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The Impact of the COVID-19 Pandemic on Tax Residence Rules

by Michael J.A. Karlin

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In this article, Karlin examines the definition of a resident alien under section 7701(b) in the context of the coronavirus pandemic.

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I. Summary

This article discusses the definition of a resident alien in section 7701(b) in the context of the coronavirus pandemic. It suggests that alien individuals should be allowed to exclude days of presence during the period of a natural disaster or a presidentially declared national emergency and that the medical condition exception should be expanded to deal with people affected by the coronavirus pandemic. The article also discusses whether the medical condition exception can apply to persons who are prevented from leaving the country because of the pandemic and whether it can also apply to a person other than the person who suffers from the medical condition, such as a caregiver or dependent.

I as well as my professional colleagues who have written to the U.S. government about this issue believe that Treasury has sufficient authority to issue this type of guidance, but to the extent Treasury considers it requires additional authority, Congress should provide that authority and direct Treasury to use it.

II. Background

A. Section 7701(b) Definition of Resident Alien

1. Principal tests.

The definition of resident alien found in section 7701(b) was enacted in 1984 and its implementing regulations were adopted in 1992. The definition applies for all purposes of the code, except subtitle B of title 26, which is concerned with the estate tax, the gift tax, the tax on generation-skipping transfers, and the tax on U.S. recipients of gifts and bequests from covered expatriates. Neither the code nor the regulations have been significantly amended in response to changes in the world economy, U.S. immigration law and practice, and U.S. tax laws. More than three and a half decades have passed since promulgation in 1984 and the time may have come to reconsider the definition. This article does not concern itself with broader issues but rather is focused primarily on the situation of aliens whose classification as "resident" or "nonresident" may be affected by the coronavirus pandemic.

Section 7701(b) provides that an individual will be treated as a resident alien for any calendar year if and only if that individual meets one of two tests.[1]

The first test, typically referred to as the lawful permanent resident test or more informally as the "green card" test, causes an individual who has been admitted as a lawful permanent resident in accordance with the immigration laws to be a U.S. resident for federal tax purposes.[2]

The second test, with which this article is concerned, is the substantial presence test, referred to informally as the "day-counting test."[3]

[1]Section 7701(b) applies for all purposes of the code except subtitle B (estate and gift taxes). The definition of residence is also relevant in determining whether an individual is a U.S. person for purposes of Bank Secrecy Act reporting (the foreign bank account report).

[2]Section 7701(b)(1)(A)(i) and (b)(6). The mere right to reside permanently in the United States, however great a privilege, may perhaps be too broad a threshold for treating an individual as a resident, but that is a topic for a different article.

[3]Section 7701(a)(1)(A)(ii) and (b)(3).

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The substantial presence test is relevant only to alien individuals who are not lawful permanent residents.[4]

2. The substantial presence test.

Under this test an alien individual is a resident for a calendar year if the individual is present in the United States for at least 31 days during the calendar year *and* the sum of (1) the number of days of presence in the calendar year, (2) one-third of the number of days of presence in the preceding calendar year, and (3) one-sixth of the number of days of presence in the second preceding calendar year totals 183 or more. This formula may be expressed in the form of an equation:

$$CY + PY_1/3 + PY_2/6 \geq 183$$

where CY is the number of days of presence in the current calendar year (the year being tested); PY_1 is the number of days of presence in the preceding calendar year; and PY_2 is the number of days of presence in the second preceding calendar year.

Nevertheless, an alien who has not been present in the current calendar year for at least 183 days is not treated as meeting the test if it is established that the individual has a tax home, as defined in section 911(d)(3), in a foreign country and has a closer connection to that country than to the United States.[5] The expression "tax home" refers to the individual's 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 the business, then at his regular place of abode in a real and substantial sense.[6] This exception is not, however, available if the individual had an application for adjustment of status pending or if the individual took other steps to apply for status as a lawful permanent resident.[7]

In effect, there are four categories of aliens:

Days Present in Current Calendar Year	Status	Exceptions
30 days or less	Nonresident	Statutory elections to be treated as resident (see reg. section 1.911-2(b) but not section 7701(b)(4))
Between 31 and 182 days *and* less than 183 days under the formula	Nonresident	Statutory elections to be treated as resident (see reg. section 1.911-2(b))
Less than 183 days but 183 days or more under the formula	Resident	Foreign tax home/closer connection Tax treaty provision (typically article 4)
183 days or more	Resident	Tax treaty provision only

B. Exempt Individuals and Medical Conditions

The code provides that some individuals will not be treated as being in the United States on any day that (1) the individual is an exempt individual,[8] (2) the individual is in transit between two foreign countries,[9] (3) the individual resides in Canada or Mexico and commutes regularly to and from employment in the United States,[10] or (d) the individual meets the medical condition exception described in more detail later.[11]

The exempt individual rules and the medical condition exception are the exceptions most relevant here. An individual meets the medical condition exception if that person was "unable to leave the United States on such day because of a medical condition which arose while such

[4] Also, there are three provisions available under which an individual can affirmatively elect to be treated as a resident: sections 6013(g), 6013(h), and 7701(b)(4). In general, those provisions are not addressed in this article.

[5] Section 7701(b)(3)(B).

[6] Reg. section 1.911-2(b).

[7] Section 7701(b)(3)(C) and (D)(i).

[8] Under section 7701(b)(5), an exempt individual is one who falls into specific temporary statuses applicable to foreign-government individuals, teachers, trainees, and students as well as professional athletes temporarily present to compete in a charitable sporting event (informally known as the "PGA exception"). This article is not generally concerned with this rule.

[9] Section 7701(b)(7)(C).

[10] Section 7701(b)(7)(B).

[11] Section 7701(b)(3)(D)(ii).

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individual was present in the United States."[12] Treasury regulations expand on this requirement.[13]

The government has historically interpreted the medical exception quite narrowly although, as pointed out below, this narrowness may not be wholly justified by the legislative history. It has also imposed procedural requirements which, for the past 30 years, at least one distinguished commentator has argued may be invalid.[14]

C. Effect of Income Tax Treaties on Residence

The United States has entered into numerous income tax treaties with other countries. The treaties almost always contain an article (usually article 4) titled "Fiscal Domicile" or "Residence," which addresses cases in which an individual is treated as a resident for the tax purposes of both treaty partners under their respective domestic laws, without regard to the treaty. In those cases, the treaties generally provide a descending hierarchy of tests that will determine the matter, but if none are decisive, the matter can be resolved by the competent authorities of the treaty partners. It is quite rare, in my experience, for a matter not to be resolved by recourse to the tests.[15]

III. The Effects of the Pandemic

A. Practical Inability to Leave the United States

Many aliens were in the United States when reports of the coronavirus first appeared; many others came to the United States before it became clear that drastic measures would be implemented to restrict or completely prohibit travel, particularly across national borders. It seems unnecessary to recount these events, which unfolded at breakneck pace beginning in January and in a manner most people have found confusing and disconcerting.

President Trump announced the first travel ban (for visitors from China) on January 31, and even required some Americans to be quarantined. Many other countries began announcing travel bans, border closings, and automatic quarantines in February. The U.S. ban on travel from continental Europe was made effective March 13, and from the United Kingdom March 17. Finding authoritative official information about restrictions can be daunting and the details in any case can shift from one day to the next; it is also well-known that officials on the ground in many countries (including the United States) are not always precisely following government rules, assuming they are clear in the first place, and this is also a significant deterrent to travelers.

The pandemic has arisen in the early part of the calendar year. (The day-counting formula uses the calendar year and residence is tested for the calendar year even when the tax year is not based on the calendar year.) It is reasonable to assume that many aliens who did not expect their stays in the United States to be extended are now unable to leave the country for a variety of reasons connected to the pandemic, including:

- Having tested positive for the coronavirus or being diagnosed with COVID-19, conditions which in some cases may have arisen before the alien entered the United States.
- Being quarantined because of having been exposed to other individuals carrying or suspected of carrying the coronavirus.
- Being unable as a legal or practical matter to return to the country in which they usually reside or to which they had planned to travel from the United States, because of factors connected to the pandemic, such as travel bans, travel restrictions, and closed borders, or unavailability of means of travel (such as canceled airline routes or refusal by airlines, bus lines, and shipping lines to carry specified passengers or categories of passengers). In some cases, and we have already encountered these situations,

[12] *Id.*

[13] Reg. section 301.7701(b)-3(c).

[14] Most recently in Bissell, "Tax Impact of Coronavirus on Nonimmigrant Aliens in the United States," 49(4) *Tax Mgmt. Int'l J.* (Apr. 10, 2020). The article lays out a series of both theoretical and practical issues which appear to be exacerbated by the particular circumstances of the coronavirus pandemic. *See also* Bissell, "U.S. Income Taxation of Nonresident Alien Individuals," BNA Tax Management Portfolio 6400-1st, III, E, 7.

[15] There is, however, one exception when the treaty does not work at all, namely the treaty with China (1984). The reason is that the treaty partners are required to resolve the matter through consultations. The treaty partners are to be guided by the rules in paragraph 2 of article 4 of the United Nations Model Double Taxation Convention between Developed and Developing Countries. These rules are essentially the same as those set out in a series of OECD models and U.S. model treaties. The problem is that it is rarely practical for the taxpayer to invoke the consultation procedure.

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families with different citizenships might have members who may be able to travel to another country but others who cannot.

An individual might not be personally subject to any of the foregoing, but these issues might affect dependents like minor children, spouses, elderly parents, or persons for whom an individual is a caregiver. In some cases, a caregiver whose assistance is necessary may be unable to travel or to render needed caregiving services for the same reasons.

B. Effect on the Substantial Presence Test

In all these cases, and others, the inability of aliens to leave the United States may, absent relief, cause them to become resident aliens under the substantial presence test.

As an extreme example, an individual present for 306 days in each of 2018 and 2019 but who previously expected to spend no more than 30 days in the United States in 2020 could already have satisfied the test if present for 31 days or more.[16] Many aliens are aware of the arithmetical rule that if they never spend more than 121 days per year in the United States, they cannot satisfy the substantial presence test and they plan visits to the United States accordingly. For example, an individual who carefully made sure he or she spent no more than 121 days in the United States in 2018 and 2019 could become a resident if that individual spent 123 days in the United States in 2020.[17]

The aliens in these examples might be able to show that they meet the exception for a foreign tax home closer connection or a tax treaty exemption. There are circumstances in which individuals might be unable to show that their personal and economic connections are in a single country other than the United States. Even assuming that an alien satisfied these conditions, he or she would be required to file a tax return that would not otherwise have been required.

C. Other Collateral Effects

The pandemic may have other potential collateral effects on the tax position of aliens. The following list of issues is not exhaustive and is meant only to be illustrative:

- The inability of an alien individual to leave the United States for an extended period may result in that person being required to engage in business activities in the United States that the alien would not have engaged in had he or she been able to return to the usual place of residence or work.

  For example, while in the United States, the alien may be required to engage in activities that would cause him to be treated as engaged in a trade or business within the United States, such as by teleworking, and may be required to do so to satisfy customers or the employer. These services could constitute the conduct of a trade or business within the United States and the related compensation could be effectively connected to that trade or business, requiring the filing of a tax return and possibly the payment of tax.[18] The United States should consider not counting as presence any days the alien is forced to remain in the country because of the pandemic. Consideration could also be given to waiving the limitation, found in treaties for the application of the dependent or independent services article, on presence in the United States during a 12-month period.[19]

- An alien individual's performance of services might also cause the employer to be considered to be engaged in a trade or business within the United States. Even if

[16] 31 + 306/3 + 306/6 = 184 days.

[17] 123 + 121/3 + 121/6 = 183.5 days

[18] Section 864(b)(1). The threshold is raised for residents of tax treaty countries so as to require that the foreign employer have a U.S. permanent establishment. While it is unlikely in most cases that the activities of an employee compelled to stay in the United States because of the pandemic could by themselves cause the employer to have a U.S. PE, the employer might already have a PE.

[19] Typically, this is 183 days but the numbers vary. *See* IRS, "Compensation for Personal Services Performed in United States Exempt From U.S. Income Tax Under Income Tax Treaties," Table 2.

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these activities did not produce income effectively connected to that trade or business, at the very least the employer might be required to file a U.S. income tax return.

- Under section 877A, an alien individual becomes a long-term resident potentially subject to mark-to-market rules and other expatriation-related rules set out in sections 877A and 2801 if he was a lawful permanent resident in eight of the 15 years ending in the year that he ceases to be a lawful permanent resident. The suspension of U.S. consular services, and the delays that will follow resumption of those services, could prevent an individual desiring to give up his status as a lawful permanent resident in time to avoid that status.[20] The question arises whether it would be appropriate to treat an individual as a covered expatriate in those circumstances.
- Under section 911, what effect will the pandemic have on the ability of U.S. citizens or residents to meet the requirements of the definition of a qualified individual, as a condition of excluding specified foreign earned income in computing their U.S. tax liability?
- Conversely, under some treaties a U.S. citizen cannot benefit from application of the treaty by the treaty partner unless she meets a test akin to the substantial presence test.[21]
- The possibility that an individual may become a resident under the substantial presence test puts into sharper relief an unresolved issue under the 2011 FBAR regulations, which the author has previously pointed out in this publication.[22] Those regulations provide that, for purposes of the FBAR filing requirement, in the case of an individual a resident of the United States includes an individual who is a resident alien under section 7701(b). The preamble to the 2011 regulations provides that "a legal permanent resident who elects under a tax treaty to be treated as a nonresident for tax purposes must still file the FBAR."[23] But the preamble does not address U.S. residents who satisfy the substantial presence test but who are dual resident taxpayers under reg. section 301.7701(b)-7(a)(1). One might draw a negative inference from the preamble that treaty nonresidents who do not have green cards do not need to file. But the problem is that the tax regulations state that a treaty only causes a nonresident to be so treated for purposes of substantive taxation and withholding and the IRS has interpreted this, it would seem, to require treaty nonresidents to file information returns, although it made an exception in the case of Form 8938, required by section 6038D. Neither FinCEN nor the IRS has ever clarified their view of how this rule applies in the context of FBARs. Forcing aliens who overstay to rely on a treaty may not get them out of having to file FBARs; at least, that may be the only safe course of action.

In general, aliens whose stay was prolonged by the coronavirus epidemic for whatever reason – actual illness, quarantine, inability to travel to their home country – but manage to leave before hitting the 183-day mark will be discouraged from returning to the United States for the rest of the year after, we hope, the pandemic has subsided. This cannot be good policy. As pointed out by the Florida Bar in a letter to the IRS, those aliens are exactly those whom the United States should be seeking to welcome back, because they use our airlines, our hotels, our restaurants, our places of entertainment, and our retailers. And they cannot use those facilities in the current environment.[24]

[20] Department of State, "Suspension of Routine Visa Services" (Mar. 20, 2020), announcing cancellation of all routine immigrant and nonimmigrant visa appointments as of March 20.

[21] *E.g.*, U.K.-U.S. income tax treaty (signed July 24, 2001; in force March 31, 2003), article 4(2).

[22] Karlin, "Now You See Them: U.S. Reporting Requirements for Tax Treaty Nonresidents," *Tax Notes Int'l*, July 16, 2012, p. 267, at 270; Karlin and Menzie, "Requesting Guidance for Treaty Nonresidents," *Tax Notes*, Sept. 7, 2015, p. 1115, at 1122.

[23] 76 F.R. 10234, 10238 (Feb. 24, 2011).

[24] Letter from the Florida Bar Tax Section to Peter H. Blessing, IRS Associate Chief Counsel (International) (Mar. 26, 2020) (requesting relief to tax residency rules from COVID-19).

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D. Residence for Transfer Tax Purposes

The rules for determining residence for estate tax purposes are different. Basically, a person is a resident if he is domiciled in the United States. Residence is not defined by statute, but for many decades regulations have provided that a resident is one who at the relevant time (date of death for the estate tax, date of the gift for the gift tax) had his domicile in the United States.

Domicile is a question of fact; there are no bright-line rules comparable to the rules of section 7701(b). A 19th century Supreme Court case made clear that "To constitute the new domicile two things are indispensable: First, residence in the new locality; and, second, the intention to remain there."[25] It would seem likely that an individual who previously was not domiciled in the United States would not become domiciled because of being detained in the United States by reason of the coronavirus pandemic, assuming that she did not intend to remain in the United States indefinitely (and that her intention in this regard did not change).

Estate of Nienhuys[26] is a 1952 Tax Court case about a Dutch citizen who came to the United States in 1940 and was unable to return home because of World War II. He obtained a green card, and died in 1946, but was found not to have become domiciled in the United States. While the case was decided on its facts, including plentiful evidence that the decedent had intended to return to the Netherlands and had never been comfortable in the United States, it clearly suggests that being unable to leave because of global conditions may not create the necessary intent to remain in the United States.

I would expect *Estate of Nienhuys*, despite its age, to control the approach of the IRS in dealing with the issue of the residence/domicile of an alien individual who is prevented from leaving because of the coronavirus, even if the individual is still in the United States on his or her date of death.

[25] *Mitchell v. United States*, 88 Wall. 350 (U.S. 1875), cited by the Tax Court in *Estate of Nienhuys v. Commissioner*, 17 T.C. 1149 (1952).

[26] *Estate of Nienhuys*, 17 T.C. 1149.

IV. What Should the Government Do?

A. In General

These are unusual times. The question is whether an alien individual who in normal circumstances would not have become or continued to be a resident under the substantial presence test (because he or she would have left before spending enough days to satisfy the test) should become a resident as a result of being unable to leave because of unforeseeable circumstances like the coronavirus pandemic.

Several professional colleagues and I have argued that the government should be able to craft a regulatory solution to the problem. The outlines of our proposed solutions follow. Although we believe that there is sufficient authority to solve the problem in most cases, Congress should grant Treasury the explicit authority to do so and to deal with any outlier cases, as well as the collateral issues described earlier.

The government might be inspired by the prompt action taken by the United Kingdom to clarify the interpretation of its rules on the topic, because the U.K. definition of residence partly keys off time spent in the United Kingdom in any given tax year.[27]

Since the author wrote to the government on March 22, a flurry of international activity has seen other countries address comparable issues under their own laws and the OECD has issued its own guidance on the interpretation of tax treaties and their application in the context of the coronavirus pandemic. In general, the guidance has been reasonably favorable to taxpayers, both individuals and the corporate sector. It seems that the U.S. government is considering some sort of relief, but the timing of any announcement is not yet clear.[28]

[27] *See* HM Revenue and Customs, "Residence: The Statutory Residence Test (SRT): Main Contents: Coronavirus (COVID-19)" (updated Mar. 23, 2020); Withers Worldwide, "How the Coronavirus Could Prejudice Your Tax Status and What to Do About It" (Mar. 20, 2020).

[28] *See, e.g.*, Kiarra M. Strocko, "Countries Relax Tax Residency Rules for Cross-Border Workers," *Tax Notes Int'l*, Apr. 6, 2020, p. 95; Stephanie Soong Johnston, "OECD Clears Up Cross-Border Tax Treaty Doubts Amid Virus Crisis" (Apr. 6, 2020); OECD, "Analysis of Tax Treaties and the Impact of the COVID-19 Crisis" (Apr. 3, 2020).

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B. Proposed Solutions — Regulatory

1. Expand the categories of exempt individuals.

The simplest approach would be to expand the category of exempt individuals for purposes of section 7701(b)(3)(D)(i) to include any individual present in the United States during a period designated as a natural disaster or in which a presidential declaration of a national emergency is in effect (or for the number of days Treasury may specify, such as up to 120, and subject to the conditions Treasury may specify). In effect, there would be a presumption that the individual was unable to leave because of the natural disaster or national emergency and days of presence during this period would not be counted.[29] The advantage of this approach is that it is simple and administrable.

2. Expand and clarify the medical condition exception.

If the simple approach were thought to be overbroad, a narrower approach would be to provide that an individual may claim the benefit of the medical condition exception for any day when the individual was "unable to leave the United States" "as a result of the prevalence of the coronavirus and COVID-19 in the United States or in the country of the taxpayer's tax home or habitual abode" because of "measures taken by the United States government or any State or any foreign government to combat the spread of the coronavirus and COVID-19" or "limitations on the ability to return to the country of the individual's tax home or habitual abode."

Each of the expressions in quotation marks could be defined. The definitions should be flexible and capable of applying to the multiple varieties of situations that have arisen in the context of the pandemic or future pandemics.[30] Longer term improvements to the medical condition exception should be undertaken but there is an immediate need concerning this virus.

Having said this, I think it should be made clear that in this particular instance, the government should accept that an alien individual need not personally be infected with the virus or be suffering from the disease. Rather, the government should acknowledge that the prevalence of the coronavirus and the disease constitute a medical condition that affects everyone in a particular country until it has been contained. Treasury and the IRS could provide for the issuance of announcements concerning this subject regarding the United States, any state, or any foreign country or geographic region.

"Limitations or restrictions on the ability to return" could include the unavailability of travel on a reasonably affordable basis by common carrier, including but not limited to the result of carrier restrictions for any person or category of persons to which the alien belongs.

As a general matter, there is an argument, explained in more detail later, that the medical condition exception should extend to the dependents and caregivers of an individual subject to a medical condition.

3. Modify application of the foreign tax home/closer connection test.

Consideration could also be given to modifying the foreign tax home/close connection test.

First, the 182-day limitation on use of the test could be eliminated in 2020 and in any subsequent year in which the pandemic (or a future pandemic) occurred, or during the pendency of a Treasury-designated period of a natural disaster or a presidential declaration of a national emergency.

Second, the requirement of section 7701(b)(3)(C)(ii) that the alien have not taken steps to apply for status as a lawful permanent resident could be waived.[31]

[29] The presumption could be limited so that it would not apply if the individual was a resident both in 2019 and in the year next following the year in which the IRS found that the pandemic was no longer prevalent or the national emergency was no longer continuing.

[30] It would be relatively simple to define a pandemic as a pandemic declared by the World Health Organization and determined by Treasury to be present in the United States and causing widespread government restrictions or practical limitations on international travel.

[31] I would not, however, recommend waiving the requirement of section 7701(b)(3)(C)(i) that the alien not have a pending application for adjustment of status. Those applications are normally made when the alien is already present in the United States and it is usually a requirement that the alien remain in the United States during the pendency of the application, unless permission to leave is obtained through a process known as advance parole. *See* U.S. Citizenship and Immigration Services, "Adjustment of Status."

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C. Treasury Authority

In addition to its general authority under the code to prescribe "needful rules and regulations,"[32] Treasury has authority to prescribe regulations as may be necessary or appropriate to carry out the purposes of section 7701(b).[33] Treasury could use this authority to construe the medical condition exception more broadly than has historically been the case, or simply to exclude from days of presence in the United States those days in 2020 designated by the Treasury secretary as a period of natural disaster or in any event after a presidential declaration of a national emergency.

The explanation of provisions in T.D. 8411 refers to congressional intent that the exception applies in very few cases. However, the explanation is not wholly accurate in this regard. The House report cited in the explanation does not refer to an intent to apply the exception in very few cases. Rather, it says that the House Ways and Means Committee "anticipates that few individuals will be physically unable to leave the United States." It is reasonable to assume that the committee did not anticipate an event such as the coronavirus pandemic or its multifarious effects, including quarantines, travel restrictions, lockdowns, and the virtual shutdown of the airline industry, and intended (or at least would not have opposed) the use of Treasury's regulatory authority in extraordinary situations, irrespective of the number of cases.

In fact, the statute does not explicitly state that the medical condition must be one from which the individual in question is suffering. While one might reasonably speculate that that was the intended rule, the statute could in fact be read to apply to an individual unable to leave because of a medical condition affecting someone else. This is at the very least reasonable policy and I wonder why, if this interpretation is possible, the government would resist the more compassionate view.

Most obviously, an individual might be a dependent or a caregiver. For example, assume an alien cannot leave because his child or elderly parent or spouse is suffering from a medical condition. A careful reading of the regulations and the explanation of provisions shows that nowhere is it explicitly stated that it is the individual whose residence is to be determined who must be the person suffering from the medical condition; even if that was what the drafters had in mind, it is perfectly possible to read all of the relevant materials without finding a single outright statement that only the person suffering from the medical condition can take advantage of the exception. In short, if the government believes it must abide by the language of the statute, the legislative history, the regulations, and the explanation of provisions, it is not precluded by the literal language of any of them from expanding the application of the medical condition exception to persons affected by someone else's illness.

If Treasury does not believe it can construe the medical condition exception as broadly as I propose, a legislative remedy would be needed. I recommend that it focus on a grant of regulatory authority to Treasury, rather than the enactment of detailed rules, but with a clear direction to exercise that authority.

Alternatively, Treasury may be able to find external authority in the Stafford Disaster Relief and Emergency Assistance Act of 1988[34] or other law that applies for emergencies. These possibilities remain to be investigated.

When the government really believes that something needs to be done, it can stretch its regulatory authority quite far, including in the international area. Examples abound, including many examples that pre-date the IRS and Treasury response to the numerous drafting imperfections of the Tax Cuts and Jobs Act. One may think, for example, of the passive foreign investment company computation rules introduced to make the Offshore Voluntary Disclosure Program administrable. Or perhaps the numerous notices and regulations dealing with corporate inversions.

[32] Section 7805(a).

[33] Section 7701(b)(11).

[34] Codified as amended at 42 U.S.C. section 5121.

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D. Legislative Relief

In any event, legislative action in this area would be helpful. Preferably, any provision should be self-executing so that relief not depend on the issuance of regulations, rather than risk dying on the vine, unused, as other priorities engage the limited resources of the regulation writers.

The simplest approach would be a specific direction to Treasury, by regulation or other guidance, to allow an alien individual to exclude days of presence during a period of a natural disaster designated by Treasury or in any event during a presidentially declared period of national emergency. If necessary, this could be formulated as a presumption that an alien individual was prevented from leaving the United States because of a medical, environmental, or other condition or circumstance that has been certified by the Treasury secretary as meeting the criteria for natural disaster relief, and also to make clear that the medical or other condition or circumstance can relate to one or more individuals other than the alien. Congress could indicate that its intent is for that grant to be construed broadly.

If Congress believes it needs to amend section 7701(b), then I recommend that the regulatory solutions proposed earlier be incorporated into the code. For example, I suggest that the following clause be added to section 7701(b)(3)(D):

> (iii) such individual was unable to leave the United States and return to a country in which the individual's tax home was located or where the individual had his habitual abode at a time when a widespread infectious disease was prevalent in either such country. [If possible, Congress could extend the proposed language to cover a broader range of situations involving medical, environmental, or natural disasters.] In determining whether an individual is described in the preceding sentence, account shall be taken of legal restrictions in the United States and such country, the reasonable availability and affordability of transportation, and the state of health of the individual and any "connected person," meaning a dependent or a person for whom the individual has significant caregiving responsibilities.

It would be helpful to clarify that an alien individual may claim the benefit of the medical condition exception based on the health of any connected person.

Treasury should also be given authority to waive the conditions to the foreign tax home/closer connection test as described earlier or to apply the test based on excluding days of presence in the manner previously described. ■

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