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DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

TD 9297

RIN 1545-BG02

Residence Rules Involving U.S. Possessions

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations that provide rules for determining bona fide residency in the following U.S. territories: American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, and the United States Virgin Islands under section 937(a) of the Internal Revenue Code.

DATES: Effective Date: These regulations are effective November 14, 2006.

Applicability Dates: For dates of applicability, see §1.937-1(i).

FOR FURTHER INFORMATION CONTACT: J. David Varley, (202) 435-5262 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

On April 11, 2005, the IRS and Treasury Department published in the **Federal Register** temporary regulations (TD 9194, 70 FR 18920, as corrected at 70 FR 32589-01), which provided rules to implement section 937 of the Internal Revenue Code (Code) dealing with U.S. possessions or territories specified in

that section (territories) and to conform existing regulations to other legislative changes with respect to the territories. A notice of proposed rulemaking (REG-159243-03, 70 FR 18949) cross-referencing the temporary regulations was published in the **Federal Register** on the same day. Written comments were received in response to the notice of proposed rulemaking and a public hearing on the proposed regulations was held on July 21, 2005. After consideration of the comments, the IRS and Treasury Department on January 31, 2006 published in the Federal Register final regulations (TD 9248, 71 FR 4996, as corrected at 71 FR 14099) under section 937(a) concerning the determination of residency in a territory and adopting with amendments the proposed regulations (specifically, §§1.937-1 and 1.881-5(f)(4)).

Section 937(a) provides that an individual is a bona fide resident of a territory if the individual meets a presence test, a tax home test and a closer connection test. In order to satisfy the presence test, a person must be present in the territory for at least 183 days during the taxable year (the 183-day rule), unless otherwise provided in regulations. The final section 937(a) regulations provide several alternatives to the 183-day rule in the statute.

Treasury Reg. §1.937-1 provides that an individual who does not satisfy the 183-day rule nevertheless meets the presence test if the individual satisfies one of three alternative tests: (1) the individual spends no more than 90 days in the United States during the taxable year; (2) the individual has no more than \$3,000 of earned income from U.S. sources and is present for more days in the territory than in the United States during the taxable year; or (3) the individual

has no significant connection to the United States during the tax year. The term “significant connection” is generally defined as a permanent home, voter registration, spouse, or minor child in the United States. The final regulations also provide that certain days count as days of presence in the relevant territory for the purposes of the presence test, even if the person was not physically present in the territory. Similarly, certain days that an individual spends in the United States do not count as days of presence in the United States for purposes of the presence test.

Before finalizing the regulations, the IRS and Treasury Department received comments suggesting that days spent outside of a territory for nonmedical family emergencies, charitable pursuits or business travel should count as days spent in the territory and outside the United States. The IRS and Treasury Department were sympathetic to the concern that the realities of life in the territories might require periodic temporary absences from the territories, but found that the particular suggestions would have been very difficult to implement and monitor administratively. Further, the IRS and Treasury Department declined to adopt the commentators’ suggestion to import a simple mirroring of the substantial presence test of section 7701(b) on the ground that Congress had considered but rejected this approach for determining residency in a territory. See H.R. Conf. Rep. No. 108-755, at 791-795 (2004). Nonetheless, the IRS and Treasury Department believed that final regulations provided meaningful advantages to taxpayers over the proposed and temporary regulations.

Explanation of Provisions

Following publication of the final regulations, additional comments were made requesting that the IRS and Treasury Department revisit the presence test. For example, one commentator requested that up to 30 days of business or personal travel outside the United States and the territory be treated as days of presence in a territory. The IRS and Treasury Department continue to be sympathetic to the concern that the realities of life in the territories might require periodic temporary absences from the territories for business pursuits. However, the IRS and Treasury Department have concluded nonetheless that such a rule would be administratively difficult to implement and monitor. In addition, commentators have not been able to offer meaningful suggestions to alleviate this concern. The IRS and Treasury Department believe that in these situations, the 183-day rule in combination with the alternatives to that rule, as liberalized in the final regulations, provide sufficient flexibility to accommodate absences from the territory to pursue a range of activities.

In addition, a commentator argued that the treatment of major disasters should be liberalized to allow individuals to spend time away from the territories in the event of a natural disaster. This commentator said the final regulations only provide rules for evacuations of territories, which suggests the IRS and Treasury Department do not realize that the territories are typically not evacuated in the event of natural disasters such as a hurricane. This commentator appears to have misunderstood the final regulations. The final regulations already address the commentator's concerns and provide that if an individual leaves, or is unable to return to, a relevant territory during a two-week period within which

an officially declared major disaster in the relevant territory occurs, then the individual will not count any day during either period as a day of presence in the United States, even though the individual is not present in the United States, and will treat such days as days of presence in the relevant territory. In addition, the regulations provide for relief in case there ever is a natural disaster that would warrant the evacuation of a territory. The IRS and Treasury Department recognize that it is currently not the custom to evacuate the territories in the event of natural disasters such as a hurricane. However, the IRS and Treasury Department continue to think it best to retain the rules regarding evacuations so that the regulations are flexible enough to allow for such an event should it ever occur. Individuals who remain in the territories during the natural disaster obviously can count those days for the presence test.

Commentators also requested that outpatient care be added to the permitted types of qualifying medical treatment. Under the final regulations, a temporary stay in the United States for certain documented medical treatment of the individual, or a parent, spouse or child whom the individual accompanies to the treatment, will not count as days spent in the United States for purposes of the alternatives to the 183-day rule, irrespective of where the medical condition arose. The final regulations focus on inpatient treatment in a hospital, hospice or residential medical care facility and the formal credentials of the health care provider as an objective proxy for a determination that a medical condition is serious enough to entail periods of treatment that may not be readily covered by other alternatives to the 183-day rule. The IRS and Treasury Department

continue to believe that in medical situations not otherwise provided for in the final regulations, the 183-day rule in combination with the alternatives to that rule, as liberalized in these final regulations, provide sufficient flexibility to accommodate absences from the territories.

Finally, these post-publication comments suggested a new alternative to the presence test whereby U.S. citizens and residents should be permitted to satisfy the 183-day rule of section 937(a)(1) by meeting some type of averaging test that would better accommodate the realities of business cycles and life in the territories. The IRS and Treasury Department believe that this final new suggestion is administrable and achieves the additional flexibility the commentators sought for the host of activities commentators discussed above and for which the commentators suggested additional exceptions to the 183-day rule.

As amended by this Treasury decision, the final regulations now incorporate a new alternative to the presence test that requires the individual to be present in the relevant territory for a simple nonweighted three-year average of 183 days per year, provided that a minimum of 60 days of presence is met in each of those three years. Thus, under this alternative, an individual will satisfy the presence test for a taxable year if the individual is present in the relevant territory a minimum of 549 days during the three-year period that includes the current taxable year and the two preceding taxable years, so long as the individual is also present in the relevant territory for a minimum of 60 days in each year during that three-year period. This test is in addition to the existing

regulatory alternatives to the statutory test and incorporates the existing rules for counting days.

In light of the additional flexibility achieved by the new three-year averaging alternative adopted in this Treasury decision, the IRS and Treasury Department have determined not to adopt the other amendments suggested by commentators. These suggestions were each felt to be either not appropriate or difficult to administer. The new three-year averaging alternative, together with the existing available alternatives, provides individuals with sufficient flexibility in applying the presence test. It is not expected that any further amendments will be made to the bona fide residence rules of §1.937-1.

Special Analyses

It has been determined that this Treasury decision is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations. Because the regulations do not impose a collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f) of the Code, the notice of proposed rulemaking preceding these regulations was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Drafting Information

The principal author of these regulations is J. David Varley, Office of the Associate Chief Counsel (International), IRS. However, other personnel from the IRS and Treasury Department participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Adoption of Amendments to the Regulations

Accordingly, 26 CFR part 1 is amended as follows:

PART 1--INCOME TAXES

Paragraph 1. The authority citation for part 1 is amended by adding entries in numerical order to read, in part, as follows:

Authority: 26 U.S.C. 7805 * * *

Section 1.937-1 also issued under 26 U.S.C. 937(a). * * *

Par. 2. Section 1.937-1 is amended as follows:

1. Revise paragraph (c)(1) and (c)(5) introductory text.
2. Revise paragraph (g) by redesignating Examples 1 through 9 as Examples 2 through 10 respectively, adding new Example 1, and revising newly designated Example 2, the last sentence; Example 3, the ninth sentence; and Example 6, the sixth sentence.

The revisions and addition read as follows:

§1.937-1 Bona fide residency in a possession.

* * * * *

(c) Presence test--(1) In general. A United States citizen or resident alien individual (as defined in section 7701(b)(1)(A)) satisfies the requirements of this paragraph (c) for a taxable year if that individual--

(i) Was present in the relevant possession for at least 183 days during the taxable year;

(ii) Was present in the relevant possession for at least 549 days during the three-year period consisting of the taxable year and the two immediately preceding taxable years, provided that the individual was also present in the relevant possession for at least 60 days during each taxable year of the period;

(iii) Was present in the United States for no more than 90 days during the taxable year;

(iv) During the taxable year had earned income (as defined in §1.911-3(b)) in the United States, if any, not exceeding in the aggregate the amount specified in section 861(a)(3)(B) and was present for more days in the relevant possession than in the United States; or

(v) Had no significant connection to the United States during the taxable year. See paragraph (c)(5) of this section.

* * * * *

(5) Significant connection. For purposes of paragraph (c)(1)(v) of this section--

* * * * *

(g) Examples. * * *

Example 1. Presence test. H, a U.S. citizen, is engaged in a profession that requires frequent travel. H spends 195 days of each of the years 2005 and

2006 in Possession N. In 2007, H spends 160 days in Possession N. Under paragraph (c)(1)(ii), H satisfies the presence test of paragraph (c) of this section with respect to Possession N for taxable year 2007. Assuming that in 2007 H does not have a tax home outside of Possession N and does not have a closer connection to the United States or a foreign country under paragraphs (d) and (e) of this section respectively, then regardless of whether H was a bona fide resident of Possession N in 2005 and 2006, H is a bona fide resident of Possession N for taxable year 2007.

Example 2. Presence test. * * * However, under paragraph (c)(1)(iv) of this section, W still satisfies the presence test of paragraph (c) of this section with respect to Possession P because she has no earned income in the United States and is present for more days in Possession P than in the United States.

Example 3. Presence test. * * * Assuming that no other accommodations in the United States constitute a permanent home with respect to T, then under paragraphs (c)(1)(v) and (c)(5) of this section, T has no significant connection to the United States. * * *

* * * * *

Example 6. Seasonal workers-- Tax home and closer connection. * * * P
satisfies the presence test of paragraph (c) of this section with respect to both
Possession Q and Possession I, because, among other reasons, under
paragraph (c)(1)(iii) of this section she does not spend more than 90 days in the
United States during the taxable year. * * *

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Linda M. Kroening
Acting Deputy Commissioner for Services and Enforcement.

Approved: November 3, 2006.

Eric Solomon
Acting Deputy Assistant Secretary of the Treasury (Tax Policy).