



# GMS Flash Alert

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## United States - COVID-19 Relief for Nonresidents Remaining in United States

On April 21, 2020, the U.S. Internal Revenue Service (IRS) issued an advance version of Rev. Proc. 2020-20,<sup>1</sup> which provides relief for certain nonresident individuals who, but for COVID-19-related emergency travel disruptions, would not have been in the United States long enough during 2020 to be considered resident aliens under the substantial presence test, or would not have become ineligible for treaty benefits in relation to dependent personal services income due to overstaying the time limitation related to such benefits. The IRS also issued a set of “frequently asked questions” (FAQs) providing relief for certain U.S. business activities conducted by a nonresident or foreign corporation.<sup>2</sup>

### WHY THIS MATTERS

This guidance from the IRS may provide welcome relief to individuals whose departure from the United States has been delayed by COVID-19-related emergency travel disruptions, and who were concerned that their extended presence in the United States could cause them to become taxable as U.S. residents and/or to lose the expected benefits of an income tax treaty provision that enabled them to exclude their wage income from U.S. income tax.

The revenue procedure effectively permits eligible individuals to disregard a period of up to 60 days of presence in the United States when calculating whether they meet the substantial presence test and/or their eligibility under the Dependent Personal Services or Income from Employment article of an income tax treaty, subject to certain conditions.

### Relief from the Substantial Presence Test

#### Background

Individuals other than U.S. citizens and green card holders can become U.S. tax residents if they meet the substantial presence test (SPT).<sup>3</sup> The SPT is met if such individuals are physically present in the United States for 183 days or more during a calendar year, counting all the days of the current year, 1/3 of the days in the previous year, and 1/6 of the days in the year before that, if the person was present in the United States for at least 31 days in the current year. There is a

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medical condition exception to the SPT,<sup>4</sup> which provides that an individual is not treated as present in the United States on days when the individual intended to leave the United States, but was unable to do so because of a medical condition that arose while the individual was present in the United States.

## **Who Is Eligible for Relief under the Revenue Procedure?**

The relief introduced by the revenue procedure is available to any 'eligible individual.' An eligible individual is any non-U.S. citizen (1) who was not a U.S. resident at the close of the 2019 tax year, (2) who is not a green card holder at any point in 2020, (3) who is present in the United States on each of the days of the individual's 'COVID-19 Emergency Period' before applying the relief introduced by the revenue procedure, and (4) who does not become a U.S. resident in 2020 due to days of presence in the United States outside of the individual's 'COVID-19 Emergency Period.' The COVID-19 Emergency Period is a single period of up to 60 consecutive calendar days selected by an eligible individual starting on or after February 1, 2020 and on or before April 1, 2020, during which the individual is physically present in the United States on each day.

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## **KPMG NOTE**

For purposes of the revenue procedure, an eligible individual will be presumed to have intended to leave the United States (but to have been unable to do so) on any day during their COVID-19 Emergency Period of up to 60 days. This presumption does not apply if the individual has applied, or otherwise taken steps, to become a green card holder.

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## **How Relief Works for Individuals Who Intended to Leave the U.S. but Have Been Unable to Do So**

The revenue procedure permits any eligible individual who intended to leave the United States during their COVID-19 Emergency Period (defined above), but was unable to do so because of COVID-19 emergency travel disruptions (which include canceled flights and disruptions to other forms of transportation, shelter-in-place orders, quarantines, and border closures), to exclude this period of up to 60 days for purposes of applying the SPT.

Hence, for purposes of calculating whether any eligible individual meets SPT in 2020, the COVID-19 emergency (which is defined to mean the global outbreak of the COVID-19 virus) will be considered a medical condition that prevented the eligible individual from leaving the United States on each day during the individual's COVID-19 Emergency Period and, as generally required by the medical condition exception as set out in the Treasury Regulations, will not be treated as a pre-existing medical condition.

## **Relief for Dependent Personal Services under Income Tax Treaties**

Most U.S. income tax treaties exempt income from employment (or other dependent personal services) if, in addition to meeting certain other conditions, the recipient is present in the United States for no more than 183 days in any twelve-month period that begins or ends in the relevant taxable year. (The duration of this period and how it is calculated can differ in certain treaties.) For purposes of computing days of presence in the United States under this type of test, days on which an illness prevented the individual from leaving the United States are not counted.

The revenue procedure provides relief to individuals who might otherwise lose their eligibility for this exemption because COVID-19 emergency travel disruptions prevented them from leaving the United States. It provides that, in determining an individual's eligibility for treaty benefits with respect to income from employment or the performance of other dependent personal services within the United States, any days of presence during the individual's COVID-19 Emergency Period (as described above) on which the individual was unable to leave the United States due to COVID-19 emergency travel disruptions (as described above) will not be counted.

For purposes of this relief, an individual will be presumed unable to leave the United States on any day during the individual's COVID-19 Emergency Period.

## Procedures for Claiming Relief

Individuals claiming the COVID-19 medical condition travel exception in relation to SPT should do so by attaching Form 8843, *Statement for Exempt Individuals and Individuals with a Medical Condition*, to their Form 1040-NR (if required) and stating on that form that they are claiming this relief.

Individuals seeking exemption from withholding on income from dependent personal services pursuant to a U.S. income tax treaty in accordance with this revenue procedure, should provide the employer or other withholding agent a Form 8233, *Exemption From Withholding on Compensation for Independent (and Certain Dependent) Personal Services of a Nonresident Alien Individual*, certifying that the income is exempt. However, if the withholding agent currently treats the income as exempt based on a previously submitted Form 8233, it is not necessary to provide an additional Form 8233. The form should be completed to state that the individual is claiming the COVID-19 medical condition travel exception and should specify the individual's COVID-19 Emergency Period.

## IRS FAQs

Lastly, the IRS released a set of [FAQs](#) providing that certain U.S. business activities conducted by a nonresident alien or foreign corporation will 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 (USTB) or has a U.S. permanent establishment (PE), but only if those activities would not have been conducted in the United States but for travel disruptions arising from the COVID-19 emergency.

Text of the FAQs:

***Question 1: Will a nonresident alien or foreign corporation, not otherwise engaged in a USTB, be treated as engaged in a USTB as a result of services or other activities conducted by one or more individuals temporarily present in the United States if, but for COVID-19 Emergency Travel Disruptions, those services or other activities would not have been conducted in the United States?***

***Answer:*** A nonresident alien, foreign corporation, or a partnership in which either is a partner (Affected Person) may choose an uninterrupted period of up to 60 calendar days, beginning on or after February 1, 2020, and on or before April 1, 2020 (the COVID-19 Emergency Period), during which services or other activities conducted in the United States will not be taken into account in determining whether the nonresident alien or foreign corporation is engaged in a USTB, provided that such activities were performed by one or more individuals temporarily present in the United States and would not have been performed in the United States but for COVID-19 Emergency Travel Disruptions. For purposes of these FAQs, an "individual temporarily present in the United States" means an individual who is present in the United States on or after February 1, 2020, and on or before April 1, 2020, and is a nonresident alien, or a U.S. citizen or lawful permanent resident who had a tax home as defined in section 911(d)(3) outside the United States in 2019 and reasonably expects to have a tax home outside the United States in 2020. In addition, to determine the nonresident status of an alien, the relief provided in Rev. Proc. 2020-20 is applicable.

***Question 2: If a nonresident alien or foreign corporation is engaged in a USTB (taking into account the application of the treatment in Question 1) but otherwise does not carry on such USTB through a PE under an applicable income tax treaty, will the nonresident alien or foreign corporation be treated as conducting business through a PE due to services or other activities conducted by individuals temporarily present in the United States that would not have been conducted in the United States but for COVID-19 Emergency Travel Disruptions?***

**Answer:** *During an Affected Person's COVID-19 Emergency Period, services or other activities performed by one or more individuals temporarily present in the United States will not be taken into account to determine whether the nonresident or foreign corporation has a PE, provided that the services or other activities of these individuals would not have occurred in the United States but for COVID-19 Emergency Travel Disruptions.*

## FOOTNOTES:

- 1 For the text of Rev. Proc. 2020-20, see <https://www.irs.gov/pub/irs-drop/rp-20-20.pdf>.
- 2 [Information for nonresident aliens and foreign businesses impacted by COVID-19 travel disruptions](#). The IRS also issued Revenue Procedure 2020-27, which provides that qualification for the foreign earned income and housing cost exclusions will not be impacted as a result of days spent away from a foreign country due to the COVID-19 emergency. Revenue Procedure 2020-27 will be covered in greater detail in a separate GMS *Flash Alert* to be published shortly.
- 3 U.S. Internal Revenue Code section 7701(b)(3).
- 4 U.S. Treasury Regulations § 301.7701(b)-3(c)(1).

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