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Tax Relief for the “Accidental” U.S. Tax Resident

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In late April, the Treasury Department and the Internal Revenue Service issued much anticipated relief and guidance for those non-U.S. individuals and businesses in the U.S. affected by travel disruptions arising from the COVID-19 emergency. The global outbreak significantly limited the ability of many individuals to leave the U.S. due to canceled flights, transportation disruptions, shelter-in-place orders, quarantines, border closures and fear of traveling due to recommendations to implement social distancing.

Non-U.S. individuals unable to leave the U.S. may inadvertently become U.S. taxpayers by meeting the “substantial presence test” under section 7701(b)(3) of the Internal Revenue Code. Also, nonresident aliens who are stuck in the U.S. by COVID-19 Emergency Travel Disruptions and perform work-related services or other activities, and foreign businesses who employ individuals to perform services or other activities in the U.S., may be considered engaged in a U.S. trade or business (USTB) for performing those services here. Generally, if a business is considered to be engaged in a USTB as a result of an employee’s work in the United States, the income associated with that service is taxable, and a business may be required to withhold U.S. taxes on that employee’s income. This Revenue Procedure provides relief for eligible non-U.S. individuals and, where relevant, their non-U.S. employers, to claim the **COVID-19 Medical Condition Travel Exception**, and it addresses whether an individual qualifies for benefits under a U.S. income tax treaty for services performed in the U.S. and whether an employer may qualify for exemption from tax on a USTB.

[Revenue Procedure 2020-20](#) provides that an “eligible” individual who intended to leave the United States during the individual’s COVID-19 Emergency Period, but was unable to do so due to COVID-19 Emergency Travel Disruptions, may exclude the individual’s **COVID-19 Emergency Period, which is up to 60 consecutive calendar days of U.S. presence starting on or after February 1, 2020 through April 1, 2020, that are presumed to arise from travel disruptions caused by the COVID-19 emergency.** Those days will not be counted for purposes of determining U.S. tax residency and for purposes of determining whether an individual qualifies for tax treaty benefits for income from personal services performed in the U.S. A concurrently released [FAQ](#) states that those days will not be counted either for purposes of determining whether the individual’s presence during those days causes a company to be engaged in a United States trade or business.

Who should be made aware of this Revenue Procedure: Individuals who are not lawful permanent residents (therefore, this does not apply to green-card holders) and who meet the “substantial presence test” for a given calendar year. If they meet the substantial presence test, they are generally treated as U.S. residents for that year. An alien individual is a resident under the substantial presence test in the current calendar year if adding up their days using the following formula totals 183 days or more: (1) the individual is present in the United States on at least 31 days during the tested calendar year; and (2) the sum of: (i) the number of days of presence in the tested calendar year plus (ii) one-third of the number of days of presence in the preceding calendar year; plus (iii) one-sixth of the number of days of presence in the second preceding calendar year. Certain days are otherwise exempt from the formula, including days subject to the Medical Condition Exception.

Who is Eligible for the benefits of this Revenue Procedure: “Eligible” persons are defined by this revenue procedure as nonresident individuals who intended to leave the U.S. during the COVID-19 Emergency Period, but were unable to do so because of travel disruptions.

What can be exempted: 60 consecutive calendar days selected by an individual starting on or after February 1, 2020 and on or before April 1, 2020, during which the individual is physically present in the U.S. on each day, may be exempted from the computation of the “substantial presence test”.

What is the basis of the exemption: The Medical Condition Exception. It provides that an alien individual can exempt those days present from the “substantial presence test” if their intention was to leave the U.S. but were unable to because the medical condition arose while they were present in the U.S. and it was not a preexisting condition and they were not aware of the condition prior to

coming to the U.S. For purposes of this revenue procedure, an Eligible Individual will be presumed to have intended to leave the U.S. on any day during the individual's COVID-19 Emergency Period, unless that individual has applied, or otherwise taken steps, to become a lawful permanent resident of the U.S.

What are the requirements for claiming the exemption: Persons claiming this Exception must file Form 1040-NR and attach Form 8843 Statement for Exempt Individuals and Individual with a Medical Condition. For those not required to file a Form 1040-NR for 2020, they should still retain all relevant records to support reliance on this revenue procedure and be prepared to produce these records and complete a Form 8843 if requested by the IRS. Individuals who qualify for other exceptions to the substantial presence test are not required to claim the COVID-19 Medical Condition Travel Exception in order to claim other available exceptions, or they may choose to claim all exceptions for which they are eligible.

Income from performing personal services in the US: Nonresident aliens who are stuck in the U.S. as a result of COVID-19 Emergency Travel Disruptions and perform work-related services or other activities, and foreign corporations who employ individuals to perform services or other activities in the U.S., whose income would otherwise be tax exempt, may be considered engaged in a U.S. trade or business (USTB) as a result of the employee performing those services in the U.S., and taxable on business income connected to that USTB. Generally, if an employer is considered to be engaged in a USTB, the employer is required to withhold U.S. tax from income earned by an employee working in the U.S. (with some exceptions for limited presence). To claim an exemption from withholding on income from personal services pursuant to a U.S. income tax treaty in accordance with this revenue procedure, an individual should provide his or her employer or other withholding agent a Form 8233, Exemption From Withholding on Compensation for Independent (and Certain Dependent) Personal Services of a Nonresident Alien Individual, certifying that the income is exempt.

Closing Thoughts: For those non-U.S. alien individuals and businesses that could become unintended U.S. tax residents, the Internal Revenue Service has responded with limited relief by exempting up to 60 consecutive days from the "substantial presence" test and providing some related relief relating to work performed while they are stuck in the U.S. The Revenue Procedure does not address what happens if individuals are unable to leave for a longer period, though other exceptions from tax (such as the "closer connection" test for residence) may be available in those cases. While the FAQ is helpful for employers, it is not binding guidance and we remain hopeful that the IRS will issue more definitive guidance in the future. The authors of this article are closely monitoring developments and contributing to communication with the IRS to request relief if these measures prove insufficient. Please contact your Saul Ewing Arnstein & Lehr point of contact about the topics covered in this article and how they can impact your tax status in the U.S.

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