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RE: Request for Further Guidance on COVID-19 Relief in Rev. Proc.
2020-20 and FAQs

Dear Ms. Stein, Mr. Connery and Mr. Wang:

The Florida Bar Tax Section is submitting this letter to request further relief and clarifications in response to the guidance contained in Revenue Procedure 2020-20 and the FAQs, both issued on April 21, 2020.

The principal authors for these comments are Paul D'Alessandro, Jr., Ellina Berdichevsky, Jennifer Wioncek, Michael Bruno, Steven Hadjiligiou, Alfredo Tamayo and Leslie Share. Questions related to this letter can be addressed to the following individuals whose contact information is immediately below.

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Although the members of The Florida Bar Tax Section who participated in preparing these comments may have clients who would be affected by the comments contained herein, no such member has been engaged by a client to make a government submission with respect to, or otherwise to influence the development or outcome of, the specific subject matter of these comments.

The Florida Bar Tax Section is comprised of approximately 2,000 members. The following letter expresses the views of the authors and is not an official position of the Tax Section.

As always, we will be pleased to provide additional commentary as requested. If you have any questions regarding our comments, please do not hesitate to contact us.

Sincerely,

/s/ Janette M. McCurley

Janette M. McCurley, Chair

Summary

This letter respectfully requests Treasury and the Internal Revenue Service ("IRS") to expand and clarify: (i) the guidance provided in Rev. Proc. 2020-20 relating to the application of the COVID-19 Medical Condition Travel Exception;¹ and (ii) the FAQs related to nonresident alien individuals and foreign businesses impacted by COVID-19 Travel Disruptions.² Specifically, we make the following requests:

Rev. Proc. 2020-20

1. Extend the duration of the COVID-19 Emergency Period beyond 60 days by an amount of time that the IRS deems appropriate.

¹ All terms used herein related to Rev. Proc. 2020-20 shall have the meanings ascribed to them in Rev. Proc. 2020-20, unless otherwise specified.

² All terms used herein related to the FAQs shall have the meanings ascribed to them in the FAQs, unless otherwise specified.

2. Provide clarification how to apply the relief for purposes of determining an individual's residency start date and termination date who rely on the "nominal presence" exception under Code Section 7701(b)(2)(C).
3. Provide clarification on the documentation and record-keeping requirements associated with proving an individual's physical presence in the United States during the individual's COVID-19 Emergency Period.
4. Modify the definition of Eligible Individual not to include individuals classified as U.S. residents in 2019, as well as certain individuals claiming residency under the tie-breaker provisions under an applicable U.S. income tax treaty.
5. Clarify the application of the presumption regarding an individual's intent to leave the United States in the case of those individuals who have applied for lawful permanent residence.
6. Provide clarification on some of the long-standing ambiguities regarding the Medical Condition Exception.

FAQs

7. Expand upon the FAQs by issuing relief with respect to the sourcing of personal services income. More broadly, issue relief for the performance of services for both non-U.S. as well as U.S. taxpayers.

Proposals and Requests in Relation to Rev. Proc. 2020-20

1. Increase the Duration of the COVID-19 Emergency Period

Section 3.02 of Rev. Proc. 2020-20 defines an individual's "COVID-19 Emergency Period" as "a single period of up to 60 consecutive calendar days selected by an 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." We believe that the 60 day period is an insufficient amount of time under the circumstances presented by the COVID-19 Emergency. The following examples illustrate why the COVID-19 Emergency Period is not long enough and creates an unjust burden for alien individuals currently present in the United States (and who would otherwise qualify as Eligible Individuals).

- a. Alien individual ("X") selects a COVID-19 Emergency Period that starts on February 1, 2020. X's COVID-19 Emergency Period would end on March 30, 2020, and, therefore, beginning on April 1, 2020, X would generally be required to include all days of physical presence in the United States for purposes of applying the substantial presence test. Undoubtedly, however, as of April 1, X's

travel plans could have still been affected by COVID-19 Emergency Travel Disruptions, thereby preventing X from travelling. For evidence of this fact, please consider an article published by the Pew Research Center on April 1, 2020, which finds that movement of people across borders has come to a standstill in much of the world as countries close their borders to visitors – and sometimes their own citizens – in response to COVID-19. See <https://www.pewresearch.org/fact-tank/2020/04/01/more-than-nine-in-ten-people-worldwide-live-in-countries-with-travel-restrictions-amid-covid-19/>.

- b. Alien individual ("X") selects a COVID-19 Emergency Period that starts on April 1, 2020. X's COVID-19 Emergency Period would end on May 30, 2020, and, therefore, beginning on May 31, 2020, X would generally be required to include all days of physical presence in the United States for purposes of applying the substantial presence test. It is very likely that even by May 31, 2020, COVID-19 Emergency Travel Disruptions will continue to be present. Indeed, we understand that as of the date of this letter, airports in certain jurisdictions remain closed, posing a severe travel limitation on alien individuals who remain in the United States as a result of the COVID-19 Emergency. Additionally, even for those airports that are currently open, including airports located in the United States, many individuals may still feel unsafe travelling. For evidence of this fact, one need look no further than the extremely low number of passengers currently travelling domestically on the various airlines operating in the United States.

We therefore request an extension of the COVID-19 Emergency Period for some number of additional days (e.g., 30 or 60 days), as the IRS deems appropriate.

2. Residency Start Date and Termination Date Clarification

Under current law, the “residency starting date” of an individual who was a nonresident alien during the entire preceding calendar year but is a resident alien under the substantial presence test, is the first day on which the individual is present in the U.S. during the calendar year in which the individual meets the substantial presence test. In making the foregoing determination, an exception is provided for certain nominal presence in the U.S. during the year under Code Section 7701(b)(2)(C) and Treas. Reg. § 301.7701(b)-4(c)(1). The exception provides that in determining an individual’s “residency starting date” in the individual’s “first year of residency” under the substantial presence test, the individual will not be treated as present in the U.S. during any period for which the individual establishes that the individual’s tax home was in a foreign country and the individual maintained a closer connection to that foreign country than to the United States. However, “nominal presence” is defined as no “more than 10 days on which the individual is present in the United States”. Similar rules apply for purposes of determining such individual’s “residency termination date”.

The exclusion of an Eligible Individual's days of presence during the COVID-19 Emergency Period also should apply for purposes of the 10 day "nominal presence" exception found in Code Section 7701(b)(2)(C) for purposes of determining an individual's "residency start date" during the initial year of tax residency or "termination date" during the last year of tax residency. The "nominal presence" exception may be especially relevant for individuals who will first become resident aliens in 2020 by meeting the substantial presence test, but who first arrived in the U.S. during the COVID-19 Emergency Period with the intention of staying a brief time (not more than 10 days) before moving to the U.S. later this year. Such individuals may have had to remain longer than the time permitted by the "nominal presence" exception, which can result in their "residency starting date" to commence sooner than intended and causing taxing of transactions unnecessarily.

As an example, alien individual (X) is a corporate executive who had not previously visited the United States, was a nonresident alien prior to 2020, lived with his spouse and children in country A, and worked in country A. X was asked by his foreign corporate employer located in country A to head up its new U.S. operation beginning on July 1, 2020. In anticipation of moving to the United States, X flew to the U.S. on March 1, 2020 and planned on visiting until March 8, 2020 to check out schools, churches, clubs, residential areas, etc. (all of the things most of us do when moving to a new area to begin a job) before returning to his home in country A. X planned to come back to the U.S. on July 1, 2020 with his family to live and work in the U.S. for the next several years. As a result, X will be considered a resident alien under the substantial presence test. Assuming X maintained a closer connection to country A than the U.S. during March 1, 2020 – March 8, 2020, and X's tax home was located in country A during the foregoing period, X's residency "starting date" should be July 1, 2020 and not March 1, 2020. Thus, X should not have any U.S. income tax liability with respect to any of his worldwide income until July 1, 2020 assuming X had no U.S. source income subject to U.S. income tax prior to July 1, 2020.

On the other hand, assume the same facts as above, but further assume X was unable to leave on March 8, 2020 due to the COVID-19 pandemic and was only able to return to his home country A on April 1, 2020. If X were unable to exclude his days of presence during the COVID-19 Emergency Period for purposes of the "nominal presence" exception, then X's "residency starting date" would be March 1, 2020 because X stayed more than 10 days during his March 1st visit.

3. Provide Clarification on Documentation and Record-Keeping Requirements

Under Section 3.02 of Rev. Proc. 2020-20, an individual's COVID-19 Emergency Period includes only those days during which the individual is physically present in the United States. Section 5.02 of Rev. Proc. 2020-20 provides that an individual required to file IRS Form 8843 should retain a copy of the completed IRS Form 8843 as well as documentation demonstrating that the individual was physically present in the United

States during all of the individual's COVID-19 Emergency Period (and should be prepared to produce the copy and such documentation if requested by the IRS). Section 5.01 of Rev. Proc. 2020-20 instructs individuals not required to file IRS Form 8843 to retain all relevant records to support reliance on Rev. Proc. 2020-20 and alerts such individuals that they should likewise be prepared to produce these records and complete an IRS Form 8843 if requested by the IRS.

We request clarification regarding the type(s) of documentation that would demonstrate that an individual was physically present in the United States during each day of the individual's COVID-19 Emergency Period. Helpful guidance would include a non-exclusive list of examples. One such example could be a print out of arrival and departure records obtained from the U.S. Customs and Border Protection I-94 Travel Website.

4. Modify the Definition of Eligible Individual

Section 3.04 of Rev. Proc. 2020-20 defines an "Eligible Individual" as any individual (1) who was not a U.S. resident at the close of the 2019 tax year, (2) who is not a lawful permanent resident at any point in 2020, (3) who is present in the United States (without regard to Rev. Proc. 2020-20) on each of the days of the individual's COVID-19 Emergency Period, 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.

We believe that the definition of Eligible Individual is too narrow, and therefore request that the definition of Eligible Individual be modified in the following ways.

- a. **U.S. Residence in 2019:** We do not believe that there is a legitimate policy reason for preventing an individual from claiming the COVID-19 Medical Condition Travel Exception solely because such individual was a U.S. resident in 2019. The following examples illustrate the unjust treatment that can arise in the case of an individual who was a U.S. resident in 2019.
 - i. Alien individual ("X") was not present in the United States for any part of 2017, and spends 120 days in the United States in 2018 and 150 days in the United States in 2019. Under the substantial presence test, X is a U.S. resident in 2019. In 2020, X only intended to spend 60 days in the United States; however, X has been unable to leave the United States this year due to COVID-19 Emergency Travel Disruptions. Were it not for the COVID-19 Emergency, X would have been able to leave the United States when he originally intended to and, therefore, would not have been classified as a U.S. resident in 2020 under the substantial presence test. Accordingly, X's status as a U.S. resident in 2019 should not automatically preclude X from claiming the COVID-19 Medical Condition Travel Exception.

- ii. Alien individual ("X") is present in the United States for 365 days in each of 2018 and 2019. In 2020, X first arrived in the United States on February 1, intending to remain in the United States only for the month of February, thereby limiting his days of U.S. presence to 29 for the 2020 calendar year. As a result of COVID-19 Emergency Travel Disruptions, however, X has been unable to leave the United States. X would not have been considered a U.S. resident in 2020 had he been able to leave the United States at the end of February, as he originally intended. Under Code § 7701(b)(3)(A)(i), in order to be classified as a U.S. resident under the substantial presence test, an individual must be present in the United States on at least 31 days during the tested calendar year, notwithstanding the amount of time such individual has been present in the United States in the two preceding calendar years.³ Furthermore, under Treas. Reg. § 301.7701(b)-1(c)(4): "If an individual is not physically present for more than 30 days during the current year, the substantial presence test will not be applied for that year even if the three-year total is 183 or more days." The foregoing example we have included in this comment letter is based on Example (2) of Treas. Reg. § 301.7701(b)-1(e), which illustrates the operation of the 31-day minimum requirement set forth in both the Code and Treasury Regulations. In every case, an alien individual who does not hold a green card will not be considered a U.S. resident under the substantial presence test if such individual does not spend at least 31 days in the United States in the tested calendar year. This rule operates independently of the amount of time such individual spends in the United States in the two preceding calendar years. Therefore, an alien individual should get the benefit of the same rule in 2020 and should be eligible to claim the COVID-19 Medical Condition Travel Exception (assuming all other eligibility requirements are met).

Based on the foregoing, we request that requirement (1) of the definition of an Eligible Individual (relating to U.S. residence in 2019) be removed.

In the event that the Treasury and the IRS do not deem it appropriate to make such modification, then, at a minimum, we request in the alternative that an exception be provided for those individuals who would not have otherwise been present in the United States for at least 31 days in 2020.

- b. **Application of Tax Treaties:** An individual who is considered both a resident of the United States pursuant to the internal laws of the United States and also a resident of a treaty country pursuant to the treaty partner's internal laws (a so-called "dual resident taxpayer") may claim to be a resident of the treaty country only (and, therefore, a nonresident of the United States) under the "tie-breaker"

³ All section ("§") references are to the Internal Revenue Code of 1986, as amended (the "Code"), or the Treasury Regulations promulgated thereunder ("Treas. Reg."), unless otherwise specified.

provisions of the applicable income tax treaty. In general, however, such claim applies only for purposes of calculating the individual's U.S. federal income tax liability under the Code and Treasury Regulations. Specifically, Treas. Reg. § 301.7701(b)-7(a)(3) provides that "for purposes of the Internal Revenue Code other than the computation of the individual's United States income tax liability, the individual shall be treated as a United States resident."

Under the literal language of the Treasury Regulations, individuals claiming residency under the tie-breaker provisions of an income tax treaty in 2019 or 2020 are not eligible for relief under Rev. Proc. 2020-20. This is not a just result given the nature of the COVID-19 Emergency and the restrictions it has brought on. We therefore request that, solely for purposes of applying Rev. Proc. 2020-20, the following modifications be made:

- i. An individual shall not be considered a U.S. resident in 2019 if such individual properly claimed residence in a foreign country under an applicable income tax treaty on a timely filed IRS Form 8833.
- ii. An individual shall not be considered a U.S. resident in 2020 if such individual properly claimed residence in a foreign country under an applicable income tax treaty on a timely filed IRS Form 8833.

5. Issue Regarding Presumption of Intent

Section 4.02 of Rev. Proc. 2020-20 states that an Eligible Individual will be presumed to have intended to leave the United States on any day during the individual's COVID-19 Emergency Period, unless that individual has applied, or otherwise taken steps, to become a lawful permanent resident of the United States. We believe that this restriction is overly broad. For example, an individual could have come to the United States in 2020 and started the application process to obtain a green card. Nevertheless, due to current wait times for application processing, such individual could have intended to return to the individual's home country while waiting for the application to be processed, only to return to the United States to formally begin U.S. residency well after the application had been approved (e.g., in 2021).

Given the potential inequities that could apply to individuals who merely began the lawful permanent resident application process, it should be clarified that these individuals are not ineligible to claim relief under Rev. Proc. 2020-20. Treasury and the IRS should state that these individuals be eligible to claim the COVID-19 Medical Condition Travel Exception, provided they can prove the requisite intent to leave the United States (and provided all other requirements be met). Examples should be given of how such individuals can prove the requisite intent.

6. General Observation Regarding the Medical Condition Exception

Section 5.04 of Rev. Proc. 2020-20 states that an Eligible Individual may claim the COVID-19 Medical Condition Travel Exception in addition to, or instead of, claiming other exceptions from the substantial presence test for which the individual is eligible. If the COVID-19 Emergency Period is not extended beyond the 60 day period, there will be uncertainty for individuals regarding the ability to use the Medical Condition Exception as it relates to COVID-19.

For example, would only individuals who contracted the virus be eligible for the Medical Condition Exception even though Treas. Reg. § 301.7701(b)-3(c)(1) by itself does not specifically provide that the individual seeking to claim the exception is the person who needs to have the medical condition that arose while present in the United States? Consider a situation where husband and wife travelled together to the United States with the intent to leave and were unable to do so during the COVID-19 Emergency Period. If husband contracted COVID-19 while in the United States and was hospitalized beyond the COVID-19 Emergency Period and wife had to either self-isolate or otherwise could not leave the United States due to COVID-19 Travel Disruptions beyond the COVID-19 Emergency Period, it is not clear if wife would be also eligible to exclude her days of presence pursuant to the Medical Condition Exception.

We note that the issue of who must have the medical condition and other long-standing ambiguities surrounding the application of the Medical Condition Exception remain unaddressed.⁴ We recognize this may not be the appropriate time to raise non-COVID-19 issues with the IRS; however, we take this opportunity to note some of the long-standing ambiguities surrounding the application of the Medical Condition Exception and that such ambiguities will cause uncertainty for individuals in how to apply the Medical Condition Exception beyond the COVID-19 Emergency Period if such period is not extended. We respectfully request Treasury and the IRS to confirm their willingness to hear further comments on these issues and to provide an appropriate timeframe and manner for submitting comments.

Proposals and Requests in Relation to FAQs

We respectfully request that the IRS and Treasury consider expanding upon the FAQs by issuing relief for sourcing personal services income.

Under current law, income earned from the performance of services is sourced according to the place of performance.^[1] Therefore, if the services are performed in the United States, the income is U.S. sourced income, and subject to U.S. federal income tax; if the services are performed

⁴ See, e.g., Michael Rosenberg, "Expanding the Exceptions to the U.S. Income Tax Resident Alien Definition," *Corporate Business Tax Monthly*, pp. 9-18 (July 2008); Michael Karlin, on behalf of the Los Angeles International Tax Club, Letter to IRS (March 22, 2020); Thomas S. Bissell, "Tax Impact of Coronavirus on Nonimmigrant Aliens in the United States," 49 *Tax Mgmt. Int'l J.* 234 (April 10, 2020).

^[1] Code §§ 861(a)(3); 862(a)(3); Treas. Reg. § 1.861-4.

outside the United States, then the income is foreign sourced income. In most cases, if a nonresident individual or foreign corporation earns income from personal services for performing services in the United States, such income should be taxed on a net basis, because the services generally would be considered engaging in a U.S. trade or business.^[2] Code Section 864(b) provides that term ‘trade or business within the United States’ “includes the performance of personal services within the United States at any time within the taxable year.” A de minimis exception exists under Code Section 864(b)(1), but it is generally not helpful in most cases.

Although IR-2020-17 (i.e., the FAQs) provides an exclusion for 60 days of presence for purposes of determining whether a nonresident alien or foreign corporation is engaged in a U.S. trade or business or has a U.S. permanent establishment, it does not provide relief for sourcing of personal services income. Therefore, a nonresident alien or foreign corporation performing services in the United States still could be taxable on a gross withholding tax basis under Code Sections 871 and 881, respectively. We request similar relief be provided for purposes of sourcing personal services income so an affected nonresident alien or foreign corporation is not subject to U.S. federal income tax on both a net and gross tax basis.

In addition, the place of performance of services also is relevant for U.S. taxpayers in a number of areas, which include determining foreign based company services income under Code Section 954(e) and claiming foreign tax credits. If a U.S. taxpayer is faced with a supply chain issue, where it currently has employees performing services outside of its home jurisdiction as a result of COVID-19 Travel Disruptions, it could present U.S. tax challenges that otherwise would not apply. Therefore, we request that relief should be given with respect to the performance of services for both non-U.S. as well as U.S. taxpayers.

^[2] Code § 864(b).