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IRS Provides COVID-19 Relief for Stranded “Snowbirds” and Other International Travellers

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The emergence of COVID-19 in early 2020 has created significant global challenges, not the least of which include restrictions on the ability to travel between countries. In particular, these restrictions sometimes have made it difficult for “snowbirds” – Canadian residents who seek refuge from the wintry conditions of the Great White North in the warmer climes of the United States – to return home.

Snowbirds, as well as other international travellers currently in the United States as a result of COVID-19-related travel disruptions, may find themselves in danger of becoming U.S. residents in 2020 for U.S. federal income tax purposes under the day-counting rules of the “substantial presence test.”¹ Fortunately for these stranded travellers, the Treasury Department and the Internal Revenue Service (IRS) have recently issued guidance providing relief from the substantial presence test under Revenue Procedure 2020-20 (Rev. Proc.).

Substantial Presence Test

Under the substantial presence test, subject to certain exceptions, an alien individual is treated as a resident of the United States in any year in which such individual (i) is physically present in the United States on at least 31 days and (ii) is deemed to be present in the United States on at least 183 days determined by adding (A) the actual number of days that the individual is in the United States in the current year; (B) one-third of the days that the individual was in the United States in the immediately preceding year; and (C) one-sixth of the days that the individual was in the United States in the second preceding year.

For purposes of this day-count formula, certain days spent in the United States are excluded, including days on which the individual intended to leave the United States, but was unable to do so because of a medical condition that arose while the individual was present in the United States. Prior to the issuance of the Rev. Proc., it was unclear whether days spent in the United States as a result of COVID-19-related travel delays would be included in the day-count formula of the substantial presence test.

Revenue Procedure 2020-20

The Rev. Proc. provides that an individual who intended to leave the United States but was unable to do so during any 60-day period selected by the individual beginning on or after February 1, 2020, and on or before April 1, 2020, due to a “COVID-19 Emergency Travel Disruption” **may exclude up to 60 calendar days of presence in the United States for purposes of applying the substantial presence test. The Rev. Proc. defines a COVID-19 Emergency Travel Disruption to include any of the following broad travel disruptions experienced by an individual, regardless of whether such individual was infected with the COVID-19 virus:**

- severe restrictions in movement, including by order of government authorities;
- cancelled flights and disruptions in other forms of transportation;
- shelter-in-place orders, quarantines and border closures; and
- feeling unsafe travelling due to recommendations to implement social distancing and limit exposure to public spaces.

In order for an individual to be eligible for the 60-day exclusion under the Rev. Proc., the individual must (i) not have been a resident of the United States for 2019, (ii) not hold a green card at any point in 2020, (iii) be present in the United States on each of the 60 days being excluded from the substantial presence test under the Rev. Proc. and (iv) not become a resident of the United States in 2020 under the substantial presence test due to days of presence in the United States outside the 60-day period excluded under the Rev. Proc.

As noted above, to qualify under the Rev. Proc., an individual must have intended to leave the United States during the 60-day period excluded under the Rev. Proc. The Rev. Proc. provides that an individual will be presumed to have intended to leave the United States during such period unless that individual has applied for, or otherwise taken steps to obtain, a green card.

An individual who would be treated as a resident of the United States on the basis of the application of the day-count formula of the substantial presence test, notwithstanding the relief of the Rev. Proc., may still be able to escape treatment as a resident of the United States under the closer connection exception or an applicable treaty tiebreaker exception. However, actions taken by such an individual after these travel restrictions are eased may affect the availability of these exceptions.

In addition to excluding days for purposes of the substantial presence test, these days are also excluded for purposes of determining whether an individual qualifies under an applicable tax treaty for an exception from U.S. federal income tax for income from employment or other dependent personal services performed in the United States. For example, the U.S.-Canada tax treaty provides that the United States cannot tax income derived by a resident of Canada from employment in the United States if the Canadian resident spends less than 183 days in the United States during any 12-month period (and certain other requirements are met). The 60 days excluded from the substantial presence test under the Rev. Proc. are also excluded for purposes of this provision of the tax treaty.

Although the medical condition exception under the substantial presence test may be available for individuals who contract the COVID-19 virus while present in the United States, **the Rev. Proc. provides some welcome guidance for individuals who have not contracted the virus but are unable to, or feel unsafe trying to, leave the United States as a result of a COVID-19 Emergency Travel Disruption.** Individuals seeking to avail themselves of the 60-day exclusion under the Rev. Proc. should be aware that there are certain required procedures and filing requirements, and should feel free to contact us with any questions they may have regarding these procedures, filing requirements, the application of the Rev. Proc. to the closer connection exception or a treaty tiebreaker exception, or more generally, the impact of COVID-19-related issues on their U.S. income, gift or estate tax-planning strategies.

Moreover, if COVID-19 Emergency Travel Disruptions persist for an extended period, we would not be surprised to see the IRS provide additional relief for affected individuals. We will continue to provide updates on further developments affecting snowbirds and other international travellers stranded in the United States, as well as other tax and legal developments resulting from the coronavirus crisis.

¹ An individual that would otherwise meet the substantial presence test may be able to avoid U.S. residency under (i) the closer connection exception if such individual was physically present in the United States for less than 183 days, maintains a "tax home" in a non-U.S. country and has a "closer connection" to such country than to the U.S. or (ii) a treaty tiebreaker exception if such individual is not treated as a U.S. resident under an applicable treaty's tiebreaker provisions.

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