

April 23, 2020

IRS ISSUES CROSS-BORDER TAX GUIDANCE FOR COVID-19 TRAVEL DISRUPTIONS

SUMMARY

The Internal Revenue Service has issued guidance that provides relief to foreign individuals impacted by COVID-19 emergency travel disruptions. Revenue Procedure 2020-20 provides that certain foreign nonresident individuals may exclude up to 60 days of presence in the United States for purposes of determining their U.S. tax residency during 2020 and for determining their qualification for certain tax treaty benefits.

BACKGROUND

An individual who is not a lawful permanent resident of the United States (that is, a green-card holder) or U.S. citizen, and who satisfies the “substantial presence test” in a given year will be taxed as a U.S. resident for that year, unless an exception applies.

A foreign individual is taxed as a resident under the substantial presence test in the tested calendar year if they meet the following requirements:

- The individual must be in the United States on at least 31 days during the tested year; and
- The following number of days added together totals 183 days or more:
 - All of the number of days of presence in the tested calendar year;
 - Plus one-third of the number of days of presence in the preceding calendar year;
 - Plus one-sixth of the number of days of presence in the second preceding calendar.

In certain scenarios, a foreign individual may exclude certain days of physical presence in the United States. For example, the Medical Condition Exception generally provides that a foreign individual is not treated as present in the United States on days when 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.

Under U.S. income tax treaties, days spent in the United States due to an illness that prevents an individual from leaving the country are generally not counted when determining the availability of treaty benefits with respect to income from dependent personal services performed in the United States.

THE COVID-19 MEDICAL CONDITION TRAVEL EXCEPTION

Revenue Procedure 2020-20 provides that eligible individuals may claim the COVID-19 Medical Condition Travel Exception to exclude certain days of presence in the United States that occurred during such individual’s “COVID -19 Emergency Period.” The Revenue Procedure defines the “COVID-19 Emergency Period” as a period selected by the individual of up to 60 consecutive calendar days, during which the individual is

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physically present in the United States on each day, starting on or after February 1, 2020, and on or before April 1, 2020.

A nonresident foreign 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 travel disruptions, may exclude up to 60 days of presence in the United States that occurred during the COVID-19 Emergency Period for purposes of applying the substantial presence test. An individual will be presumed to have intended to leave the United States during this timeframe unless the individual has taken steps to become a lawful permanent resident of the United States.

In determining the individual's eligibility for treaty benefits with respect to income from employment or the performance of other dependent personal services within the United States, any days of presence during the individual's COVID-19 Emergency Period in which the individual was unable to leave the United States due to travel disruptions will not be counted.

NEXT STEPS

Individuals who are required to file 2020 Form 1040-NR must claim the COVID-19 Medical Condition Travel Exception by attaching Form 8843 to their Form 1040-NR by the applicable due date. Individuals not required to file Form 1040-NR should retain relevant records to support their reliance on Revenue Procedure 2020-20.

Individuals claiming an exemption from withholding on income from dependent personal services pursuant to a U.S. income tax treaty should provide to their employer or other withholding agent Form 8843 claiming the COVID-19 Medical Condition Travel Exception.