

Client Alert

April 22, 2020

ASKED AND ANSWERED, IRS EXPANDS MEDICAL CONDITION EXCEPTION TO INCLUDE US DAYS OF PRESENCE RELATED TO COVID-19

Up until now, the medical exception to the substantial presence test has been limited only to medical conditions arising while such individual was present in the United States. During this unprecedented time, with countries closing their borders, global travel limited and persons stranded in countries not their own, following the lead of the OECD and other countries, the IRS has expanded the medical condition exception to the substantial presence test to account for US days of presence related to COVID-19.

Here is a summary of this alert of the newly issued Revenue Procedure 2020-20 (the “Revenue Procedure”):

- Foreign nationals who spend too much time in the US may become US resident taxpayers under the Substantial Presence Test
- The Medical Condition Exception, generally, is an exception that excludes certain days of US presence related to a medical condition that arose while the foreign national was in the US
- The Revenue Procedure expands the Medical Condition Exception for COVID-19 related US days of presence of foreign nationals
- Under the expansion, a foreign national may exclude for purposes of the Substantial Presence Test up to 60 days of US presence during a consecutive period that begins on or after February 1, 2020 and on or before April 1, 2020 (the “COVID-19 Medical Condition Travel Exception”)
- The COVID-19 Medical Condition Travel Exception is claimed by attaching an IRS Form 8843, *Statement for Exempt Individuals and Individuals with a Medical Condition*, to their IRS Form 1040NR if they are required to otherwise file an IRS Form 1040NR. If they are not required to file an IRS Form 1040NR, such foreign nationals are not required to present an IRS Form 8843 to the IRS but are urged to document and maintain records in case the need to present the eligibility to exclude such days arises.

Who is a US Tax Resident

US tax residents include US citizens and US permanent residents (wherever they may reside in the world), and foreign nationals who satisfy the “Substantial Presence Test” for any given tax year. An individual meets the substantial presence test (and becomes a US tax resident) with respect to any calendar year where: (1) such individual is present in the US on at least 31 days during the





current calendar year; and (2) the sum of the number of days on which such individual was present in the US equals or exceeds 183 days under a 3-year formula which includes:

- i. The number of days of presence during the tested calendar year, plus
- ii. 1/3 of the number of days of presence during the first preceding calendar year, plus
- iii. 1/6 of the number of days of presence during the second preceding calendar year

Thus, foreign nationals who spend too much time in the US and become residents under the Substantial Presence Test, are subject to taxation on their worldwide income and in addition must comply with onerous information reporting obligations disclosing their ownership of certain foreign assets (e.g. foreign bank accounts, interest in foreign companies) and cross-border activities related to such assets.

Medical Condition Exception to Substantial Presence Test

There are some exceptions that may apply to exclude days of presence when calculating the days under the Substantial Presence Test, such as the "Medical Condition Exception." The Medical Condition Exception provides that the foreign national is not treated as present in the US, i.e. the days are not counted for purposes of the Substantial Presence Test, in which the foreign national intended to leave the US but due to a medical condition that arose while the foreign national was present in the US was unable to do so. There are two key elements: (1) the individual must have had an intent to leave the US and the determination of intent is based on all the facts and circumstances, and (2) the medical condition arose while the individual was present in the US. Importantly, such exception does not extend to a pre-existing condition if the individual was aware of it prior to arriving in the United States.

The Internal Revenue Code and Regulations do not expressly address whether the exception would apply in the case of individuals who could not leave during a pandemic. The technical language of the statute and regulations could potentially support a broad interpretation of the term "medical condition" to include a pandemic, as opposed to an individual's sickness. However, without the Revenue Procedure it would not have been clear that this exception would apply.

IRS Expansion of Medical Condition Exception – COVID-19 Medical Condition Travel Exception

The Revenue Procedure expands the Medical Condition Exception so that "Eligible Individuals" may exclude their "COVID-19 Emergency Period" (up to 60 consecutive calendar days, and defined below) of US days of presence for purposes of calculating the Substantial Presence Test. Under the Revenue Procedure this is known as the COVID-19 Medical Condition Travel Exception.

The Revenue Procedure contains a number of defined terms. "COVID-19 Emergency Period" is defined as a single period during which the "Eligible Individual" is physically present in the US of up to 60 calendar days selected by such individual that starts on or after February 1, 2020 and on or before April 1, 2020. An "Eligible Individual" is an individual who meets the following: (1) was not



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a US tax resident at the close of 2019, (2) who is not a lawful permanent resident at any time in 2020, (3) who is present during each of the days of the individual's "COVID-19 Emergency Period," and (4) who does not otherwise become a US tax resident in 2020 under the substantial presence test after excluding the "COVID-19 Emergency Period."

As mentioned above, the Medical Condition Exception generally has two elements. The first is the intent to leave the US but was presented from doing so as a result of the medical condition, and the second is that the medical condition arose while such individual was present in the US. Under the COVID-19 Medical Condition Travel Exception, these two elements are considered and addressed. The Revenue Procedure states that the COVID-19 Emergency will be considered a medical condition that prevented the individual from leaving the US, and will not be treated as a pre-existing medical condition. It addresses the element of intent by created a presumption of intent and inability to leave the US during such 60-day COVID-19 Emergency Period. The presumption is lost if such individual has applied or otherwise taken steps to become a lawful permanent resident of the US.

Application of COVID-19 Medical Condition Travel Exception with other Exceptions to Substantial Presence Test

The Revenue Procedure states that an individual may claim the COVID-19 Medical Condition Travel Exception in lieu of or in addition to claiming other exceptions from the Substantial Presence Test, and are not required to forego the COVID-19 Medical Condition Travel Exception to claim under one of the other available exceptions. Apart from the Medical Condition Exception, there are other exceptions and exclusions of US days of presence from the Substantial Presence Test, such as the Closer Connection Exception, exempt individuals (e.g. students) and treaty relief under a tax treaty the US has with another country.

Foreign nationals who qualify for the normal Medical Condition Exception, in addition to the COVID-19 Medical Condition Travel Exception, may exclude days under both exceptions. The normal Medical Condition Exception may be claimed for medical conditions related to the COVID-19 virus with respect to any period in 2020 provided they otherwise satisfy the Medical Condition Exception.

The Revenue Procedure includes an example where a foreign national who would be a US resident taxpayer under the Substantial Presence Test, even after excluding the eligible days under the COVID-19 Medical Condition Travel Exception, may still be considered a nonresident alien if the individual is eligible to claim the Closer Connection Exception. Unfortunately, what is not clear is whether the Closer Connection Exception would be available if the individual was physically present in the US beyond the 182 day limitation, but with the exclusion of the days under the COVID-19 Medical Condition Travel Exception was able to bring the days below the 182 threshold. Also, missing from the Revenue Procedure is any guidance relating to the 183 day rule for the taxation of capital gains.



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How to Claim the COVID-19 Medical Condition Travel Exception

Foreign nationals who are required to otherwise file an IRS Form 1040-NR, claim the COVID-19 Medical Condition Travel Exception by attaching an IRS Form 8843, *Statement for Exempt Individuals and Individuals with a Medical Condition*, to their Form 1040-NR by the form's due date (with extensions). If the foreign national is not otherwise required to file an IRS Form 1040-NR, they are not required to file the IRS Form 8843 to claim the COVID-19 Medical Condition Travel Exception. The Revenue Procedure recommends that such individuals retain all relevant records to demonstrate that they have met the COVID-19 Medical Condition Travel Exception and be prepared to share these records with the IRS.

US Income Tax Treaties and COVID-19 Medical Condition Travel Exception

The Revenue Procedure also addresses the availability of treaty benefits with respect to dependent personal services that may arise under US income tax treaties as a result of days spent in the US due to a medical condition. For example, many US income tax treaties exempt income from employment if, among other things, the employee is present in the US for no more than 183 days in a twelve-month period. The Revenue Procedure indicates that such days are not taken into account when determining the availability of treaty benefits related to dependent personal services, whether or not such individual is an "eligible individual."

You can also view our recent alert on Tax, Immigration and Social Security Implications for Mobile Individuals [here](#), and a related Alert on travel restrictions and foreign nationals is available [here](#).

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