

# TAX TALKS

Australia's Tax News Podcast - The Podcast for Australian Tax Professionals

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## 13 | US Nonresident Alien Spouse

Aliens do exist. There are around 7 billion aliens living all over the world. In fact you are probably one of them. And not just any alien, but a nonresident alien, maybe even a nonresident alien spouse. "But I am Australian and live in Australia," you might object. "I have never been out of space, let alone overseas. How can I be an alien?"

This is how. You are not a US citizen. That makes you an alien per US tax legislation. You live in Australia and don't have a Green Card. That makes you a nonresident alien. And maybe you got a spouse who is a US citizen or resident alien. That makes you a nonresident alien spouse. Will you one day get a US tax assessment? Covering your worldwide income since the day you met? When do you fall into the claws of the US tax system? And when are you safe?

### Nonresident Alien Spouse

Let's start with some definitions. Definitions are boring. But you need to understand the US tax lingo to understand how the US tax system might affect you or your client.

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### Alien

You are an alien unless you are a US citizen. Full stop. So by definition, at least in the eyes of the US, over 7 billion aliens inhabit this globe. Living in Australia without a US passport you are probably one of them. But you are never just an alien though. There is always more to it.

### Resident Alien

You are a resident alien if you pass either the green card test or the substantial presence test. The green card test looks at whether you got a so called Green Card, a lawful permanent visa to live in the US. You pass the substantial presence test if you are in the States for at least 31 days in the current calendar year and at least 183 days over the current calendar year and the preceding two years. As a resident alien you are treated like a US citizen for tax purposes. You have to file a US tax return and are taxed on your worldwide income.

### Nonresident Alien

So what happens if you pass neither the green card test nor the substantial presence test? You are a nonresident alien. And as such you only fall under the US tax jurisdiction if you derive income in the States that hasn't been subject to enough withholding tax. But let's put that aside. Let's assume you derive no income in the States. So in that case you are clear of the US tax system.

So now you got a US boyfriend or girlfriend or a US de facto spouse. Does this change things? Nope. The US tax system doesn't really do the girlfriend/boyfriend or de facto thing. Completely irrelevant to them. So you continue being a nonresident alien.

### **Nonresident Alien Spouse**

And then one day you marry the love of your life who happens to be a US citizen or resident alien. Does this change things? Yep, it does – in a way. You are still a nonresident alien, but you are now a nonresident alien spouse. Welcome to the US tax system.

Does it matter whether it is a same sex marriage? No, it doesn't. If you legally married and your marriage is recognised in the US state or foreign jurisdiction where you married, then you are considered being married like any other married couple. Even if you later live in a US state or foreign jurisdiction that doesn't recognise same sex marriages.

### **Why Would You Elect to Be Treated as a Resident**

As a nonresident alien spouse you are still a nonresident alien. But now you got a choice. You can choose to stay outside of the US tax system (assuming you don't derive any income in the US or enough withholding tax was withheld from any US income).

Or you can elect to be treated as a resident. In that case you are taxed in the US on your worldwide income. Why would anybody in their right mind do that? Why would you ever even consider this?

There are different scenarios where this makes perfect sense. For example you might have no or little income. Your spouse can claim to be head of household with you as a dependant resulting in a lower tax bill. Or you paid a lot more tax in Australia than you would in the US, so filing in the US gives you a nice foreign tax credit that is carried forward and waiting for you should you two ever choose to live and work in the States. These are just two scenarios where this election will give you an advantage.

### **How To Elect To Be Treated as a Resident**

To be treated as a resident you file a joint tax return in the year of your election. After that first year you can choose to file jointly or separately, but in that first year you have no choice – you must file jointly.

You attach a declaration to this joint tax return. There is no specific form. You just declare that your spouse is a US citizen or resident alien and that you want to be treated as a resident. You list the details for both of you (name, address and **identification number** – this one is important, remember this one). And then you sign and ask your spouse to sign as well since this election affects both of you. That's all.

### **Identification Number**

Did you see the word "identification number"? This is important. To be treated as a resident, you need a Social Security Number (SSN) or an Individual Taxpayer Identification Number (ITIN) so the US tax system can deal with you efficiently.

For an SSN you apply to the US consulate in Australia with Form SS-5. If you can't get a SSN, file Form W-7 with the IRS to apply for an ITIN.

### **Suspending or Ending Your Election**

Once made, the choice to be treated as a resident applies to all later years unless you suspend or end it.

Suspension happens automatically when neither of you is a US citizen or resident alien. Remember that you are still a nonresident alien. You are just treated as a resident. So it all depends on your spouse.

And you end your election by one of you dying, revoking the election, keeping inadequate records or legally separating. If you do any of this and thereby end your election, you usually can't make this choice again.

So this is how you can become a US resident for tax purposes without ever holding US citizenship or a Green Card and never setting foot on American soil.

### **Becoming a Resident Alien**

And then one day you and your spouse move to the States – not forever – just for a couple of years. Does this change things? Yes, big time. You are now a resident alien. Before you were just treated as a resident if you elected this option. But now you actually are a resident. And your worldwide income is taxed in the States. This is no longer a choice. You are still an alien though. A resident alien.

This all sounds reasonably straight forward but the US tax system can be very complicated. Mistakes can cost you dearly. So make sure you seek professional US tax advice before you move yourself into the realms of US tax authorities. See you in the next episode.

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[US Tax While Living in Australia](#)

[Australia's Tax Residency Rules are Broken](#)

[Tax Residency of Individuals and Companies](#)

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