COMING TO AMERICA – WHEN DOES TAX RESIDENCE BEGIN?

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The Statue of Liberty tells the world (in Emma Lazarus' immortal words):

> "Keep ancient lands, your storied pomp!" cries she
> With silent lips.
> Give me your tired, your poor,
> Your huddled masses yearning to breathe free,
> The wretched refuse of your teeming shore."

In *Coming to America*, Eddie Murphy accepts this invitation. Murphy plays a not entirely typical immigrant, 21-year old Akeem, Crown Prince of the African nation of Zamunda, who moves to Brooklyn to find true love and avoid the arranged marriage planned for him by his father, King Jaffe Joffer (James Earl Jones – the voice of Darth Vader and CNN).

The film is a minor comic masterpiece as Akeem and his sidekick Semmi (Arsenio Hall) adjust to life in America. But for reasons entirely mysterious to the author, and no doubt many other members of the audience, the filmmakers consigned to the cutting room floor the parts of the film that deal with the tax planning Akeem (and even Semmi) and his family needed to undertake before and after coming to America. Akeem spends a large part of the movie living very modestly in a ratty apartment and working a minimum wage job at a local hamburger joint. This may indeed be what wealthy immigrants can look forward to if they don't pay attention to the tax laws of the United States before and after their arrival.

But when exactly is it that they arrive? Getting the timing right is critical to good planning, a subject to which we will return. Let is be remembered for now that the United States treats a new resident as importing tax attributes such as built-in gains and losses, accrued income, and undistributed income of corporations and trusts, even if these attributes had no connection to the United States at all before the new resident's arrival. The stakes really are potentially quite high for the new immigrant.

The laws governing the residence of individuals were supposed to have been simplified back in 1984 but a review of the law will show that the answer to the question "When do you become a resident?" is not quite straightforward.

The initial answer to the question may well be "Why do you need to know?" The rules are not the same for Federal and state tax purposes; they are not even the same for the purposes of the Federal income tax and the three Federal transfer taxes (estate tax, gift tax and generation skipping transfer tax). As we shall see, they are not even the same for all purposes of the Federal income tax! And just because an alien arrives in the United States does not mean he or she has actually escaped from his or her home country.

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Even if we narrow the question down to residence for (most) Federal income tax purposes, the answer depends on which test of residence applies and the impact of statutory and treaty-based escapes, as well as elections made by the taxpayer under provisions located both in plain sight and in some obscure locations.

Federal Income Tax

The starting point for determining whether an alien individual (alien being a pejorative sounding word for an individual who is not a citizen of the United States which we will nevertheless use because of its pervasive use in the statute) is section 7701(b) of the Internal Revenue Code of 1986, as amended. Section 7701(b) came into effect for on January 1, 1985, which is long enough ago that we will not spend any time on prior law – still contained in Treas. Reg. § 1.871-2, which gives no warning at all that it does not apply for calendar years 1985 and later.[2]

Section 7701(b) provides two tests. If either is satisfied, an alien will be a resident.

The Lawful Permanent Resident Test (also known and usually referred to as the "Green Card" Test). Under this test, an individual is a resident for income tax purposes if he is a lawful permanent resident of the United States under the immigration laws. The test is known as the green card test. This is because the U.S. Immigration and Naturalization Service issues a card, technically known as an "Alien Registration Receipt Card", to an alien who is granted permanent lawful resident status. The card is called a green card because it used to be green, although for more than 20 years it has actually been white and blue.

The Substantial Presence Test (sometimes referred to as the "Day Counting Test"). This test is applied in each calendar year. The individual counts the number of days in which he was physically present in the United States. Days of arrival and days of departure are counted as full days. Days are not counted if an alien is in transit between two foreign points and spends less than 24 hours in the United States. There are a variety of exceptions relating to such aliens as commuters from Canada and Mexico, employees of foreign governments and international organizations and their families, student visas, persons prevented from leaving because of medical conditions and (the so-called "PGA exception") professional athletes present to compete in a charitable sports event. These exceptions are not without their tricks and traps, but they are not further considered in this article.

After having counted the days in the current calendar year:

- If the number of days is less than 31, the individual is not a resident.
- If the number of days is 183 or more, the individual is a resident, subject to the effects of an income tax treaty (discussed below).
- If the number of days is 31 or more but not more than 182, the individual must count the number of days of U.S. presence in the two preceding years and calculate the result of the following formula:

[2] For completeness, we note that section 876 treats an alien who is a bona fide resident of Puerto Rico as a resident alien with the right to exclude from income all Puerto Rico source income.

$CY + 1/3\ PY_1 + 1/6\ PY_2$

where CY = the number of days of presence in the current calendar year

PY_1 = the number of days of presence in the preceding calendar year

PY_2 = the number of days of presence in the second preceding calendar year

If the result of the formula is 183 or more, the individual is a resident. However, unlike the case where CY by itself is 183 or more, the individual may escape being a resident under the "foreign tax home/closer connection" test. Under this test, the individual can show (by filing a tax return and including the requisite statement) that he is not a resident by establishing that he has *a tax home outside the United States* AND that he has *a closer connection to the foreign country in which the tax home is located* than to the United States. It is clear that the tax home and the country to which the individual has the closer connection must be the same country. The exception does not apply if at any time during the year in question the individual has taken steps to be admitted as a permanent resident of the United States or the alien has an application pending for adjustment of status to that of a permanent resident.

The Internal Revenue Service treats an individual's tax home as:

> "his regular or principal (if more than one regular) place of business, or if the individual has no regular or principal place of business because of the nature of his business, then at his regular place of abode in a real and substantial sense." Treas. Reg. § 301.7701(b)-2(c)(1).

A closer connection to a foreign country is demonstrated by facts and circumstances relating to personal life, such as the location of (1) home, (2) family, (3) belongings, (4) social, business and religious organizations, (5) personal bank accounts, (6) driver's license, (7) the country of residence listed on forms and documents, (8) the types of forms and documents filed, and (9) where the individual votes. Treas. Reg. § 301.7701(b)-2(d).

Tax Treaty Exception. What if an individual is resident in more than one country? Tax treaties may provide the answer. Most U.S. tax treaties contain a provision fairly similar to Article 4(2) of the U.S. model income tax treaty (1996) reproduced below. Fairly similar means there is no substitute for reading the specific treaty potentially applicable to any particular individual, but the model is more than sufficient for purposes of a general discussion.

> 2. Where by reason of the provisions of paragraph 1 [which in substance provides that domestic law of each country is applied to determine the question], an individual is a resident of both Contracting States, then his status shall be determined as follows:
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> a) he shall be deemed to be a resident of the State in which he has a permanent home available to him; if he has a permanent home available to him in both States, he shall be deemed to be a resident of the State with which his personal and economic relations are closer (center of vital interests);

b) if the State in which he has his center of vital interests cannot be determined, or if he does not have a permanent home available to him in either State, he shall be deemed to be a resident of the State in which he has an habitual abode;

c) if he has an habitual abode in both States or in neither of them, he shall be deemed to be a resident of the State of which he is a national;

d) if he is a national of both States or of neither of them, the competent authorities of the Contracting States shall endeavor to settle the question by mutual agreement.

To claim the benefit of a treaty in the United States, an alien must file a U.S. tax return and include a form (IRS Form 8833) claiming that he or she is not a U.S. resident because of the treaty.

Differences between Statutory and Tax Treaty Residence

In general. It is useful to compare the effects of nonresidence under the statutory test and nonresidence under a treaty.

An individual who is nonresident under the statutory test is nonresident for virtually all purposes of the income tax.

By contrast, an individual who is nonresident under a treaty is nonresident for the purposes of computing tax liability and the imposition of withholding under Chapter 3 of the Internal Revenue Code; for all other purposes of the Code, the individual will be resident.[3] For example, an individual will be a resident for determining whether a foreign corporation is a controlled foreign corporation or a foreign personal holding company. This does not mean that the alien will be taxable on Subpart F income or on foreign personal holding company income; but it can have an effect on other U.S. shareholders, to their potential surprise, if the corporation becomes a CFC only because the treaty nonresident's stock is counted as held by a U.S. shareholder.

Imagine a couple moving to the United States. Assume they jointly own 100% of the stock of a foreign corporation. Assume that one spouse moves here outright but the other continues for a year or two to travel back and forth because of continuing commitments in the home country. As a result, perhaps that spouse will be resident under the statutory test but will escape under a treaty. Under the IRS view, the foreign corporation would be a CFC because *all* the shares, rather than just 50%, would be treated as owned by U.S. shareholders. Subpart F income would therefore be includible in the income of the resident spouse, but not in the income of the treaty nonresident. This might encourage a planner to try to find a way for the treaty nonresident to try to escape the statutory test, including by not applying for a green card and claiming protection of the foreign tax home/closer connection test.

The rules with respect to S corporations are in flux. The IRS proposed regulations in 1992 to the effect that if an alien claims to be a nonresident under a treaty, the alien is a

[3] Treas. Reg. § 301.7701(b)-7(a).

nonresident for purposes of determining the eligibility of a corporation to make an S election and an S corporation with such a shareholder will have its S election terminated. However, the proposed regulations would treat the alien as a resident for purposes of determining the eligibility of a corporation that has never been a C corporation or a successor to a corporation that has ever been a C corporation, if certain conditions are satisfied. Although the proposed regulations do not specifically state that such treatment is elective, the conditions require affirmative steps by the alien and the corporation. The conditions are:

- The character and source of any S corporation income included in the alien's income shall have the same character and source as if realized by the alien.
- The alien is treated as carrying on business within the United States through a permanent establishment if the S corporation would have been treated as carrying on business through such a permanent establishment (and as if the S corporation for this purpose had been a resident of the treaty country)
- Procedures similar to the withholding procedures under section 1446 applicable to partnerships with foreign partners are to apply.
- The alien and the S corporation must enter into a withholding agreement with respect to the alien's pro rata share of items of income of the S corporation.
- On a disposition of stock in the corporation, the alien will be treated as if he were a foreign partner disposing of an interest in a partnership. (This leaves open the question of whether the alien would be treated as disposing of his share of the underlying assets of the S corporation – the IRS has previously answered this question in the affirmative, but its position is controversial.[4])

When it issued the proposed regulations, the Service indicated it intended to publish a revenue procedure that would provide additional detail concerning the manner of applying these rules and the contents of the withholding agreement. For example, the revenue procedure was to prescribe the withholding requirements on current income (income attributable to a permanent establishment, income that is fixed or determinable, annual or periodical income, and income attributable to U.S. real property interests), and gain on sale of S corporation stock (including gain attributable to U.S. real property interests).

The road below is paved with unfulfilled IRS pledges of regulatory and administrative action. The cumbersome but favorable treatment of S corporations has not been finalized, leaving legions of dual resident aliens and their S corporations twisting in the wind. According to the most recent IRS business plan, finalization of the regulations has a low priority ("Timetable: Next Action Undetermined", to use the agency jargon).

One last comment on S corporations: The favorable treatment is not available to an S corporation with an individual shareholder who is a nonresident under the statutory test even if that shareholder satisfies the numerical aspects of the substantial presence test and only escapes under the foreign tax home/closer connection test.

[4] Rev. Rul. 91-32, 1991-1 C.B. 107.

Foreign tax home/closer connection test and tax treaty dual residence. It's worth noting the differences between the closer connection/foreign tax home test and the center of vital interests test under the tax treaty dual residence provisions. An alien resident in a treaty country may be entitled to establish nonresidence under either or both of these provisions. Leaving aside the CFC and S corporation issues noted above, should the alien care? We shall see.

Assume first that the permanent home test would not resolve the matter under a treaty because, as in many cases, the alien has a home in each country or, more rarely, neither. The treaty will provide that, where an individual is a dual resident, residence will be in the country where the individual's personal and economic relations (center of vital interests) are closer. The statutory exception says that the individual must have a foreign tax home and a closer connection to a foreign country than to the United States.

The center of vital interests provision of the treaty sounds similar to the foreign tax home (principal place of business)/closer connection (location of personal connections). Not quite. For one thing, the statute requires separate examination of the foreign tax home and the closer connection. The treaty looks at this on an overall basis and it may be possible to claim not to be U.S. resident under a treaty without having to deal with some of the technical requirements of the statutory test. But if this seems a little too subtle, and there are indications the IRS regards the practical application of the two tests as virtually identical, there are other significant differences.

Most importantly, a treaty can apply regardless of how many days the individual spent in the United States and regardless of the individual's immigration status. Certainly the Immigration and Naturalization Service in most cases might be expected to take a dim view of a green card holder who claimed that he was not a resident for tax purposes under a treaty. Perhaps the INS would argue that the green card holder had abandoned U.S. residence or never intended to take it up. We hope to look at the relationship of immigration and tax laws in a future issue. But for tax treaty purposes, the holding of a green card would only be relevant as one of a number of balancing factors to be weighed if the matter was being determined based on an evaluation of the center of vital interests, and would not be very persuasive at that, since in most such cases, the alien will also be a citizen or have residence privileges in the other country.

For the purposes of this article, another crucial difference between the statutory and treaty exceptions to U.S. residence is timing. The treaty will address overlapping periods of residence. The day the balance tips from one country to another, residence will shift. This can occur at any time during the year. By contrast, if the foreign tax home/closer connection test is satisfied, the alien escapes residence for an entire calendar year. Indeed, if the alien then becomes a resident in the following year, he or she will have a residency starting date which could be later than January 1.

An alien who can satisfy the foreign tax home/closer connection test, or indeed any leg of the day counting test, may nevertheless be able to escape tax residence in his or her country of origin for part of the year and undertake pre-immigration tax planning while a resident of nowhere. This is not possible under the dual residence provision of a treaty, where an honest alien will always be contending with the tax laws of one of the treaty partners. (Presumably a super aggressive alien might take inconsistent positions on the

application of the dual residence provision in dealings with two treaty partners – but this is not something that most professional advisors would or should feel comfortable in supporting.)

So When Does Residence Begin?

With the above detailed background, we can now try to answer the question of when residence begins. The residence rules require residence to be tested for each calendar year and individuals who satisfy either test are treated as resident for the whole year.[5] For individuals who have been continuously resident for a period of years, no great amount of analysis is required. However, the law provides special rules for newly resident individuals who were not resident *at any time* in the preceding calendar year. These individuals are treated as resident only for the portion of the year which begins on the residency starting date.

Substantial Presence Test. In the case of the substantial presence test, the residency starting date is the first day of presence in the calendar year in which the test is satisfied. Just for this limited purpose (*i.e.*, not for purposes of the day counting formula), the individual is not treated as present during any period for which he or she can establish a closer connection to another country than to the United States – no need to prove the existence of a foreign tax home. However, no more than 10 days of presence may be excluded in this way. The regulations make clear that this rule may refer to more than one period, so that an individual who was here for two or even more stays where the total for all such stays was 10 days or less would only be able to exclude the each such period. The regulations also make clear that taking advantage of the 10 days is optional, as the taxpayer must affirmatively establish the closer connection to a foreign country.

There is a regulatory trap here: The individual may not exclude any day that is part of a period where not all of the days in the period can be excluded. For example, suppose N stays in the United States for from February 1 through 11 and then returns on July 1 for the rest of the year. Suppose during those 11 days, he had a closer connection to his home country. Residence would begin on February 1, not February 11. Similarly, if an alien stayed from March 1 to March 4 and from April 10 to April 17, residence would begin on April 10. The four days in March could be excluded, but because not all the days in April could be excluded, none of them may be excluded.

Green Card Test. Under the green card test, residence for an alien who was not previously resident under the substantial presence test begins on the first day of presence in the United States under the status. (If he was already resident under the substantial presence test, then this rule does not apply.)

In the case of an individual who satisfies the substantial presence test, acquiring or coming to the United States under a green card will make no difference. However, applying for the green card will disqualify an individual from escaping residence based on the foreign tax home/closer connection test.

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[5] This is stated explicitly in section 7701(b)(1)(A)(i) for the green card test and it is the necessary consequence of section 7701(b)(1)(A) and (b)(2)(A)(i) so far as the day counting test is concerned.

So we have the basic rules for residency starting dates, but there are some additional issues to be considered.

Tax Treaty Dual Residence Provisions. If a taxpayer intends to rely on the dual residence provision of a treaty to escape residence, the taxpayer may never become a U.S. resident, at least for treaty purposes. But there may come a point when the individual becomes a U.S. resident, notwithstanding the treaty.

This may occur in one of two ways. First, the taxpayer may cease to be a resident of the other country entitled to rely on the treaty. Second, the taxpayer's circumstances may change in such a way that the treaty balance tips in favor of U.S. residence.

In the former case, U.S. residence will begin the minute treaty protection ceases. In the latter case, U.S. residence will begin when the balance tips. Either way, residence will begin on the date that treaty protection is no longer available. Treaty dual residence provisions do not appear to apply on a calendar year basis but rather on a day by day basis, although as a practical matter, the question will be analyzed with respect to the facts over a period of time. In many cases, a well advised taxpayer will have some control over the process of becoming a U.S. resident through the way the facts are presented to the Service.

Accelerating Residence by Election. There are several elections available to taxpayers who actively wish to become U.S. residents at an earlier date than might otherwise be the case. Why would they want this? One reason would be to permit the filing of a joint return, which requires the spouses to be resident for the entire year; another would be if the alien had U.S. source income taxed at a flat rate of 30% and would be subject to a lower effective rate if such income were taxable at regular graduated rates. However, the type of case where the most dollars would be at stake is where the alien had sustained losses or incurred deductions before what would otherwise be the residency starting date and the losses would not be deductible unless the alien were a resident. An example would be an alien whose property was expropriated and who later came to the United States as a refugee. (The timing of losses in an expropriation is a whole other topic.)

Section 7701(b)(4) allows an alien to make an election to be treated as resident during a year (the "election year") if he or she meets several requirements. The alien must not otherwise be resident in the United States within the election year or the immediately preceding calendar year. The alien must meet the substantial presence test for the calendar year following the election year. The alien must spend at least 31 consecutive days in the United States during the election year and must be present for 75% of the days in a "testing period" that begins with the first day of the 31 consecutive days and ending on December 31 of the election year. For this purpose, the alien is required to treat up to five days of absence from the United States during the testing period as days of presence. The election must be made on a tax return, but cannot be made until the substantial presence test has been met in the year after the election year.

Where the election is made, residence begins on the first day of the earliest testing period during the election year. In those cases where an alien is contemplating whether to take advantage of the election but wants to time the starting date, understanding these mechanical rules is essential.

Section 6013(g) allows a nonresident alien to elect to be treated as a resident for the whole of the taxable year (for most, but not all, couples, the taxable year will be the calendar year) if he or she was married to a U.S. citizen or resident on the last day of the year. The election remains in effect until revocation by either taxpayer, divorce, legal separation or termination by the IRS if the couple fails to maintain proper records. A couple may only make the election once.

Section 6013(h) allows an individual to elect to be treated as a resident for the whole taxable year if he or she was a nonresident alien at the beginning of the taxable year but a resident at the end of the year *and* the other spouse is a citizen or resident at the close of the year. A couple may make only one such election, even if they cease to be residents and resume residence in a later year.

In both cases, both members of the couple must make the election. There is nothing in either provision that explicitly states that the couple must file a joint return. Nevertheless, the elections are both placed within section 6013, which is the section that deals with joint returns and it would be a brave taxpayer that would file these elections as part of a separate return.

Section 6013(g) and (h) only apply for purposes of Chapters 1 (income tax) and 24 in relation to wage withholding. They do not apply, notably, for purposes of Chapter 3 (withholding), as to which see below.

Last and least, a few treaties allow students or trainees to elect to be treated as U.S. residents.

When Is a Resident Not a Resident?

There are circumstances in which an individual who is resident for most purposes of the income tax laws is not resident for all such purposes. These circumstances are most likely to arise round about the time residence begins.

Withholding. The United States has an extensive set of requirements for the withholding of tax on income of nonresident aliens. How is a nonresident alien defined for this purpose? Section 7701(b) applies for purposes of withholding but its operation is not entirely obvious in the case of an alien who is not a green card holder or in a year in which a treaty could override the result of section 7701(b). The substantial presence test may require residence to be determined based on facts that will not be known until the end of the year or even later. Determination of residence or nonresidence may be affected by a treaty claim or a first year election made in a tax return filed many months after the close of a taxable year. In the meantime, it seems reasonable to require that the individual be treated as nonresident for withholding tax purposes but the results can be decidedly odd.

This may not be a significant issue for withholding agents. They are allowed to rely on the form filed by an individual – W-8BEN for foreign persons claiming treaty benefits or nonresident status, subject to Chapter 3 withholding but not to back-up withholding; W-9 for persons claiming to be U.S. residents, who are not subject to Chapter 3 withholding

and will be subject to back-up withholding in limited circumstances (failure to provide a valid taxpayer identification number, IRS notice to payor, etc.).[6]

But what about the taxpayer? For example, an individual may begin the year as a nonresident but, by staying here for 183 days, can become a resident retroactive to the residency starting date. The residency starting date is the beginning of his stay in the year he became a resident, but the duration of the stay cannot be guaranteed at the outset of the stay. Can the alien file a Form W-8BEN to (a) claim a treaty rate reduction or (b) claim to be a nonresident, knowing perhaps that he or she was going to become a resident? And if not, can the alien file a Form W-9 and claim to be a resident not subject to chapter 24 withholding (or back-up withholding)?

The regulations ignore these tantalizing questions. Instead, they simply state that a nonresident alien individual means a person described in section 7701(b)(1)(B), which in turn says that a nonresident is someone to whom the green card test, the substantial presence test and the first-year election do not apply. But advisers to intending immigrants should give some thought to how to avoid unnecessary withholding. One way to narrow down the problems is as follows: If the taxpayer has a high degree of confidence as to what his or her status will be, the taxpayer can file a form (W-8BEN or W-9) or make a claim based on that status. It would be pretty awkward for the IRS to attack a taxpayer who claimed a status based on events that had not yet occurred if the events did in fact occur and the taxpayer has control over whether they did occur. But what about taxpayers who were not certain how long they were going to stay? For those of you who read through this article to get the really tough questions answered, we will have to disappoint you on this one. We simply don't have an answer.

We have already considered two other examples of the phenomenon of discontinuity between residence for substantive income tax purposes and for withholding purposes, namely the elections under section 6013(g) and (h). Under these elections, an individual is resident for purposes of Chapters 1 and 24, but not for purposes of withholding. It is easy to think of the two sections in the same way, but they actually operate quite differently. A section 6013(h) election will be made just once, most typically by a newly immigrated couple or a couple who were married during the year, one of whom was not a resident at the beginning of the year. It will be made well after the end of the year and will not be made again because, first, the statute allows it to be made only once, and in most cases the couple wouldn't need to make the election a second time even if it were possible because they will be resident for the full year without needing an election. So in the year covered by the election, it seems reasonable to treat the electing nonresident alien(s) as nonresident for purposes of withholding in the year covered by the election. A section 6013(g) election, on the other hand, is made with respect to an individual who is otherwise a nonresident at the end of the year. The election will then apply indefinitely in future years. While it would seem reasonable to treat the electing alien as nonresident in the first year of the election, one might reasonably ask why withholding status should not be based on the election after it has been made. The statute and the regulations do not

[6] Treas. Reg. §1.1441-1(b)(2)(i).

permit this, however, so that an alien who is not resident under section 7701(b) but is resident under section 6013(g) will be subject to withholding as a foreign person.

There is one last sting in the tail here: Despite the fact that the individual is treated as a nonresident alien for withholding purposes, the regulations under section 6013(g) and (h) require the election to include a treaty benefit waiver and the waiver appears to cover all treaty benefits, including limitations on withholding.[7] At least the maker of an unrevoked section 6013(g) election can file a Form W-8BEN to avoid back-up withholding and information reporting.

Source of Income Rules. It is sometimes necessary to determine the source of income based on residence of a payor or the taxpayer. Residence in these circumstances requires a look at more than section 7701(b). For example, under section 861(a), interest has a U.S. source if paid by a domestic corporation or a "noncorporate resident". Section 7701(b) seems to apply for this purpose where the borrower is an alien; but interest paid by a U.S. citizen resident abroad also has a foreign source and the regulations do not explain how to determine residence of a U.S. citizen.

Section 865(a) applies for determining the source of gains from sales of some classes of personal property. Gain is sourced according to the residence of the payor; but a resident is defined by section 865(g) to be a U.S. citizen or resident alien who does not have a tax home in a foreign country or a nonresident alien who does have a tax home in the United States. In these cases, we would assume that the tax home must de determine at the time of the sale, which means that once again the timing of an individual acquiring or giving up the tax home is important.

Other Taxes

Gift, Estate and Transfer Taxes. Section 7701(b) does not apply for the purposes of Subtitle B, which deals with the gift, estate and generation skipping taxes. In short, residence is determined based on a subjective test of domicile.[8] Dual residents may find relief under treaties, but the United States has entered into many fewer estate and gift treaties than it has income tax treaties. The dual residence provisions of our estate and gift tax treaties are similar but not identical to those in our income tax treaties.

Section 7701(b) does not apply for state tax purposes either. Immigration status and days of presence in the United States are not really helpful concepts in trying to determine residence in a state; and U.S. treaties generally do not apply for state tax purposes.

Instead, residence in a state is determined based on a patchwork of state rules, mostly subjective rules with the occasional rebuttable presumption in the case of presence in the state in excess of a minimum period of time. Perhaps the best description of state rules on income tax residence is C.S. Lewis' line in *The Horse and His Boy*: "Easily in but not easily out, as the lobster said in the lobster pot."

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[7] Treas. Reg. § 1.6013-6(a)(2)(v), cross-referenced in § 1.6013-7(a)(2).

[8] Treas. Reg. §§ 20.0-1(b)(1) (as amended in 1980), 25.2501-1(b) (as amended in 1983).

Almost all states will treat an individual as resident for state income tax purposes if that individual is domiciled in the state. California law, for example, provides that a "resident" includes: (1) Every individual who is in California for other than a temporary or transitory purpose and (2) every individual domiciled in California who is outside the state for a temporary or transitory purpose. There is a rebuttable presumption that an individual present in the state for nine months within a taxable year is a resident.[9] Massachusetts says that a "resident" or "inhabitant" is (1) any Massachusetts domiciliary, or (2) any non-domiciliary who maintains a permanent place of abode in Massachusetts who spends in the aggregate more than 183 whole or partial days of the taxable year there.[10] In New York, a resident individual means (1) a New York domiciliary, unless he maintains no permanent place of abode in New York, maintains a permanent place of abode elsewhere, and spends in the aggregate not more than 30 days of the taxable year in this state, or a non-domiciliary who maintains a permanent place of abode in New York and spends in the aggregate more than 183 days of the taxable year.[11] Several states, including California and New York have special rules for prolonged absences related to employment and/or service in the armed forces.

In the End

When does it all end? How can an alien, or even a citizen, exit gracefully? What if the alien leaves after a time, or a few times, in the immortal words of Monty Python? This will be the subject of a future article.

[9] Cal. Rev. & Tax. Code §§ 17614-6.

[10] Mass. Ann. Laws ch. 62, § 1.

[11] NY CLS Tax § 605 (2001)