the U.S. during year 1 for which he was entitled to a payment of say $200,000 in year 2, all of which income constituted community income. Assume further that neither spouse was engaged in trade or business within the U.S. during year 2. Under the law in effect prior to the Act, the nonresident alien spouse would have been subject to a U.S. tax of 30% on the part of the community income with which she was vested. Sec. 871(a)(1)(A). By requiring that the entirety of the income be taxable to the U.S. citizen husband, the effect of Sec. 879 changes the rate of U.S. tax on the nonresident alien spouse's share of community income from 30% to the effective U.S. tax rate applied to taxable income.