

Internal Revenue Service
memorandum

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to: Charles Prince, Group Manager
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subject: Assistance concerning the residency of a foreign national.

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This memorandum is being submitted in response to your request for assistance concerning the residence of [REDACTED] [REDACTED] for purposes of the United States-United Kingdom Income Tax Treaty.

ISSUE

Whether [REDACTED] a national of the United Kingdom, who was a resident of the United States during the [REDACTED] tax year, is a resident of the United States under Article 4(2) of the United States-United Kingdom Treaty ("Treaty").

CONCLUSION

[REDACTED] should be deemed to be a resident of the United States under the residence "tie-breaker" provisions in Article (4) (2) of the Treaty.

DISCUSSION

I. Facts

[REDACTED] is a national of the United Kingdom and has lived there for most of his life. [REDACTED] background is in [REDACTED]. Prior to coming to the United States in [REDACTED] he frequently performed throughout the world. In [REDACTED] [REDACTED] signed various contracts with [REDACTED] a U.S.

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production company. In these contracts, entered into via his 100% owned "loan-out corporation," [REDACTED] agreed to perform on certain U.S. [REDACTED] through the [REDACTED]

[REDACTED] One of these contracts also contained a provision granting [REDACTED] a starring role in a feature motion picture. Due to the limited success of the [REDACTED] [REDACTED] was the last time [REDACTED] performed on an [REDACTED]. No motion picture was ever made. [REDACTED] remained in the United States on and off until [REDACTED] at which time he left to go on a worldwide tour.

In [REDACTED] [REDACTED] purchased a home in [REDACTED] which, as the facts indicate, he planned to reside in during the time he was working in the United States. He continued to maintain two homes in the United Kingdom. [REDACTED] family moved from the United Kingdom to live with him in the [REDACTED] home. [REDACTED] agent, lawyer, accountant, and investments were in the United Kingdom.

[REDACTED] was a dual resident taxpayer for the [REDACTED] tax year. He was a U.S. resident for the 1991 tax year under the substantial presence test in § 7701(b)(3) of the Internal Revenue Code (the Code).¹ In addition, [REDACTED] was subject to U.K. tax as a resident of the United Kingdom during this period. He is claiming that he is a resident of the United Kingdom under the residency tie-breaker rule in Article 4(2) of the Treaty.

II. Law & Analysis

Assuming that [REDACTED] is a resident of both the United States and the United Kingdom under Article 4(1) of the Treaty, it is necessary to apply Article 4(2) to assign residence exclusively to one country for purposes of the Treaty. If [REDACTED] is deemed to be a resident of the United Kingdom after application of the tie-breaker provisions, he is subject to tax only under § 871 of the Code, as modified by the Treaty. See § 301.7701(b)-7(a)(1) of the regulations. However, if [REDACTED] is deemed to be a resident of the United States, he is subject to tax on his worldwide income.

Article 4(2) contains a series of tie-breaker tests used to determine an individual's exclusive residence for purposes of the Treaty. Article 4(2) provides:

¹ [REDACTED] was also present in the United States for a total of [REDACTED] days during the [REDACTED] taxable year. Although [REDACTED] meets the substantial presence test in § 7701(b)(3), the revenue agent believes that [REDACTED] may nonetheless be considered a nonresident alien because of the "closer connection to a foreign country" exception in § 1.7701(b)-2.

Where by reason of the provisions of paragraph (1) an individual is a resident of both Contracting States, then the individual's tax status shall be determined as follows:

(a) the individual shall be deemed to be a resident of the Contracting State in which he has a permanent home available to him. If the individual has a permanent home available to him in both Contracting States or in neither of the Contracting States, he shall be deemed to be a resident of the Contracting State with which his personal and economic relations are closest (centre of vital interests);

~~(b) if the Contracting State in which the individual's centre of vital interests is located cannot be determined, he shall be deemed to be a resident of the Contracting States in which he has an habitual abode;~~

(c) if the individual has an habitual abode in both Contracting States or in neither of them, he shall be deemed to be a resident of the Contracting State of which he is a national; and

(d) if the individual is a national of both Contracting States or of neither of them, the competent authorities of the Contracting States shall settle the question by mutual agreement.

In order to determine whether [REDACTED] is a resident of the United Kingdom or the United States under the Treaty, the tie-breaker tests in Article 4(2) must be applied in the order in which they are presented. Subsection (a) deems an individual to be a "resident of a Contracting State in which he has a permanent home available to him." The concept of a "permanent home" is explained in the Commentaries to Article IV(2) of the OECD Model Treaty. Generally, a permanent home is a home that an individual has retained for his permanent use, as opposed to a place that is retained for a stay of short duration. Permanent use means that the individual has arranged to have the dwelling available to him at all times continuously.²

[REDACTED] purchased the home in [REDACTED] to use for an indefinite period of time. At a minimum it appears that [REDACTED] bought the house with the intention of residing in it through the [REDACTED]. We assume that [REDACTED] did in fact live in this home for a period extending from shortly after the purchase through [REDACTED] of

² Commentary to the OECD Model Treaty, paragraphs 11-13.

Neither the Treaty nor the OECD Model Treaty provide any guidance as to the time threshold that must be crossed in order for a home to qualify as "permanent". However, we believe [redacted] intention to use the [redacted] home at least through the [redacted] and the fact that he actually resided there for approximately [redacted] months of the [redacted] tax year would satisfy whatever time element might be applicable.³

The fact that [redacted] family was living with him in the United States is another circumstance that should be taken into consideration in determining whether the [redacted] home was his permanent home. The United States has defined permanent home in at least three other treaties as: "the place in which an individual dwells with his family."⁴ Although we have not been provided with the date that [redacted] family joined him in [redacted], apparently it was sometime in [redacted]. His children were subsequently enrolled in school in the United States. In light of the importance attributed to the presence of an individual's family in other U.S. treaties, it would be reasonable to consider this factor in determining where [redacted] permanent home is located. Since his family joined him to live in [redacted] it would be reasonable to conclude that [redacted] had a permanent home available to him in the United States in [redacted].

However, if, after an analysis of all the surrounding facts and circumstances, it is determined that [redacted] had a permanent home available to him in the United Kingdom as well as in the United States, his residence will next depend on where his personal and economic relations were closest ("centre of vital interests"). Under this test consideration is given to a person's family and social relations, his occupation, his political and cultural activities, and his place of business and the place from which his property is managed.⁵ Commentators on the OECD Model have explained that in applying the centre of vital interests test: "[t]he circumstances concerned in the fiscal year concerned are decisive."⁶ It is

³ See Vogel K., Klaus Vogel on Double Taxation Conventions 171 (1991).

⁴ See the U.S.-Belgium Treaty (Article 4(2)), the U.S.-France treaty (Article 3(3)), and U.S.-Norway Treaty (Article 3(2)).

⁵ Commentary to the OECD Model Treaty Article IV, paragraph 15.

⁶ Vogel at 172.

likely that the Service would also take this position.⁷

██████████ maintained some economic relations with the United Kingdom (his agent, attorney, accountant, and investments) after he moved to the United States. However, during most of the ████████ tax year, ██████████ primary personal and economic interests, his family and place of business, were all in the United States. Therefore, in light of the fact that ██████████ most significant relations for the ████████ tax year were with the United States, we believe there is support for finding that his centre of vital interests was with the United States, and not the United Kingdom.

██████████ argument is that the term resident in Article 4 of the Treaty, as applied to a foreign person residing in the United States, "must be construed to include the taxpayer's lifelong activity." There is no indication in the Treaty or the OECD Model Treaty that an individual's lifelong activities must be taken into account in determining whether a person is a resident for treaty purposes. However, paragraph 15 of the Commentary on Article IV(2) of the OECD Model Treaty does acknowledge that the combination of certain factors (some of which include long term relations) may indicate that a dual resident has retained his centre of vital interests in a State other than the one in which he is presently residing. The last sentence of paragraph 15 states:

If a person who has a home in one State sets up a second in the other State while retaining the first, the fact that he retains the first in the environment where he has always lived, where he has worked, and where he has his family and possessions, can, together with other elements, go to demonstrate that he has retained his centre of vital interests in the first State.

This sentence supports ██████████ argument that certain historic facts can be relevant in determining residence, at least when the centre of vital interests test is being applied. However, based on the record before us, we are not satisfied that ██████████ circumstances come within the intended scope of this sentence. As an initial matter, since ██████████ immediate family did not remain in the house in ██████████, there is a question as to whether his situation is covered by

⁷ This approach is consistent with the substantial presence test in § 7701(b)(3) of the Code and § 1.7701(b)-7(c). Section 1.7701(b)-7(c) provides that a dual resident taxpayer will be treated as a nonresident alien individual, if he is a resident of a foreign country under a treaty tie-breaker provision and has claimed a benefit under the treaty. The determination of whether a dual resident taxpayer will be taxed as a nonresident alien is made on an annual basis.

paragraph 15.

There is also an issue as to whether the "other elements" referred to in paragraph 15 would demonstrate that [REDACTED] has retained his centre of vital interests in the United Kingdom. In particular, the circumstances of [REDACTED] presence in the United States could be interpreted to indicate that he was shifting his professional relations toward the United States. His contract with [REDACTED] to perform in a [REDACTED] [REDACTED] along with the amendment to the contract by which he was to perform in [REDACTED] indicate that the United States had become the focus of his livelihood. In fact, it would be reasonable to assume that had the shows been successful, [REDACTED] intended to remain, and would have remained, in the United States with his family for several years.

The limited facts before us strongly suggest that [REDACTED] centre of vital interests was in the United States. However, since the centre of vital interests test is highly factual, Examination should consider all of the surrounding facts and circumstances. [REDACTED] a-c

If an individual's centre of vital interests cannot be determined, his residence will next be resolved based on the location of his habitual abode. A person's habitual abode is determined by where an individual stays more frequently.⁸ We believe the [REDACTED] calendar year is a sufficient period of time for it to be possible to determine whether [REDACTED] residence in the United States was habitual. [REDACTED] was present in the United States for a total of [REDACTED] days during [REDACTED]. Since he clearly stayed more frequently in the United States than in the

⁸ See Commentary to the OECD Model Treaty Article IV, paragraph 17. However, the length of time over which a comparison is to be made has not been specified. Paragraph 19 of the Commentary states that "[t]he comparison must cover a sufficient length of time for it to be possible to determine whether the residence in each of the two states is habitual and to determine the intervals over which the stays take place."

United Kingdom, ██████████ habitual abode for that year was in the United States. Consequently, ██████████ should be deemed to be a resident of the United States for the ██████████ tax year.

██████████ residence can ultimately be determined by one of the three tests outlined above. Therefore it is not necessary to consider ██████████ status as a national of the United Kingdom. Should the United Kingdom and the United States both take the position that ██████████ is a resident of their State under Article 4(2) of the Treaty, then under Article 25 (Mutual Agreement Procedure), ██████████ may present his case to the competent authority of either State.⁹

⁹ Article 25(3)(d) of the Treaty allows the competent authorities to reach agreement on the meaning of terms (i.e., "permanent home", "centre of vital interests", and "habitual abode") that are not defined in the Treaty. Note that the provision in Article 4(2) of the Treaty which allows the competent authorities to settle the question of residency would only apply if the tests in subsection (a)-(b) did not resolve the his residence and ██████████ were either "a national of both Contracting States or of neither of them." Since ██████████ is a national of the United Kingdom and the issue of his residence arises, if at all, because both taxing authorities do not attribute the same meaning to the tie-breaker tests, the competent authorities must resolve the issue of residency under Article 25 and not Article 4(2)(d).