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COVID-19 **UPDATE**

IRS Issues New Guidance Addressing COVID-19 Travel Disruptions and the Impact on U.S. Tax Residency

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In our recent advisory—[COVID-19 and the Unintended Resident; the Good, the Bad, and the Ugly](#)—we alerted non-U.S. citizens unable to leave the United States due to COVID-19 travel disruptions of the potential tax implications of their unintended stay in the country. The IRS apparently heard the call and recently issued Revenue Procedure 2020-20 that provides guidance and relief for foreign individuals and corporations as it pertains to U.S. tax residency.

Background – The Physical Presence Trap

Non-U.S. citizens prevented from leaving the United States may unintentionally become U.S. tax residents because it is generally based on the number of days they are physically present in the U.S. The longer someone stays, whether due to COVID-19 or other reasons, the greater the likelihood they will exceed the day-count threshold that can trigger U.S. tax residency.

As discussed in our last advisory, this residency test is based on the number of days in the U.S. for the current year plus a fraction of the number of days in the U.S. from the two preceding years. This day-count calculation is called the “substantial presence test”. For more details, refer to [COVID-19 and the Unintended Resident; the Good, the Bad, and the Ugly](#).

New IRS Guidance

IRS Revenue Procedure 2020-20 (the “Rev. Proc.”), issued on April 21, 2020, acknowledges the COVID-19 travel disruptions regardless of a person’s medical condition. It provides that an “**Eligible Individual**” who intended to leave the U.S. during their “**COVID-19 Emergency Period**” but was unable to do so because of “**COVID-19 Emergency Travel Disruptions**” may exclude their COVID-19 Emergency Period when applying the substantial presence test. Importantly, there is no requirement that the person prove or attest that he or she was infected with COVID-19, so this new guidance also provides relief for individuals remaining in the country to care for an infected family member and is further described, below.

The COVID-19 Emergency Period is a single period of up to 60 consecutive days selected by an Eligible Individual. The 60-day period must start between February 1, 2020 and April 1, 2020, during which the individual is present in the U.S. The term “Eligible Individual” means someone who:

1. Was not a U.S. resident at the end of the 2019 tax year;
2. Is not a lawful permanent resident at any point in 2020;
3. Is physically present in the U.S. on each of the days of the individual’s COVID-19 Emergency Period; and
4. Does not become a U.S. resident in 2020 due to their days of presence in the United States outside of the individual’s COVID-19 Emergency Period (i.e, by applying the Substantial Presence Test).

Example: someone who moves to the U.S. in the second half of 2020 and then activates his or her Green Card may not exclude any of their days of U.S. presence due to COVID-19 in early 2020 and may become a U.S. tax resident earlier than expected.

The term “COVID-19 Emergency Travel Disruptions” means travel disruptions suffered by individuals, regardless of whether they were infected with the COVID-19 virus. These include those who:

1. Become severely restricted in their movements, including by order of government authorities;
2. Are restricted due to canceled flights or other forms of transportation disruption, shelter-in-place orders, quarantines, or border closures; or,
3. Could travel but felt unsafe doing so during the COVID-19 Emergency due to recommendations to implement social distancing and limit exposure to public spaces.

An Eligible Individual will be presumed to have intended, but was unable, to leave the U.S. on any day during the individual's COVID-19 Emergency Period, unless they applied or took steps to obtain a Green Card. This clarity relieves the individual from providing the IRS with the different types of periods during the emergency when he or she may or may not have intended to leave the U.S.

In addition, an Eligible Individual will be presumed unable to leave the U.S. for purposes of the Substantial Presence Test on any day during their COVID-19 Emergency Period.

Finally, any days during the COVID-19 Emergency Period where the individual was unable to leave the U.S. due to COVID-19 travel disruptions will also not be counted in determining eligibility for tax treaty benefits with respect to employment income or the performance of other dependent personal services within the U.S.

Important: The exception afforded by this new Revenue Procedure may be useful to a significant number of non-U.S. citizens currently or recently confined to the U.S., but it does not apply to everyone.

To claim the exception, Eligible Individuals who are required to file an IRS Form 1040-NR (U.S. non-resident tax return) for 2020 (taking into account the application of the new Revenue Procedure) must claim the COVID-19 Medical Condition Travel Exception by attaching IRS Form 8843 to their Form 1040-NR. There is no need for a physician's statement or certification when claiming the exception.

Eligible Individuals who are not required to file a 2020 Form 1040-NR are not required to file Form 8843 to claim the COVID-19 Medical Condition Travel Exception, but they should still retain all relevant records to support their reliance on the Revenue Procedure and be prepared to produce supporting records and complete a Form 8843 if requested by the IRS.

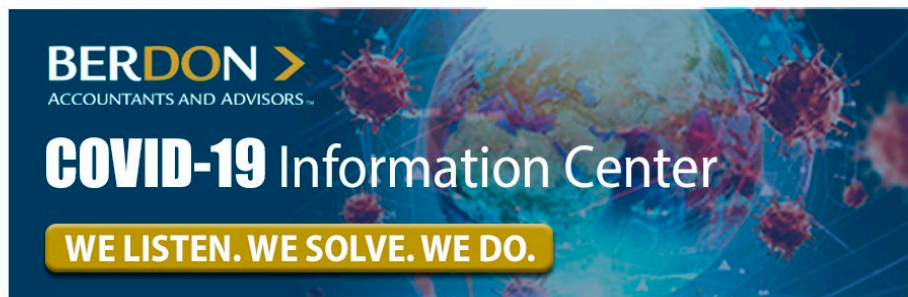
Lastly, the IRS provided guidance that individuals who qualify for other exceptions to the Substantial Presence Test, such as the "closer connection" exception, may claim the COVID-19 Medical Condition Travel Exception in addition to, or instead of, other available exceptions, or they may choose to claim all exceptions for which they are eligible.

Conclusion

The Rev. Proc. provides significant and welcome relief for many non-U.S. residents who were prevented from leaving the U.S. due to COVID-19. An individual who wishes to rely on the Revenue Procedure must review and prepare **evidence** of the facts establishing his or her eligibility for the exception (including the COVID-19 Emergency Travel Disruptions he or she experienced), and ensure that the filing requirement rules are satisfied.

If you have any questions on this matter, contact:

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