

# 美国税法困扰中国家庭和公司

## US Tax Law Worries for Chinese Families and Companies

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The U.S. and China enjoy increasingly strong connections. Yet virtually no Chinese family or business relishes dealing with the Internal Revenue Service (IRS). American tax laws are famously complex, and dealing with the IRS can be like quicksand. Of course, whether they like it or not, U.S. citizens and green card holders (U.S. permanent residents) must deal with the IRS.

They must file their tax returns with the IRS on a worldwide basis, even if they are resident and paying taxes elsewhere. There was a time when the only Chinese persons worrying about such issues were U.S. citizens and permanent residents. Increasingly, though, many others having more attenuated connections with the U.S. must also now consider these rules and their IRS exposure.

For example, Chinese companies with U.S. shareholders now face increasing reporting and disclosure rules. FATCA, the Foreign Account Tax Compliance Act, has expanded America's tax reach into many foreign countries, including

China. And the U.S. is enforcing its tax laws more vigorously than ever.

FATCA requires foreign banks to reveal Americans with accounts over \$50,000. Non-compliant institutions can be frozen out of U.S. markets, so institutions worldwide are complying. Despite the uptick in enforcement, U.S. worldwide tax reporting has been a part of U.S. law for decades.

FBARs date to 1970, requiring filing for any non-U.S. account(s) having a combined value of more than \$10,000 at any time during the year. Compliance with all these rules was fairly low until the last 6 or 7 years. In 2009, the IRS struck a groundbreaking settlement with UBS for \$780 million in penalties and the disclosure of thousands of Americans with UBS accounts.

FATCA was enacted in 2010, as related enforcement developments were unfolding. FATCA's idea was to cut off companies from access to critical U.S. financial markets if they failed to pass along American data. More than 100 nations have agreed to the law, including China. Foreign

美国和中国的关系越来越紧密，但几乎没有中国家庭或商业愿意跟美国国家税务局（IRS）打交道。美国税法是出了名的复杂，而跟 IRS 打交道是很危险的事情。当然，不论愿意与否，美国公民和持绿卡者（美国永久居民）必须要跟 IRS 打交道。

即使他们居住在美国以外的地区，税款上缴到美国以外的地区，也必须在全球范围的基础上向 IRS 提交纳税申报表。曾经有段时间担心这个问题的中国人是美国公民和永久居民。但渐渐地，现在很多其他跟美国联系还不那么紧密的人也必须考虑这些规定和他们的 IRS 披露。

举个例子，拥有美国股东的中国公司现在面临着越来越多的申报和披露规则。FATCA（《外国账户税务合规法案》）已经扩大了美国税收的范围，涉及到很多海外国家，包括中国。而且美国会比以往更加积极地执行各项税法。

FATCA 要求海外银行揭露账户金额超过 5 万美元的美国人。凡不照办的机构都不得进入美国市场，所以全世界的机构都很配合。尽管执行力度加大，但数十年来美国全球范围的纳税申报已经成为美国法律的一部分。

FBAR（海外银行和金融账户报告）始于 1970 年，要求申报一年内任何时间海外账户金额超过 1 万美元的所有账户。但一直到 6、7 年前，并没有太多人遵守这些规定。2009 年，



Financial Institutions (FFIs, a term defined in FATCA) must report account numbers, balances, names, addresses, and U.S. identification numbers.

For U.S.-owned foreign entities, they must report the name, address, and U.S. Taxpayer Identification Number of each substantial U.S. owner. American indicia will likely mean a letter from the bank asking about U.S. compliance and the need to verify that so the bank can also be compliant with the U.S.

### FBARs Still Required

FATCA does not replace FBARs. U.S. persons with foreign bank accounts exceeding \$10,000 must file an FBAR by each June 30. These forms are serious, and so are the criminal and civil penalties.

FBAR failures can mean fines up to \$500,000 and prison up to ten years. Even a non-willful civil FBAR penalty can mean a \$10,000 fine. Willful FBAR violations can draw the greater of \$100,000 or 50 percent of the account for each violation—

IRS 跟 UBS (瑞士银行) 达成了一项突破性的解决办法, UBS 支付了 7.8 亿美元的罚款并揭露了数千拥有 UBS 账户的美国人。

随着相关执行的展开, 2010 年 FATCA 得以颁布。FATCA 旨在切断那些未能通过美国数据的公司进入美国关键金融市场的机会。超过 100 个国家同意了这项法律, 其中包括中国。外国金融机构 (FFIs, 由 FATCA 定义的术语) 必须报告账户数量、余额、名称、地址和美国身份号码。

对美国所有的海外实体, 则必须报告名称、地址和每一位重要美国所有者的美国纳税人身份号码。美国邮戳可能意味着一封来自银行的信件, 它会询问美国合规事宜, 并对此进行核实, 因此这家银行也可能是符合美国规定的。

### FBARs 仍是必要的

FATCA 并没有取代 FBARs。每年 6 月 30 日, 海外账户金额超过 1 万美元的美国人都必须向 FBAR 进行申报。这些表格是很严肃的, 而刑事处罚和民事处罚同样很严厉。

FBAR 报告失败可能意味着最高达 50 万美元的罚款和最多十年的监禁。即使是非故意不报的 FBAR 民事处罚都可达 1 万美元。故意违反 FBAR 会罚高达 10 万美元的罚款或为每一项违反支付账户金额的 50%——且每年都是独立的。这个数字会迅速增长。



and each year is separate. The numbers can add up quickly.

### Form 5471 filing

Currently, there are four categories of persons that must file Form 5471, ranging from Category 2 through Category 5. Category 1 was eliminated in 2004. A Category 2 filer includes a U.S. citizen or resident who is an officer or director of a foreign corporation in which a U.S. person acquires shares representing 10 percent

or more of the aggregate voting power or value of the corporation.

A “U.S. person” is a citizen or a resident of the U.S., a domestic partnership or corporation, or a domestic estate or trust. A corporation or partnership is considered “domestic” if it was organized in the U.S. or under the laws of the U.S. or of any state.

A trust is considered “domestic” if a court within the U.S. is able

**申报表格 5471**

目前，有四种个人必须申报表格 5471，从种类 2 到种类 5。种类 1 于 2004 年停止使用。种类 2 的申报者包括在海外公司担任官员或总监的美国公民或居民，且在公司内美国个人持有代表 10% 或更多的公司总投票权或价值的股份。

“美国个人”是指美国公民或居民，国内合作伙伴或公司，或国内房地产或信托。若公司或伙伴关系在美国国内组织或遵守美国或任一州法律，则被视为“国内的”。

若美国国内法院可以对信托的行政进行基本的监管，或一名或多名美国公民或居民有权控制此信托的所有重要决定，则视此信托为“国内的”。若房地产的收入需向美国缴纳所得税，则视此房地产为“国内的”。

to exercise primary supervision over the administration of the trust or one or more U.S. citizens or residents have the authority to control all substantial decisions of the trust. An estate is usually considered “domestic” if the income of the estate is subject to U.S. income tax.

**Generally, a Category 3 filer is a U.S. person who during the year:**

- Acquires 10 percent of the voting or participating shares in a foreign corporation;
- Acquires voting or participating shares that, when added to the shares owned on the date of acquisition, equals or exceeds 10 percent or more of the voting or participating shares; or
- Disposes of voting or participating shares in a foreign corporation that reduces

ownership to less than 10 percent.

A Category 4 filer is a U.S. person who owned more than 50 percent of the aggregate voting power or value of a foreign corporation for at least 30 days during the foreign corporation’s year. While Form 5471 is required for Category 2 and 3 filers only for the year in which the relevant transactions occur, a U.S. person should file Form 5471 for each year in which the more than 50 percent ownership threshold is met.

Generally, a Category 5 filer is a “U.S. shareholder” (as defined herein) who owned stock in a foreign corporation that is a controlled foreign corporation (CFC). The stock must have been owned for at least 30 days during the year, as well as owned on the last day of the year. A U.S. shareholder is generally defined as a U.S.



通常，种类3的申报者是指美国个人在一年内：

- 获得海外公司10%的表决权股或参与股；
- 当获得的表决权股或参与股在加上获得日所持有的股票份额时，等于或超过10%或更多的表决权股或参与股份额；或是
- 处置的海外公司表决权股或参与股将所有权降低到少于10%。

种类4的申报者是指在境外公司年中至少有30天拥有超过50%的总投票权或公司价值的美国个人。而申报表5471所需的种类2和种类3申报者只要处在相关交易发生的年份即可，若满足超过50%所有权这个临界点，则超过的每一年美国个人都需申报5471表格。

通常，种类5申报者是指拥有受控外国公司(CFC)股票的“美国股东”(在此定义)。一年中的持股时间至少为30天，同时一年中最后一天也拥有股份。美国股东通常是指拥有CFC10%或以上的表决权股的美国个人。

通常，CFC是指一家外国公司，其人员作为美国股东，在一年中的任一天拥有超过公司50%的表决权股或参与股。对于种类4的申报者，美国个人需在种类5的要求得到满足的每一年提交申报表5471。

### IRS 审计时间和处罚

若美国股东持有超过外国公司50%



person who owns 10 percent or more of the voting shares of a CFC.

Generally, a CFC is a foreign corporation that has persons qualifying as U.S. shareholders that own more than 50 percent of the voting or participating stock of the corporation on any day of the year. As with Category 4 filers, a U.S. person should file Form 5471 for each year in which the Category 5 requirement is met.

IRS Audit Periods and Penalties  
When a U.S. shareholder holds more than 50 percent of the vote or value of a foreign corporation, the company is a controlled foreign corporation or CFC. A U.S. shareholder is a U.S. person who owns 10 percent or more of the foreign corporation's total voting power. That triggers reporting, including filing an annual IRS Form 5471.

It is an understatement to say this is an important form. Failing to file it means penalties, generally \$10,000 per form. A separate penalty can apply to each Form 5471 filed late, and to each Form 5471 that is incomplete or inaccurate.

What's more, this penalty can apply even if no tax is due on the return. That seems harsh, but the next rule—about the statute of limitations—is even more surprising.

The IRS normally gets three years to audit. But if you have a CFC and fail to file a required Form 5471, your tax return remains open for audit indefinitely.

This statutory override of the normal IRS statute of limitations is sweeping. The IRS not only has an indefinite period to examine and assess taxes on items relating to the missing Form 5471. In fact, the IRS

的投票权或公司价值，则此公司为受控外国公司（CFC）。美国股东是指拥有超过外国公司总投票权10%的美国个人。因此需要申报，包括提交年度 IRS 申报表 5471。

若说申报表很重要，就太轻描淡写了。未能提交申报就意味着处罚，通常是一份申报表罚1万美元。单独的处罚可以应用在每一份迟交的5471申报表上，以及每一份不完整或不准确的5471申报表上。

不仅如此，即使申报表上没有需要支付的税费，处罚同样可以施行。看起来很不近人情，但下一条规则——关于限制的法令——就更出人意料了。通常 IRS 有三年的审计时间。但如果你拥有一家 CFC，并未能递交所需的5471申报表，那么你的所得税申报表将无限期备审。

这种对正常 IRS 法令限制的法令颠覆是彻底的。IRS 不仅仅可以无限期审核和评估与丢失的申报表5471相关的税费。实际上，IRS 可以对整个申报表做任意调整，没有时间限制，直到所需的申报表5471提交。

你可能会觉得申报表5471就像你申报表上的签名。如果没有对伪造签名的处罚来保护签名，那么所得税申报表真的就不是一份所得税申报表。相似地，如果没有所需的申报表5471，所得税申报表就会一直公开。

如果因为美国股东未拥有超过50%的股份而没有CFC怎么办？不

can make any adjustments to the entire tax return with no expiration until the required Form 5471 is filed.

You might think of a Form 5471 like the signature on your return. Without a signature under penalties of perjury, a tax return really isn't a tax return. Similarly, without a required Form 5471, the tax return will remain open.

What if there is no CFC because U.S. shareholders do not own over 50 percent? Forms 5471 are not only required of U.S. shareholders in CFCs. They

are also required when a U.S. shareholder acquires stock that results in 10 percent ownership in any foreign company.

The harsh statute of limitation rule for Form 5471 was the result of the HIRE Act passed March 18, 2010. Not coincidentally, this was the same law that brought us FATCA. Bottom line: be careful with CFCs and with Form 5471.

### IRS Voluntary Disclosure Programs

The presence of all of these tough rules may cause some



仅 CFC 中的美国股东需要申报表 5471，如果美国股东得到的股份可以带来对任何外国公司 10% 的所有权，那么申报表 5471 也是需要的。

申报表 5471 限制规则的严厉法令是因为 2010 年 3 月颁布的《恢复就业鼓励雇佣法案》(HIRE Act)。无独有偶，也正是这部法案带来了 FATCA。底线：小心应对 CFC 和申报表 5471，

### IRS 自愿披露项目

所有这些严酷的规则可能会让一些美国公民和居民考虑如何改正他们之前的错误。IRS 自 2009 年开始以来，于 2011 年、2012 年和 2014 年对各种办法进行了修改，为纳税人提供了一条解决他们之前不遵守规则的后果的方法。自 2014 年 6 月 18 日起，相关人士有几种不同的项目可供选择。

IRS 保留了境外自愿披露程序，即 OVDP，涉及 8 年修正税表和 FBAR。OVDP 涉及了缴税和利息以及占任何未申报收入 20% 的罚款，加上对境外最高账户余额 27.5% 的罚款。简化程序则远没有那么贵，跟 OVDP 相比提供的保证更少。

简化程序取决于纳税人证明自己是非故意不申报的，并受伪证惩罚的监督。要注意了，IRS 是可以检查纳税人的。实际上简化程序包括为在美国境内的人们服务的境内简化程序和为居住在海外的人们服务的境外简化程序。



两种简化程序都包括三年的税表，而不是八年的。两种简化程序都要求六年的 FBAR，而不是三年的，以符合 FBAR 的六年法令限制。境外简化程序没有处罚。

境内简化程序会对六年 FBAR 进行罚款，其数额为境外最高账户年终余额的 5%。部分美国公民和居民也许会想着怎么摆脱这些规则，而不是改正自己的错误。不过，如果不解决过去的问题，是很难逃脱的。

### 放弃国籍

如果一个公民凌驾在 IRS 之上，则这位公民必须放弃美国国籍。永久居民（绿卡持有者）必须放弃绿卡。这涉及到居民和长居居民的差别。

通常，长居居民是非美国公民，并在其 15 年居住期满之前合法居住至少八年。一年中即使只有一天持绿卡，也会影响整一年。

虽说如此，一个人不会为了在一年里进行的这种八年测试就被视为合法的永住居民，且在这一年中，根据税收协定，这个人被视为国外的居民，以及一个没有破坏适用于那个国家居民税收协定优惠待遇的人。

过去十几年中，关于放弃国籍的美国税法改了又改。2004 年，国会放弃了所有避税动机。2008 年，国会又做了进一步的改变。

U.S. citizens and residents to consider how to correct their past failings. Starting in 2009, with changes in 2011, 2012, and 2014, the IRS has given taxpayers a way to resolve their noncompliance with these rules. Since June 18, 2014, there are now several programs from which to choose.

The IRS has kept the Offshore Voluntary Disclosure Program or OVDP, involving 8 years of amended tax returns and FBARs. The OVDP involves paying taxes, interest and a 20 percent penalty on any unreported income, plus a 27.5 percent penalty on the highest offshore account balance. The Streamlined program is far less expensive, and provides fewer assurances than the OVDP.

The Streamlined program hinges on the taxpayer certifying under penalties of perjury that he or she was non-willful. Caution is in order, since the IRS can examine the taxpayer. The Streamlined actually consists of a Domestic Streamlined program for people in the U.S., and a Foreign Streamlined program for those living abroad.

Both Streamlined programs involve three years of tax returns, not eight. Both Streamlined programs require FBARs for six years instead of three, to match the six year FBAR statute of limitations. The Foreign Streamlined program has no penalty. The Domestic Streamlined program applies a 5 percent penalty to the highest

year-end balance in the offshore accounts over the six FBAR years.

Some U.S. citizens and residents may think more about getting out of these rules than about correcting their filing history. Yet it can be difficult to exit without addressing the past.

### Expatriation

To put oneself beyond the reach of the IRS, a citizen must give up U.S. citizenship. A permanent resident (green card holder) must give up that status. It is also relevant to distinguish between residents and long-term residents.

In general, a long-term resident is a non-U.S. citizen who is a lawful permanent resident of the U.S. in at least eight years during the 15-year period before that person's residency ends. Holding a green card for even one day during a year will taint the whole year.

Nevertheless, a person is not treated as a lawful permanent resident for purposes of this eight-year test in a year in which that person is treated as a resident of a foreign country under a tax treaty, and who does not waive the treaty benefits applicable to the residents of that country.

The U.S. tax law on expatriation changed multiple times over the last few decades. In 2004, Congress discarded tax avoidance





如果一个美国公民或长居居民在2008年6月17日当天或之后放弃国籍，则被认定在离开美国前以公平的市场价格卖掉了其世界范围内的所有资产。而由此带来的收入则根据资本利得率上交美国做税费。幸运的是，也有例外。

首先，只有当个人在放弃国籍前五年的平均年度净所得税达到16万美元时，才需要缴纳脱籍税，或者如果在放弃国籍当日其净资产达200万美元或以上，也需要缴纳脱

motives altogether. In 2008, Congress made further changes.

If a U.S. citizen or long-term resident expatriates on or after June 17, 2008, he is deemed to have sold all of his worldwide property for its fair market value the day before leaving the U.S. This deemed gain is subject to U.S. tax at the capital gain rate. Fortunately, there are exceptions from its application.

First, an individual is subject to the exit tax only if he has an average net annual income tax for the five years preceding expatriation of \$160,000, or if he has a net worth of \$2 million or more on the date of expatriation. However, another way of being hit with this exit tax is if you fail to certify on Form 8854 that you have complied with all U.S. federal tax obligations for the five years preceding the date of your expatriation or termination of residency.

籍税。不过，还有一种情况也要缴纳脱籍税，即没能在表格 8854 上证明自己在放弃国籍之日或终止居住期之日前五年一直履行美国联邦纳税义务。

关于销售门槛也是有利可获的。如果脱籍日应卖资产的收入少于 60 万美元，那么纳税人也不需要缴纳税款。这个豁免金额根据通货膨胀做调整。（2015 年为 69 万美元）

### 提前计划

如果过去五年里 IRS，司法部和美国立法行动有教了我们一些事的话，那就是美国税收规则并非儿戏。拥有美国利益和美国股东和成员的家庭和公司需要考虑这些规则以及如何应用它们。

不论一个适当的策略是为了改正过去的申报，为了重组公司，还是为了让一个家庭成员放弃美国护照或绿卡，计划总是重要的。

当然，紧要的不仅是税收问题。如果一个人对家庭担忧添加了不确定性，也就意味着大量资本面临流失风险，那么这些都是艰巨的问题。

不管形势看起来多么黯淡，总有解决的办法。这总比为了无视这些问题而出现的越发危险的路子要好得多。

There is also a gain on sale threshold. If a taxpayer has less than \$600,000 of income from the deemed sale of assets on expatriation, there is no tax due. This exemption amount is adjusted for inflation (\$690,000 for 2015).

### Plan Ahead

If the last five years of IRS, Justice Department and U.S. legislative actions have taught us anything, it is that U.S. tax rules are nothing to take lightly. Families and companies with U.S. interests and U.S. shareholders and members need to consider them and their application to their facts.

Whether the appropriate strategy is to correct past filings, to restructure a company, to have a family member give up a U.S. passport or green card, planning is important. Of course, it is not just taxes at stake. When one adds uncertainties about family worries, and what can be big dollars at stake, these can be daunting issues.

Regardless of how grave the situation may seem, there is almost always a way to address it. That is far better than the increasingly dangerous approach of ignoring these issues. ©

