

## IRS Provides Relief to Accidental U.S. Residents

*“Should I stay or should I go now?*

*If I go, there will be trouble.*

*And if I stay it will be double.”*

- The Clash, ‘Should I Stay or Should I Go’

Many nonresidents stuck in the U.S. during the COVID-19 outbreak asked the same question that The Clash asked many years before: ‘Should I stay, or should I go?’ A nonresident alien faced “trouble” by traveling during the height of the outbreak, potentially risking her health or the health of others. But she potentially risked “double” taxation if she stayed in the U.S. longer than expected and became an “accidental resident” subject to U.S. tax on her worldwide income.

Fortunately, the IRS has granted relief for certain types of accidental residents who have been unable to travel due to COVID-19. The two revenue procedures discussed below provide relief for non-U.S. individuals at risk of U.S. taxation due to their extended U.S. presence and for U.S. citizens and residents who want to rely on the foreign earned income exclusion for time spent living outside the U.S.

### **Rev. Proc. 2020-20: Relief for Non-U.S. Individuals**

An individual who is not a U.S. citizen or green card holder will be considered a U.S. resident, and thus be subject to U.S. tax, for any given year if she has “substantial presence” in the country. The most straightforward way to show that a nonresident lacks substantial presence is to count the number of days during which the nonresident was in the U.S. An individual is not a U.S. tax resident if she spent fewer than 183 days in the U.S. during a three-year period. The number of days that a person is considered to have spent in the U.S. equals the number of days that the person spent in the U.S. during the current year, plus 1/3rd of the days spent in the U.S. in the last year, plus 1/6th of the days spent in the U.S. during the year before that. For example, a person who spent 120 days in the U.S. in each of 2017, 2018, and 2019 would be treated as having spent 180 days in the U.S. ( $180 = 120 + (1/3 \times 120) + (1/6 \times 120)$ ).

An exception to the general presence rule applies if a medical condition arises that prevents a visiting nonresident from leaving the U.S. when she intended to do so. In [Revenue Procedure 2020-20](#), the IRS expanded this exception to automatically include anyone who intended to leave the U.S. during the “COVID-19 Emergency Period” but was unable to leave because of COVID-19 travel disruptions. An individual may designate any period of up to 60 days, starting on or after February 1 and on or before April 1, as her COVID-

19 Emergency Period. The guidance provides a helpful presumption that a person intended to leave the U.S. unless that individual affirmatively took steps to become a lawful permanent resident.

Anyone seeking relief under this revenue procedure need not be infected with COVID-19, but must satisfy these conditions:

- a) Was not a U.S. resident at the close of 2019;
- b) Is not a lawful permanent resident at any point in 2020;
- c) Was present in the U.S. during the entire COVID-19 Emergency Period; and
- d) Would not otherwise become a U.S. resident in 2020 due to days of presence outside her COVID-19 Emergency Period.

This relief only applies to a consecutive period of days in which the individual was in U.S. and unable to leave. For example, a person who spent the entire month of April in the U.S. would only be able to exclude 30 days from the substantial presence test calculation.

To claim relief under the revenue procedure, individuals who are otherwise required to file Form 1040-NR will need to attach IRS Form 8843, *Statement for Exempt Individuals and Individuals with a Medical Condition*, and state that they are using the COVID-19 Medical Condition Travel Exception for the substantial presence test. Individuals who do not otherwise need to file a Form 1040-NR only need to maintain adequate records to support their reliance on this revenue procedure.

This revenue procedure also provides a similar grace period of up to 60 days for certain individuals who provide personal services in the U.S. and claim an exemption from withholding under a U.S. income tax treaty. Frequently such treaty exemptions require the claimant to be present in the U.S. for 183 days or less. Individuals looking to rely on the revenue procedure to claim such an exemption should file with their employer or withholding agent an IRS 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 and designating the individual's COVID-19 Emergency Period.

This relief may not be appropriate for everyone. First, the revenue procedure does not impact other exceptions to the substantial presence test. For example, some individuals claim an exception to the substantial presence test under a U.S. income tax treaty provision for dual residency or by relying on the regulatory "closer connection" test. Rev. Proc. 2020-20 does not impact either of these tests. If you want to claim that you are not a U.S. resident by using a treaty or the closer connection test, it is best to talk to your tax adviser to see how your COVID-19 residency changes your position in 2020.

Second, individuals may be able to claim relief in addition to that which the IRS granted in the revenue procedure. Some people who were diagnosed with COVID-19 in the U.S. may have been forced to quarantine in the U.S. Those individuals who could not leave may be able to satisfy the "regular" medical condition exception in addition to the general relief the IRS granted in this guidance. In other words, Rev. Proc. 2020-20 provides up to a 60-day safe harbor, but it does not prevent a taxpayer from claiming other exemptions as well.

### Rev. Proc. 2020-27: Relief for U.S. Expats

U.S. citizens and residents are taxed on their worldwide income even if they do not live in the U.S. That said, section 911 of the tax code provides a limited exemption to the extent of certain earned income and housing expenses of individuals living abroad, provided that the claimant is either

- (a) a U.S. citizen who is a bona fide resident of a foreign country or countries for an uninterrupted period that includes an entire taxable year; or
- (b) a U.S. citizen or resident who, during a 12-month period, is present in a foreign country for a least 330 full days.

In addition, a partial exemption may be available to a U.S. citizen or resident who is a “bona fide resident” of another country for some period of time during a taxable year but is forced to leave before fulfilling the above time requirements due to “war, civil unrest, or similar adverse conditions which precluded the normal conduct of business”. The Treasury Department, in consultation with the State Department, publishes an annual list of countries to which this rule may apply. If it applies, a U.S. expat can qualify for the annual section 911 exemption to the extent of the number of days she was otherwise considered a bona fide resident of the foreign country.

A U.S. citizen or resident who was caught outside their claimed tax home due to the COVID-19 crisis will likely have difficulty satisfying the bona fide resident test in (a) or the 330-days test in (b). However, in Revenue Procedure 2020-27, the IRS designated the COVID-19 emergency as an adverse event for purposes of the partial exemption. The guidance provides that an individual who was stranded outside their claimed country of residency between February 1, 2020 (or December 1, 2019 for China, excluding Hong Kong and Macau) and July 15, 2020 may still be able to satisfy the section 911 requirements for the partial exemption, even if they were outside of their foreign country of residence during the COVID-19 outbreak.

A person will still be treated as a bona fide resident for the period of time in which she was in a foreign country, provided she can show that she had a reasonable expectation of meeting the requirements of section 911 (e.g., by showing that she intended to make that foreign country her tax home if the COVID-19 outbreak had not occurred), left the country after the date above, and goes back to the foreign country by July 15, 2020. For example, a U.S. citizen that left the United Kingdom on March 1, 2020, plans to return on July 14, 2020, stays in the United Kingdom for the rest of 2020, and otherwise meets the requirements of section 911 will be considered a bona fide resident between January 1 to March 1 and July 14 to December 31.

For questions, please contact a member of our [Tax team](#). For more information on tax issues related to the pandemic, please visit our [COVID-19 Resources Page](#).