

Becoming a US Person amid Coronavirus

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Amid the Coronavirus, people are doing all they can to keep safe and sound. However, if you are one of those who are travelling, you are very likely to be trapped in a foreign country for longer than you planned. Other than having to stay in a hotel, being away from the family, and immigration issues, you might also have US tax issues if you happen to get stuck in the United States.

The United States is one of few countries that still taxes its citizens and permanent residents (“US green card holders”) on their worldwide income. Further, a non-US citizen or non-green card holder can be treated as a US income tax resident by virtue of spending too much time in the United States (meeting the so-called “substantial presence test”) and therefore similarly subject to US federal income tax on his or her worldwide income.

An individual will meet the substantial presence test and thus be treated as a US tax resident if **(1)** he is physically present in the United States on at least 31 days during the calendar year; and **(2)** the sum of the number of days on which the individual is considered to be present in the United States in the current calendar year plus 1/3 of the days spent in the first preceding year and 1/6 of the days spent in the second preceding year equals or exceeds 183 days. As such, generally, one way to avoid inadvertently becoming a US Person is to monitor the amount of time one spends in the United States.

However, in light of the worldwide lock down, a non-citizen and non-green card holder individual might be forced to spend more time in the United States. When the result of the formula is getting closer to 183, what can you do to avoid becoming a US income tax resident?

If an individual does get sick in the United States and is receiving treatment, for the substantial presence test purposes, days are generally excluded from the calculation. However, the medical condition must arise while the individual is present in the US and the individual can only stay for a reasonable period of time after the treatment is completed.

A person who meets the substantial presence test can nonetheless avoid the classification as a US income tax resident by qualifying for an exception. One such exception is known as the “closer connection exception” and the other as the “treaty tie-breaker exception.” An individual would need to be a tax resident in a jurisdiction that has an income tax treaty with the US (such as the People’s Republic of China) to be able to use the treaty tie-breaker exception. Unfortunately, there is no income tax treaty between the United States and Hong Kong, SAR. However, the closer connection exception does not require residence in a treaty jurisdiction.

To be able to invoke the closer connection exception, the individual **(1)** must be present in the United States for fewer than 183 days in 2020; **(2)** can establish that during 2020 the individual has a tax home in a foreign country and **(3)** can establish that during 2020 the individual has a closer connection to one foreign country in which the individual has a tax home than to the United States.

The individual who invokes the closer connection exception is required to file the IRS Form 8840 by the annual tax filing due date (generally April 15 of 2021 for the 2020 tax year, but an automatic 6 month extension is available).

Thus, for non-US citizens and non-green card holders stuck in the United States during these trying times, it is still important, in addition to staying safe and sound, to monitor the days in the United States and understand what filings need to be made to be able to alleviate the undesirable and unwanted consequences of Coronavirus.

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