
MEMORANDUM

RE: U.S. INCOME TAX TREATIES

Under U.S. Federal Income Tax Laws, an alien is either taxed as a resident alien (subject to U.S. Income Tax on world-wide income) or a non-resident alien (subject to U.S. Income Tax on U.S. source income).

Non-Resident Alien: U.S. Tax Resident

An alien is classified as a resident alien (U.S. tax resident) if:

1. He is a U.S. lawful permanent resident at any time during the calendar year (i.e., has a “green card”).
2. He meets the “substantial presence test” (present in the U.S. for 122 days per year over a 3 year period).

Substantial Presence Test

An alien satisfies the “substantial presence test” for any calendar year (the “current year”) if:

1. He is in the U.S. for at least 31 days during the current year.
2. The sum of the number of days in the U.S. in the current year and two preceding calendar years equals or exceeds 183 days (“183 day test”).
3. For the “183 day test”, each day in the U.S. in the current year is counted as a full day. Each day in the U.S. in the first preceding calendar year is counted as 1/3 of a day, each day of presence in the second preceding calendar year is counted as 1/6 of a day (IRC §7701(b)(3)(A)(ii)).

“Substantial Presence Test”: Closer Connection Exception

An alien who meets the substantial presence test may avoid being classified as a U.S. tax resident if:

1. He is present in the U.S. for fewer than 183 days during the calendar year.

2. He maintains a tax home in a foreign country during the entire current year.
3. He has a closer connection to the foreign country (i.e., his tax home) during the current tax year.
4. He timely files IRS form 8840, and has not applied for a “green card” (IRC §7701(b)(3)(B) and (C)).

The United States has 61 income tax treaties (see below). To be eligible for the benefits of an income tax treaty, an individual must qualify as a resident of either the U.S. or the other country that is a party to the treaty (“the contracting state”).

The U.S. Model Income Tax Treaty (Art 4(1)) defines “resident of a contracting state” as “any person who, under the laws of that state is liable for tax in the state, by reason of his domicile, residence, citizenship, place of management, place of incorporation”.

If an alien is classified as both a U.S. tax resident and a resident of its treaty partner (“dual resident”), the tax treaties contain “tie-breaker” provisions which determine the dual resident’s tax residence status as follows:

1. Tax resident in country with permanent home.
2. If permanent home in both countries, tax resident in country with “center of vital interests” (personal and economic interests).
3. If the center of vital interests cannot be determined, tax resident in country in which he has a habitual abode.
4. If the habitual abode is in both (or neither) countries, he is a tax resident of the country in which he is a national).

An alien who claims the benefit of a treaty, to be classified as a non-resident, will still be subject to U.S. federal income tax as a non-resident alien.

A non-resident alien who relies on a U.S. tax treaty for an exemption from U.S. tax that is effectively connected with a U.S. trade or business is required to file IRS Form 8833 to disclose the tax exemption reliance (IRC §6114; Treas Reg 301.6114-1).

Gary S. Wolfe
A PROFESSIONAL LAW CORPORATION
9100 Wilshire Blvd., Suite 505 East
Beverly Hills, CA, 90212
Tel: 310-274-3116 Fax: 310-274-3118
<http://www.gswlaw.com>
email: gsw@gswlaw.com