

# IRS ANNOUNCES PANDEMIC RELIEF FOR U.S./ FOREIGN RESIDENCY DETERMINATIONS

*Hodgson Russ International Tax Alert*  
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On April 21, Treasury and the IRS issued welcome guidance that provides U.S. income tax relief for nonresident individuals who may be present in the United States indefinitely as a result of COVID-19 travel disruptions, including travel bans, government-mandated lockdowns, and canceled flights.

## **Exceptions to Substantial Presence Test**

Under the substantial presence test, a taxpayer is considered a U.S. resident for tax purposes if she has been physically present in the United States for 31 days during the current year and 183 days during the three-year period that includes the current year and two immediately preceding years, which is subject to a weighted average basis formula prescribed by the IRS.

Rev. Proc. 2020-20 allows an individual to claim a COVID-19 medical condition travel exception for purposes of the substantial presence test if pandemic-related measures prevented the individual from leaving the United States during the individual's COVID-19 emergency period. That is defined as a period of up to 60 consecutive calendar days selected by the individual starting between the dates of February 1 and April 1 during which the individual was physically present in the United States each day.

The individual must claim this exception when filing Form 8843, "Statement for Exempt Individuals and Individuals with a Medical Condition," and maintain all relevant documentation to be produced at the IRS's request. The individual may also claim other exceptions, including the medical condition exception, under the substantial presence test. Under the medical condition exception, an individual's presence won't be counted under the substantial presence test if she cannot leave the United States because of a medical condition that arose while she was in the United States.

## **Foreign Earned Income and Housing Exclusions**

Generally, pursuant to IRC Section 911, "qualified individuals" who satisfy residency requirements outside the United States are able to exclude certain foreign earned income and housing costs from gross income. Section 911 previously provided that an individual will still be treated as a qualified individual with respect to a period in which the individual was a *bona fide* resident of, or was present in, a foreign country

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even if the individual left the country during a period for which the Secretary of the Treasury, after consultation with the Secretary of State, determines that individuals were required to leave because of war, civil unrest, or similar adverse conditions that precluded the normal conduct of business.

Revenue Procedure 2020-27 announces that the Secretary of the Treasury, after consultation with the Secretary of State, has determined that COVID-19 has created an adverse condition that precluded the normal conduct of business:

- in the People's Republic of China, except for Hong Kong and Macau, as of December 1, 2019, and
- globally, as of February 1, 2020.

This disruption will be deemed to end on July 15, 2020, unless the IRS announces an additional extension.

### **U.S. Trade or Business Exclusions**

On April 21, the IRS also issued guidance in the form of frequently asked questions (FAQs) providing that a nonresident alien, foreign corporation, or a partnership in which either is a partner may choose an uninterrupted period of up to 60 calendar days starting between February 1 and April 1 during which its services or other activities conducted in the United States won't be considered in determining whether it is engaged in a U.S. trade or business, if the activities were performed by one or more individuals temporarily present in the United States and would not have been performed there were it not for COVID-19 emergency travel disruptions.

These activities also won't be considered in determining whether the nonresident alien individual or foreign corporation has a permanent establishment in the United States.

Individuals should maintain documentation to provide to the IRS upon request establishing that they were present in the United States starting from the COVID-19 emergency period, and that the individual would not have performed these business activities but for the COVID-19 travel disruptions.

Nevertheless, the IRS cautions that nonresidents and foreign corporations may want to make protective U.S. tax filings, even if they don't think they need to file for the 2020 tax year, to preserve any deductions or claim treaty relief.

The tax professionals at Hodgson Russ LLP will continue to monitor this relief and are here to guide you with respect to your residency determinations. Please contact Leslie R. Kellogg (716.848.1468) or one of the tax attorneys at Hodgson Russ LLP if you would like to discuss how these new rules may impact your tax situation.

Please check our Coronavirus Resource Center and our CARES Act page to access information related to both of these rapidly evolving topics.

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