Cross-border Tax Guidance for Travel Disruptions Due to COVID-19 Emergency

The Treasury Department and the IRS have provided tax relief guidance to individuals and businesses affected by travel disruptions arising from the COVID-19 emergency.

- Up to 60 consecutive calendar days of U.S. presence that are presumed to arise from COVID-19 travel disruptions will not be counted for determining U.S. tax residency under Code Sec. 7701(b) or determining whether an individual qualifies for tax treaty benefits for income from personal services performed in the United States.
- For certain U.S. citizens and residents, qualification for gross income exclusion of foreign earned income under Code Sec. 911 will not be impacted by days spent away from a foreign country due to the COVID-19 emergency based on certain departure dates.
- Certain U.S. business activities by a nonresident alien or foreign corporation will not be counted for determining whether the individual or entity is engaged in a U.S. trade or business or has a U.S. permanent establishment, provided the activities would not have been conducted in the United States without COVID-19 travel disruptions.

COVID-19 Travel Disruptions
The relief recognizes that the global outbreak of COVID-19 may have affected the travel plans of foreign travelers who intended to leave the United States. Regardless of whether they were infected with the coronavirus, individuals may have been severely restricted in their movements, including by order of a government authority. Individuals who do not have COVID-19 and attempt to leave the United States may face canceled flights, disruptions in other forms of transportation, shelter-in-place orders, quarantines and border closures.

COVID-19 Medical Condition Travel Exception for Foreign Individuals
Travel and related disruptions resulting from the COVID-19 emergency may cause foreign individuals who did not anticipate meeting the substantial presence test under Code Sec. 7701(b)(3) to become U.S. residents for federal income tax purposes during 2020, and may impact the individual’s qualifications.
for certain treaty benefits. To address this situation, Rev. Proc. 2020-20 does the following:

- Allows certain foreign individuals to claim a COVID-19 medical condition travel exception to becoming U.S. residents
- Provides similar relief for determining if an individual (whether or not eligible for the medical travel exception) qualifies for U.S. income tax treaty benefits for income from dependent personal services performed in the United States

“The relief recognizes that the global outbreak of COVID-19 may have affected the travel plans of foreign travelers who intended to leave the United States.”

Under the general medical condition exception to the substantial presence test, foreign individuals are not treated as present in the United States on days when they intended to leave the United States but were unable to because of a medical condition that arose while they were present in the United States. This does not apply, however, if the condition or problem existed before the individual’s arrival in the United States, and the individual was aware of the condition or problem (Reg. §301.7701(b)-3(c)). Individuals are eligible to claim a COVID-19 medical condition travel exception if they:

- Were not U.S. residents at the close of the 2019 tax year
- Are not lawful permanent residents at any point in 2020
- Are present in the United States on each day of their COVID-19 emergency period
- Do not become U.S. residents in 2020 due to days of presence in the United States outside of their COVID-19 emergency period

The COVID-19 emergency period is a single period of up to 60 consecutive calendar days selected by individuals, starting on or after Feb. 1, 2020, and on or before April 1, 2020, during which they are physically present in the United States on each day. Eligible individuals who intended to leave the United States during their COVID-19 emergency period but could not leave due to COVID-19 emergency travel disruptions can exclude up to 60 calendar days of presence in the United States for the substantial presence test. The COVID-19 emergency will be considered a medical condition that prevented individuals from leaving the United States on each day during their COVID-19 emergency period, and will not be treated as a pre-existing medical condition.

Further, in determining individuals’ eligibility for treaty benefits for income from employment or other dependent personal services within the United States, any days of presence during their COVID-19 emergency period on which they were unable to leave the United States due to COVID-19 emergency travel disruptions will not be counted.

Eligible Individuals who must file a 2020 Form 1040-NR, U.S. Nonresident Alien Income Tax Return, must claim the COVID-19 medical condition travel exception by attaching Form 8843, Statement for Exempt Individuals and Individuals with a Medical Condition, to their return by its due date (with extensions) and mailing the forms to the address in the Form 1040-NR instructions.

Eligible individuals who are not required to file a 2020 Form 1040-NR are not required to file Form 8843 to claim the exception but should retain all relevant supporting records so they can produce these records and complete a Form 8843 if requested by the IRS.

Foreign Earned Income Exclusion Relief

Rev. Proc. 2020-27 provides a waiver for certain individuals who failed to meet the eligibility requirements of Code Sec. 911(d)(1) for the foreign earned income exclusion because adverse conditions in a foreign country precluded the individual from meeting the requirements during 2019 and 2020. Under Code Sec. 911(d)(4), the COVID-19 emergency is an adverse condition that precluded the normal conduct of business in the People’s Republic of China (excluding the Special Administrative Regions of Hong Kong and Macau (China)) as of Dec. 1, 2019, and globally, as of Feb. 1, 2020.

The covered period ends on July 15, 2020, unless the Treasury Department and IRS announce an extension.
Under this relief, individuals who left China on or after Dec. 1, 2019, or left another foreign country on or after Feb. 1, 2020, but on or before July 15, 2020, will be treated as qualified under the foreign earned income exclusion rules for the period during which they were present in, or were bona fide residents of, that foreign country, provided they establish a reasonable expectation that they would have met the requirements of Code Sec. 911(d)(1) without the COVID-19 emergency.

An individual who was first physically present or established residency in China after Dec. 1, 2020, or another foreign country after Feb. 1, 2020, is not eligible for this relief.

Individuals seeking to qualify for the foreign earned income exclusion because they could reasonably have been expected to be present in a foreign country for 330 days but for the COVID-19 emergency, and have met the other requirements for qualification, may use any 12-month period to meet the qualified individual requirement.

Guidance on Forbearance Programs Arising from COVID-19

The IRS has released guidance on the tax qualification of certain securitization vehicles that hold mortgage loans for which borrowers have participated in forbearance programs arising from the COVID-19 emergency (Rev. Proc. 2020-26). Specifically, the guidance describes safe harbors under which modifications to certain mortgage loans in connection with a forbearance program are not treated as:

- Replacing the unmodified obligation with a newly issued obligation
- Giving rise to prohibited transactions
- Manifesting a power to vary for purposes of determining the federal income tax status of certain securitization vehicles that hold the loans

The guidance also describes safe harbors under which certain securitization vehicles are not treated as having improper knowledge of an anticipated default on the grounds that they acquired a mortgage loan with respect to which the borrower had participated in a forbearance program.

Affected Transactions

For mortgage loans held by real estate mortgage investment conduits (REMICs) or investment trusts, the guidance applies to:

- Forbearances of any federally backed mortgage loans or federally backed multifamily mortgage loans provided under sections 4022 or 4023 of the Coronavirus Aid, Relief, and Economic Security (CARES) Act (PL. 116-136), respectively, and all related modifications
- Forbearances (and all related modifications) not described above, that are provided by a holder or servicer, agreed to by the borrower of any federally or non-federally backed mortgage loan, and made under certain forbearance programs for borrowers experiencing a financial hardship due directly or indirectly to the COVID-19 emergency, under which, between March 27, 2020, and Dec. 31, 2020, inclusive, the borrower requests or agrees to the forbearance (and all related modifications)

The guidance also applies to these direct or indirect acquisitions by a REMIC on or after March 27, 2020:

- Any federally backed mortgage loans, and any federally backed multifamily mortgage loans, with respect to which the borrower received a forbearance under section 4022 or 4023 of the CARES Act, respectively
- Any mortgage loans not described above, for which between March 27, 2020, and Dec. 31, 2020, inclusive, the borrower requested or agreed to a forbearance, and for which the forbearance was granted under a program for borrowers experiencing a financial hardship due to the COVID-19 emergency.
Guidance on 163(j) Elections for Legislation

The IRS has released guidance (Rev. Proc. 2020-22) on making the following elections for the business interest deduction limitation:

- Election out of the 50% adjusted taxable income (ATI) limitation for tax years beginning in 2019 and 2020 under the Coronavirus Aid, Relief, and Economic Security (CARES) Act (P.L. 116-136)
- Election to use the taxpayer’s ATI for the last tax year beginning in 2019 to calculate the Code Sec. 163(j) limit for the 2020 tax year under the CARES Act
- Election out of deducting 50% of excess business interest expense (EBIE) for the 2020 tax year without limitation under the CARES Act

The guidance also provides transition relief to taxpayers making or revoking the election to be an electing real property trade or business, or an electing farming trade or business, under Code Sec. 163(j)(7).

“The IRS grants the taxpayer consent to revoke the election by filing an amended return and using the 50% limit.”

Business Interest Limit

A taxpayer’s deduction of business interest expenses paid or incurred for any tax year is generally limited to the sum of business interest income, floor plan financing interest and 30% of ATI. The Code Sec. 163(j) limitation is generally increased from 30% to 50% of a taxpayer’s ATI for any tax year beginning in 2019 and 2020 under the CARES Act.

A taxpayer may elect not to have the increased limitation apply in 2019 or 2020. In addition, a taxpayer may elect for any tax year beginning in 2020 to use ATI from the 2019 tax year to calculate its Code Sec. 163(j) limitation. The 50% ATI limitation does not apply to partnerships for the 2019 tax year. Instead, a partner treats 50% of its allocable share of a partnership’s EBIE for 2019 as an interest deduction in the partner’s 2020 tax year, without limitation. The remaining 50% of such EBIE remains subject to the Code Sec. 163(j) limit applicable to EBIE carried forward at the partner level. A partner may elect out of the 50% EBIE rule.

Election Out of 50% ATI

No formal statement is required to make the election not to apply the 50% ATI limit for the 2019 or 2020 tax year. The election is made by filing a federal income tax return (or Form 1065 in the case of a partnership for 2020) by the due date, including extensions, using the 30% ATI limitation. The election may also be made on an amended return or administrative adjustment request (AAR).

The election must be made for each tax year. For a partnership, it is made by the partnership and not the partners. It is made by the agent for a consolidated group and by each controlling domestic shareholder for an applicable controlled foreign corporation (CFC). The IRS grants the taxpayer consent to revoke the election by filing an amended return and using the 50% limit.

Election to Use 2019 ATI in 2020

Likewise, no formal statement is required to make the election to use 2019 ATI in the 2020 tax year. The election is made by filing a federal income tax return (or Form 1065) by the due date for the 2020 tax year, including extensions, using the taxpayer’s 2019 ATI. The 2019 ATI used for the calculation is prorated if the taxpayer’s 2020 tax year is a short tax year. The election may also be made on an amended return or AAR.

For a partnership, the election is made by the partnership and not the partners. It is made by the agent for a consolidated group and by each controlling domestic shareholder for an applicable CFC. For a CFC group, the election is not effective for any group member unless made for every tax year of a CFC group member for which the election is available.
Election Out of 50% EBIE Rule
No formal statement is required by a partner in a partnership to make the election out of the 50% EBIE rule. A partner makes the election by filing its federal income tax return (or Form 1065) by the due date for the 2020 tax year, including extensions, by not applying the 50% EBIE rule in determining the Code Sec. 163(j) limitation. The election may also be made on an amended return or AAR. The IRS grants the partner consent to revoke the election by filing an amended return, Form 1065, or AAR applying the 50% EBIE rule.

IRS Addresses Bonus Depreciation for Post-2017 Qualified Improvement Property

As a result of the retroactive assignment of a 15-year recovery period to qualified improvement property (QIP) placed in service after 2017, QIP generally qualifies for bonus depreciation, typically at a 100% rate. IRS guidance (Rev. Proc. 2020-250) requires taxpayers who previously filed two or more returns using what is now an incorrect depreciation period (usually 39 years) to file an accounting method change on Form 3115, Application for Change in Accounting Method, to claim bonus depreciation and/or depreciation based on the 15-year recovery period. The automatic consent procedures apply. If only one return has been filed, a taxpayer may either file Form 3115 or an amended return. No alternatives to filing Form 3115 or an amended return are provided.

The guidance also allows taxpayers to make or revoke various elections, whether or not directly related to QIP, such as the election out of bonus depreciation. These elections and revocations may be made on an amended return or Form 3115.

The guidance applies to a tax year ending in 2018, 2019 or 2020.

Amended Return Due Date
When an amended return (including an amended Form 1065, U.S. Return of Partnership Income) is filed for the placed-in-service year to correct the QIP depreciation period and/or claim bonus depreciation, the amended return is due on or before Oct. 15, 2021, but not later than the applicable assessment limitations period. Certain partnerships subject to the centralized audit regime may file an administrative adjustment request (AAR) by Oct. 15, 2021.

Late Elections and Revocations
For a limited time, taxpayers may make a late election or revoke a prior election that was made for depreciable property placed in service during a tax year ending in 2018, 2019 or 2020. The return must have been timely filed before April 17, 2020.

These elections and revocations are not limited to QIP. The covered elections are:

- Election to use the MACRS alternative depreciation system (Code Sec. 168(g)(7))
- Election to claim bonus depreciation on specified plants in the year of planting or grafting (Code Sec. 168(k)(5))
- Election out of bonus depreciation for a class of property (Code Sec. 168(k)(7))
- Election to claim bonus depreciation at the 50% rate in lieu of the 100% rate for all bonus depreciation property placed in service in a tax year that includes Sept. 28, 2017 (Code Sec. 168(k)(10))

“The guidance applies to a tax year ending in 2018, 2019 or 2020.”

Generally, making or revoking an election is not considered an accounting method change. However, due to the administrative burden of filing amended returns and AARs, the IRS allows taxpayers to treat the making or revoking of these elections as a change in method of accounting with a Code Sec. 481(a) adjustment.
Taxpayers may make or revoke these elections by filing an amended return (including any subsequent affected return) or AAR for the placed-in-service year of the property by Oct. 15, 2021. However, if earlier, the amended return must be filed no later than the expiration of the limitations period for the tax year of the amended return.

For taxpayers choosing not to file an amended return, a Form 3115 to make or revoke these elections must be filed with a timely filed original income tax return (or Form 1065) for the first or second tax year after the tax year in which the property was placed in service, or with a timely filed original income return (or Form 1065) filed on or after April 17, 2020, and on or before Oct. 15, 2021.

Excluded Taxpayers

These procedures do not apply to QIP that was expensed under any provision, including Code Sec. 179, as qualified real property. They also do not apply to an electing real property trade or business, or electing farming business, that made a late election or withdrew an election related to the business interest deduction limitations (Code Sec. 163(j)) for the tax year in which QIP was placed in service. Changes to depreciation affected by the late election or withdrawn election were previously addressed in Rev. Proc. 2020-22.

Accounting Method Change Lists

Rev. Proc. 2019-43, 2019-48 I.R.B. 1107, which contains all automatic consent accounting method changes, adds new section 6.19 to reflect the rules described in this guidance. Section 6.19 provides that certain eligibility rules do not apply. Thus, the automatic procedure will apply even if the change is made in the taxpayer’s last tax year of business or if the taxpayer made a change for the same item during any of the five tax years ending with the year of change.

Rev. Proc. 2015-56, 2015-49, I.R.B. 827, relating to the remodel-refresh safe harbor, is modified to require a taxpayer to substantiate the portion of the property that is QIP.

Guidance on NOL Carryback Under CARES Act

The IRS has issued guidance providing administrative relief under the Coronavirus Aid, Relief and Economic Security (CARES) Act (P.L. 116-136) for taxpayers with net operating losses (NOLs) (Rev. Proc. 2020-24; Notice 2020-26; IR-2020-67).

The CARES Act provides a five-year carryback for NOLs arising in tax years beginning in 2018, 2019 and 2020. The Tax Cuts and Jobs Act (P.L. 115-97) had eliminated carryback periods effective for tax years ending after 2017. Some taxpayers have filed 2018 and 2019 returns without using the five-year carryback period.

“**The CARES Act allows these taxpayers to file a late application for a tentative refund.**”

The relief provides procedures for waiving the carryback period in the case of an NOL arising in a tax year beginning after Dec. 31, 2017, and before Jan. 1, 2020. It describes how taxpayers with NOLs arising in tax years 2018, 2019 or 2020 can elect to either waive the carryback period for those losses entirely or exclude from the carryback period any years in which the taxpayer has an inclusion in income as a result of the Code Sec. 965(a) transition tax.

Six-month Extension for Filing Refund Claims

Taxpayers are granted an extension to file refund applications on Form 1045 (individuals, estates and trusts) or Form 1139 (corporations) for the carryback of an NOL that arose in any tax year that began during calendar year 2018 and ended on or before June 30, 2019.
2017/2018 Fiscal Year Taxpayers
Relief is also provided for 2017/2018 fiscal year taxpayers who failed to claim an NOL carryback due to a drafting error in the Tax Cuts and Jobs Act that terminated the two-year NOL carryback period applied to NOLs arising in tax years ending after 2017. The CARES Act corrects the effective date error by providing that the termination applies to tax years beginning after 2017, making these taxpayers eligible to claim an NOL carryback. The CARES Act allows these taxpayers to file a late application for a tentative refund. The application is considered timely if filed by July 25, 2020.

The guidance also explains how 2017/2018 fiscal year taxpayers may waive the carryback period, reduce the carryback period (if it is longer than the standard two-year carryback) or revoke an election to waive a carryback period for a tax year that began before Jan. 1, 2018, and ended after Dec. 31, 2017.

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