United States - Information on residency for tax purposes

Section I – Criteria for Individuals to be considered a tax resident

As a general matter, under the U.S. Internal Revenue Code (Code), all U.S. citizens and U.S. residents are treated as U.S. tax residents.

In order for a non-U.S. citizen (alien individual) to be treated as a resident alien, he or she must satisfy either the "green card test" or the substantial presence test. The U.S. residence tests are generally applied on an annual calendar year basis.

Green Card Test – An alien individual will meet the green card test if the individual is a lawful permanent resident (LPR) of the United States, under U.S. immigration law, at any time during the calendar year. An individual is considered a LPR if such individual has been given the privilege by the U.S. Citizenship and Immigration Services (USCIS) (or its predecessor organization) of residing permanently in the United States as an immigrant. An individual will generally have this status if USCIS has issued an alien registration card, also known as a "green card" to the individual. Unless the special rule for dual residents discussed below applies, an individual will continue to be treated as a U.S. resident under this test unless his or her LPR status is taken away by USCIS or is administratively or judicially determined to have been abandoned. The mere expiration of the actual "green card" document is not sufficient to terminate residence for tax purposes.

Substantial Presence Test – An alien individual will meet the substantial presence test if the individual is physically present in the United States for at least:

1. 31 days during the current calendar year; and

2. 183 days during the 3-year period that includes the current calendar year, and the 2 calendar years immediately preceding counting:

- *a. All days of physical presence in the United States during the current calendar year, and*
- *b. 1/3 of the days the individual was present in 1st preceding year; and*
- *c. 1/6 of the days the individual was present in 2nd preceding year.*

Generally, an individual is treated as present in the United States on any day he or she is physically present in the country at any time during the day. However, there are exceptions where certain days of physical presence may not count for purposes of the test. For information on the specific exceptions, see IRS Publication 519, U.S. Tax Guide for Aliens (http://www.irs.gov/pub/irs-pdf/p519.pdf).

First-Year Choice Election – An alien individual who is classified as a nonresident of the United States for the entire calendar year immediately preceding his or her first calendar year as a U.S. resident under the substantial presence test may nevertheless be able to elect to be treated as a U.S. resident for part of the immediately preceding calendar year by making a special election. For information on the specific requirements of the First-Year Choice election, see IRS Publication 519.

Dual residents – Some green card holders and other resident aliens may also be residents of a foreign jurisdiction with which the United States has an income tax treaty. If such "dual residents" would be residents of the other country under a tie-breaker rule in the treaty, they may compute their U.S. tax liability for all or part of a tax year as if they were nonresident aliens provided they notify the U.S. tax authority that this is what they are doing. If they fail to notify the U.S. tax authority, they will continue to be treated as U.S. residents for purposes of computing their U.S. tax liability.

U.S. citizens are not automatically treaty residents under a number of U.S. tax treaties. The treaties *provide additional requirements for those individuals to claim benefits as U.S. citizens from another country. U.S. citizens and other U.S. resident aliens may file IRS Form 8802, Application for United States Residency Certification, and Instructions (http://www.irs.gov/pub/irs-pdf/i8802.pdf), to obtain a letter from the U.S. Internal Revenue Service (IRS) certifying that the applicant is a U.S. resident. The certification of residence is used almost exclusively by U.S. taxpayers to demonstrate to another jurisdiction that they are eligible to obtain tax treaty benefits, and therefore, takes into account specific treaty rules that may affect whether a person is resident of the United States for purposes of that treaty.*

Relevant Tax Provisions include the following:

Code section 7701(b)

Treas. Reg. §§ 301.7701(b)-1(b) & (c); 301.7701(b)-3; 301.7701(b)-4(c)(3); 301.7701(b)-7.

Section II – Criteria for Entities to be considered a tax resident

Corporations – Generally a corporation is treated as a domestic corporation if it is created or organized under the laws of the United States, any State, or the District of Columbia. No other criteria related to place of management will cause a corporation to be domestic. There are, however, specific statutory provisions that treat certain foreign corporations as domestic. Some of these statutory provisions apply for all purposes of the Code, such as sections 269B, 953(d), 1504(d), and 7874 (some are elective and some involuntary).

Domestic corporations are U.S. tax residents, regardless of whether they are also residents of a foreign jurisdiction. If a corporation is a dual resident of the United States and a treaty jurisdiction, a tax treaty may contain a so-called tie-breaker rule to determine the sole jurisdiction of the corporation for treaty purposes. The determination of its treaty residence will not affect its status as a domestic corporation.

Check-the-box regulations – The check-the-box regulations list certain domestic business entities that are considered "per se" corporations (per se corporations are always treated as corporations for U.S. federal tax purposes and cannot elect to be treated otherwise). Treas. Reg. §301.7701-2(b). They include domestic entities formed under a Federal or State statute that refers to the entity as incorporated or as a corporation, and insurance companies. It also includes any entity that is chartered in both the United States and a foreign jurisdiction, if the foreign chartered entity is on the list of foreign entities that are per se corporations or on the list of domestic entities that are per se corporations. Domestic business entities not on the list of per se corporations in Treas. Reg. §301.7701-2(b), such as limited liability companies, default into partnership status if they have two or more owners and into disregarded entity status if they have one owner. Both partnerships and disregarded entities are treated as fiscally transparent entities, as discussed further below. Within some limits, these business entities are eligible to elect to change their classification from corporate to fiscally transparent status (and vice versa) under Treas. Reg. §301.7701-3(c). This election is colloquially referred to as "checking the box." For further information on taxation of limited liability companies, see IRS Publication 3402 (http://www.irs.gov/pub/irs-pdf/p3402.pdf). If an entity elects into or out of fiscally transparent status, certain transactions are deemed to occur with respect to the entity and / or its owners that are discussed in detail in Treas. Reg. §301.7701-3.

Entities that are not on the list of per se corporations but that are also treated as corporations include, but are not limited to, a publicly traded partnership described in section 7704 of the Code (subject to certain exceptions), a charitable or other tax exempt organization (formed as a company or trust) under section 501(c) of the Code, a regulated investment company (RIC) as defined in section 851 of the Code, a real estate investment trust (formed as a corporation, trust or association) (REIT) as defined in section 856 of the Code, and a real estate mortgage investment conduit (REMIC) as defined in section 860D of the Code.

Partnerships – Generally a partnership is treated as a domestic partnership if it is created or organized *under the laws of the United States, any State, or the District of Columbia. With the exception of publicly traded partnerships, an entity classified as a partnership is fiscally transparent. Thus, the residence of a partnership has no bearing on whether its income is subject to U.S. tax; rather, tax is imposed on each partner of a partnership in accordance with each partner's distributive share of partnership income, and each partner's status as a nonresident or resident of the United States (e.g., as nonresident alien or U.S. citizen, as a foreign corporation or domestic corporation). Similarly, because disregarded entities are also fiscally transparent, the residence of the disregarded entity has no bearing on whether its income is subject to U.S. federal tax; rather, tax is imposed on the disregarded entity's sole owner in the state in which the owner is resident.*

Trusts – Sections 7701(a)(30)(E) and 7701 (a)(31) of the Code and regulations thereunder collectively define whether a trust is domestic by reference to whether a court within the United States is able to exercise primary supervision over the administration of the trust, and whether one or more U.S. persons have the authority to control all substantial decisions of the trust.

A trust may be either fiscally transparent for U.S. tax purposes or taxable as an entity in its own right, depending primarily on the terms of the trust document. A "grantor trust" (described in sections 671 – 679 of the Code) is not a taxable entity, and thus not a tax resident. Rather it is treated as owned by the grantor (generally a person who has contributed property to the trust) if the grantor has retained certain statutory powers over the trust, or holds one or more specified powers to control the trust or portion of the trust. See sections 671-678 of the Code. Foreign trusts with U.S. grantors are fiscally transparent if the trust may benefit any U.S. person. See section 679 of the Code. In the case of a grantor trust, the owner takes into account all items of income, deductions, and credits of the trust as if they were his own, and the owner's residence status determines whether the trust's income will be taxed as the income of a resident in the United States.

So-called "simple trusts" are also not tax residents. In general, a trust that is required to distribute all of its income currently, and that does not provide for amounts to be paid, set aside, or used for charitable purposes is considered a "simple trust". See sections 651-652 of the Code.

A trust that can accumulate income, and is not required by the terms of the trust document or other relevant documents, to distribute all of its net income to beneficiaries is referred to as a "complex" or "discretionary" trust. See sections 661-662 of the Code. A complex trust generally is considered a taxable entity, and is a tax resident if the trust is a domestic trust. It files a tax return reporting its worldwide income, but may deduct amounts earned in that year (limited to distributable net income or DNI) to the extent such amounts are distributed to trust beneficiaries in that year.

In the case of both simple and complex trusts, distributions of income to beneficiaries that are not taxed in the trust are income of the beneficiaries and are taxed in accordance with their residency and citizenship. Section 61(a)(15) of the Code.

Pension trusts, in particular section 401(a) of the Code qualified pension trusts, which must be domestic, are considered to be tax residents, although generally exempt from tax on their gross income if all relevant requirements of the Code are met.

Estates – A domestic estate is a tax resident, liable to tax on its worldwide income in the same manner as a trust, while it is in existence. Section 641 of the Code. Generally that period is limited in time, since the executor of a decedent's estate must file a tax return within a prescribed time following the death of the decedent, which effectively terminates the existence of an estate as a separate taxable entity. There is no simple statutory definition of the term "foreign estate," and a variety of factors have to be taken into account in determining whether an estate should be treated as "foreign" for this purpose. These include, among others, the situs of the estate assets, the location of the estate's domiciliary administration, and the nationality and residence of the domiciliary personal representative. Neither the nationality of the decedent nor that of the estate's beneficiaries is dispositive.

See also IRS Form 8802, Application for United States Residency Certification, and Instructions (http://www.irs.gov/pub/irs-pdf/f8802.pdf)). This application form is used to obtain a letter from the U.S. Internal Revenue Service (IRS) certifying that the applicant is itself a U.S. resident, or if the applicant is fiscally transparent, that one or more of its owners is a U.S. resident. The certification of residence is used almost exclusively by U.S. taxpayers to demonstrate to another jurisdiction that they are eligible to obtain tax treaty benefits, and therefore, takes into account specific treaty rules that may affect whether a person is resident of the United States for purposes of that treaty.

Relevant Tax Provisions include the following:

Code §§ 7701 (a)(1)-(5), (30) and (31). Code §§ 269B, 953(d), 1504(d), and 7874

Treas. Reg. §§ 301.7701-1 through -5, 301.7701-7

Section III – Entity types that are as a rule not considered tax residents

Partnerships (other than publicly traded partnerships), subchapter S corporations, grantor trusts, simple trusts, and common trust funds under section 584 of the Code are fiscally transparent entities for purposes of U.S. federal tax law. In general, a business entity that is domestic and not a per se corporation will default into either disregarded entity status (if one owner) or partnership (if more than one owner) unless it elects to be treated as a corporation. If it makes the election to be a corporation, it will be liable to tax as a resident for treaty purposes. A foreign business entity that is not a per se corporation (regulations list foreign per se corporations) may also default or elect to be treated as a disregarded entity or partnership. Disregarded entities and partnerships are fiscally transparent for U.S. tax purposes. For these purposes, fiscal transparency means that no income tax is imposed on or collected from the entity, and the owner or owners of the entity separately take(s) into account on a current basis their share of such entity's income, whether or not distributed, and the character and source of the income to the owner are determined as if the income was realized directly by the owner or owners. As discussed above, a fiscally transparent or flow-through entity may be a U.S. tax resident.

An entity that is fiscally transparent for U.S. tax purposes should not be denied treaty benefits on income derived from a foreign country so long as the person who takes into account the income derived through the fiscally transparent entity is a U.S. tax resident.

See also IRS Form 8802, Application for United States Residency Certification, and the Instructions (http://www.irs.gov/pub/irs-pdf/i8802.pdf), as discussed in Section II, above.

Section IV – Contact point for further information

Deputy Commissioner (International)
Large Business and International Division
Internal Revenue Service
1111 Constitution Avenue, NW
Routing M4-365
Washington, DC 20224
Attn: TAIT (Treaty Assistance and Interpretation Team)