**Title:** Overriding Tax Treaties: An Inside Look

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**Meta Description:** Overriding Tax Treaties: An Inside Look

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**Author:** James F. McDonough

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**Raw Content:** The United States Congress believes it has ability to override income tax treaties negotiated by the Executive Branch as evidenced by the passage of <a href="http://www.law.cornell.edu/uscode/text/26/894">IRC §894</a> and other provisions.  People who are in support of the supremacy of international law may argue that overrides violate the standards of fairness, but not in a case where taxes are involved (all is fair game). The Constitution implies that overrides are permitted as set forth in Article VI: “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land.”
<h4><a href="overriding-tax-treaties-an-inside-look" rel="attachment wp-att-527"></a>Early Beginnings...</h4>
Ah, 1980. During a time when people were blasting Pink Floyd's "Another Brick in the Wall" on their car stereos, the US introduced treaty overrides when it sought to tax gains on the sale of real estate by foreigners.  Payments to a non-resident must be reduced by a statutory 30% withholding tax unless a treaty provision applies and provides for a lower rate. The <a href="http://en.wikipedia.org/wiki/FIRPTA">Foreign Interests in Real Property Tax Act (FIRPTA)</a> marked the beginning of legislative attempts to defend the public fisc by limiting techniques that would otherwise qualify for low or no withholding taxes under a treaty.  The US has conduit financing rules that are designed to prevent the use of jurisdictions for low tax rates and withholding to extract profits from the US at rates that may otherwise be available.  The IRC §894 rules are designed to prevent pass-through entities from claiming treaty benefits where the funds it receives will be passed on to an entity that would suffer withholding at a higher rate of tax.
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<h4>Tea and Treaties, Anyone?</h4>
The UK, not to be outdone, also has introduced specific legislation last year that would also override treaties.  The <a href="http://hm-treasury.gov.uk/d/consult\_condoc\_statutory\_residence.pdf">UK’s Statutory Residency Test</a>, for determining if one is to be taxed as a resident,  was designed to provide an objective means by which one could determine residency status.  Artists and authors often depart for  lower tax climates prior to receipt of significant royalty payments or a stream of such payments.  The override would attempt to catch these individuals through the use of “connecting factors” and allows the tax authorities to ignore treaties and the Statutory Residence Test.  The impact of the override could cause businesses to be taxed on capital transactions thought to be protected by treaty. I understand that businesses with fixed locations would not be so tormented and could rely on existing rules...
<h4>BUT...</h4>
The US has about sixty treaties, the UK twice that number and Hong Kong has about one-half of the US.  This suggests that residence and business operations would be established in particular jurisdictions with treaties in part because of the absence of broad treaty networks.   How does an individual or business evaluate New York, London or Hong Kong as locations where the ultimate determination of qualification is subjective and will be rendered useless some years from now?  If each taxing jurisdiction creates its own overrides, designed to address situations that offend the local treasury, my copy of international tax treaties will be named the “Book of Exceptions.”