

COVID-19 relief available to some nonresident aliens, foreign corporations

In recent guidance, the IRS provided relief to nonresident aliens and foreign corporations affected by the novel coronavirus (COVID-19) pandemic. More specifically, the relief applies to eligible parties who normally wouldn't conduct business in the United States but have done so because they couldn't leave the country during the COVID-19 crisis.

Affected parties

Nonresident alien individuals who perform services or other activities in the United States, and foreign corporations who employ individuals or engage individuals as agents to perform services or other activities in the United States, may be considered engaged in a U.S. trade or business (USTB). Generally, a nonresident alien or foreign corporation engaged in a USTB incurs taxes on its business income connected to that USTB.

If a U.S. income tax treaty applies, however, the nonresident alien individual or foreign corporation generally won't be liable for tax on its USTB income (in other words, its profits). But there's an exception if the business is conducted through a permanent establishment (PE) in the United States — such as an office, other fixed base or a dependent agent.

Restricted travel

The COVID-19 crisis has significantly limited the ability of many individuals to leave the United States. Regardless of whether they're infected with the virus, many people have become severely restricted in their movements because of:

- Canceled flights or other transportation disruptions,
- Shelter-in-place orders by governmental authorities,
- Mandatory quarantines, and
- Border closures.

In addition, some individuals may simply feel unsafe traveling during the COVID-19 crisis because of the inherent inability to maintain social distancing in travel-related public spaces and unavoidable exposure to others.

Relief specifics

Many nonresident aliens and individuals acting as agents of foreign corporations remain temporarily in the United States solely because of COVID-19-related travel disruptions. As a result, they're continuing to be engaged in a USTB when they otherwise wouldn't. The IRS has provided some relief from the USTB rules for those eligible.

First, the agency has stated that a nonresident alien, foreign corporation or a partnership in which either is a partner (otherwise known as an "affected person") may choose an uninterrupted period of up to 60 calendar days, beginning on or after February 1, 2020, and on or before April 1, 2020, (the COVID-19 emergency period), during which services or other activities conducted in the United States

won't be considered in determining whether the nonresident alien or foreign corporation is engaged in a USTB. This is provided that such activities were performed by one or more individuals temporarily present in the United States, and the activities wouldn't have been performed in this country but for COVID-19-related travel disruptions.

For purposes of this guidance, an "individual temporarily present in the United States" means an individual who's:

- Present in the United States on or after February 1, 2020, and on or before April 1, 2020, and
- Is a nonresident alien, U.S. citizen or lawful permanent resident who had a tax home as defined under Internal Revenue Code Section 911(d)(3) outside the United States in 2019 and reasonably expects to have a tax home outside the United States in 2020.

In addition, to determine the nonresident status of an alien, the relief provided in Revenue Procedure 2020-20 is applicable.

Second, the IRS has provided that, during an affected person's COVID-19 emergency period, services or other activities performed by one or more individuals temporarily present in the United States won't be considered in determining whether the nonresident or foreign corporation has a PE. This is provided that the services or other activities of these individuals wouldn't have occurred in the United States but for COVID-19-related travel disruptions.

Documentation and protective filing

An affected person should retain contemporaneous documentation to establish the period chosen as the COVID-19 emergency period. He or she should also document that the relevant business activities conducted by individuals temporarily present in the United States during the COVID-19 emergency period wouldn't have been undertaken in the United States but for COVID-19-related travel disruptions. The affected person should be prepared to provide such documentation upon IRS request.

Nonresident aliens and foreign corporations (including those that are partners in partnerships) may make protective filings of their annual U.S. tax returns — even if they believe they aren't required to file for the 2020 tax year because they weren't engaged in a USTB. Doing so properly will activate the benefits and protections that arise from such filings (such as those relating to deductions, statutes of limitations and claiming tax treaty-based relief).

Evolving effects

The IRS intends to continue monitoring the evolving effects of the COVID-19 pandemic on nonresident alien individuals and foreign corporations. It may update this guidance as appropriate. Consult your CPA for the latest developments.