

## International Tax Insights

# IRS May Not Provide Additional Assistance to Foreign Travelers Affected by COVID-19

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One of the more difficult tax issues caused by the COVID-19 pandemic has been how to determine the tax residence of individuals who are stuck in a country because of travel restrictions, as well as the businesses that employ them. The rules relating to tax residency generally hinge on the idea that the location of the individual and where they perform work is a choice, but the pandemic has limited that choice.

The IRS provided clear guidance to exclude time spent in the U.S. because of the pandemic, but only for 60 days. As travel restrictions continue and the 60-day period having expired, surely the exception would be extended? Perhaps not.

### Initial IRS Guidance

Almost immediately after travel restrictions intensified in March 2020, tax practitioners began asking about how the IRS would apply residency rules to individuals and businesses. In April, the IRS provided guidance in two revenue procedures and an FAQ. For foreign individuals not otherwise resident in the U.S., up to 60 consecutive calendar days of U.S. presence were presumed to arise from travel disruptions caused by the COVID-19 emergency and would not be counted for purposes of determining U.S. tax residency. Further, certain U.S. business activities conducted by a nonresident alien or foreign corporation or partnership would not be counted for up to 60 consecutive calendar days in determining whether the individual or entity is engaged in a U.S. trade or business or has a U.S. permanent establishment, but only if those activities would not have been conducted in the United States but for travel disruptions arising from the COVID-19 emergency. (Prior article with full discussion of these notices can be [found here.](#))

This 60-day period was the “COVID-19 emergency period.” This period could begin anywhere between February 1 and April 1, but in no instance could last longer than 60 days. Thus, even those choosing the latest possible start date have seen their COVID-19 emergency period expire.

### IRS Guidance Updates

In June, the IRS further clarified that income earned in the U.S. during the COVID-19 emergency period would also not be subject to gross basis tax of U.S. source income of a nonresident alien, either. However, that guidance did nothing to expand the COVID-19 emergency period, despite the travel restrictions remaining in place.

The IRS has asked those affected to maintain contemporaneous documentation of their inability to travel, and thus that their presence in the U.S., as well as the work performed for those companies in the U.S, was only due to the COVID-19 emergency. Thus, it seemed reasonable to assume that the IRS would eventually extend the COVID-19 emergency period in its guidance.

However, an IRS attorney advisor, Jim Wang, recently said in a panel discussion that “We are not considering extending that relief, but we are continuing to monitor the situation.” Thus, foreign individuals stranded in the U.S. and those who employ them cannot simply assume that more relief is forthcoming.

## Action Items

Given these recent IRS statements, it's incredibly important for foreign individuals and companies with employees or executives in the U.S. to consider the potential impact of continued presence in the United States, including potential tax filings and tax liabilities. Individuals will need to consider the likelihood of residency under the "substantial presence test" by projecting the number of days they will spend in the U.S. in 2020, and consider whether any exceptions besides the 60-day grace period provided might reduce that number for tax purposes. Companies will need to consider whether the activities of still-stranded employees or executives rise to the level of a U.S. trade or business or permanent establishment, depending on the test that applies to them.

It's also worth noting that the U.S. is not alone in potentially claiming residency for those present because of COVID-19. We have become aware that other countries are looking to impose resident taxation on those unable to travel because of COVID-19. Thus, considerations of the tax residency impact of travel disruptions should not be limited to those stuck in the U.S., but consider stranded employees and executives worldwide.

For example, consider a UK company with no connection to the U.S. except an executive who is stranded in the U.S. in March and decides to remain there for the quarantine. If that executive has not yet been able to (or has not chosen to) return to the UK, he/she will be at risk of creating U.S. residency based on the number of days he/she stays in the U.S. past the grace period, which ended sometime in May. The company will have to consider whether the activities of the executive create a U.S. trade or business for the UK company. If the individual and the company are subject to tax in the U.S., they will have to consider how that interacts with their taxation in the UK, who likely still considers the individual subject to tax there and will certainly consider the company to be so. Consideration should be given now to avoid surprises at tax time.

## Contact Us

As always, if you need any assistance, please reach out to your PKF O'Connor Davies client service team, or to one of the authors. We are here to help.

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