March 26, 2020

Peter H. Blessing, Esq.
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Internal Revenue Service
Office of Chief Counsel
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RE: Request for Relief to Tax Residency Rules from COVID-19

Dear Mr. Blessing:

The Florida Bar Tax Section is submitting this letter to request relief for those alien individuals who are presently in the United States and unable to leave the United States as a result of travel restrictions, or becoming ill from the virus itself, or otherwise, and as a result, would be inadvertently treated as a resident alien taxpayer.

Principal authors for these comments were Leslie Share, Alfredo Tamayo and Jennifer Wioncek.

Although the members of The Florida Bar Tax Section who participated in preparing these comments may have clients who would be affected by the proposed regulations, 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.

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The Florida Bar Tax Section is comprised of approximately 2,000 members.

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 exercise their available powers and issue regulations or other appropriate guidance that would exclude days of presence beginning on or after January 1, 2020 through July 31, 2020 (or for a longer period of time, if later deemed necessary) from the definition of a "day" for purposes of IRC §7701(b), the Treasury Regulations promulgated thereunder (Reg. §§301.7701(b)-1 through 301.7701(b)-9, inclusive), as well as for all other provisions of the Internal Revenue Code and the Treasury Regulations that reference these rules [e.g., IRC §877(g)].[1] In the event that Treasury and the IRS do not deem it appropriate to exercise its powers to provide a short-term exclusion of days, this letter suggests other proposals that we would respectfully request be considered as relief options. We believe that Treasury has sufficient authority to issue such guidance but to the extent Treasury considers it requires additional authority, we consider that Congress should provide such authority and direct Treasury to use it.

Reasons For Relief

The COVID-19 pandemic is a public health crisis without precedent in living memory which is impacting the health, personal and economic well-being of individuals worldwide. As a result of the virtually uncontrolled spread of the COVID-19 virus since earlier this year, the United States and numerous other countries have in effect closed their respective borders to numerous individuals. In addition, airlines and cruise ship companies have cancelled or suspended their operations, making it practically impossible for alien individuals to leave the United States to return to their home countries against their will. Many such individuals (as do many U.S. citizens and permanent residents) have justifiable fears of travelling under any circumstances because of the current pandemic and the ease of becoming ill in close quarters, as

[1] All Section ("§") references herein refer to the Internal Revenue Code (hereinafter "Internal Revenue Code" or "IRC"), as amended from time to time, or the Treasury Regulations issued thereunder (hereinafter "Treasury Regulations" or "Reg.").

evidenced by the many individuals becoming ill in travel-related positions such as TSA personnel, flight attendants, and cruise ship crew and other industry workers. In addition, a number of these alien individuals or their dependents have contracted the COVID-19 virus either before or after arriving in the United States and cannot leave until their medical treatment is fully complete.

An issue that has recently become apparent to the International Division of the Florida Bar Tax Section is how the COVID-19 crisis can cause alien individuals to become United States residents for Federal income tax purposes as a result of inadvertently spending too much time in the United States, either due to travel restrictions caused by COVID-19 or as a result of suffering from COVID-19. If alien individuals spend too much time in the United States, they may inadvertently become residents of the United States for Federal income tax and reporting purposes ("RAs") and subject to the same Federal tax reporting obligations as citizens and lawful permanent residents of the United States which include: (1) paying income tax on worldwide income and (2) complying with broad information reporting obligations to disclose ownership of certain foreign assets (e.g., foreign bank accounts, ownership of foreign companies) and cross-border activities relating to such assets.

Other issues that alien individuals are beginning to realize is that if their days of presence were to count as result of the COVID-19 pandemic they could be limited in the number of days they could spend in the United States in the future without being treated as a RA under the Substantial Presence Test ("SPT") rules. This could lead to other collateral effects such as the cancellation of future trips to the United States by such persons that could have additional economic effects on such individuals. Perhaps even more importantly is that alien individuals are an important factor to the United States economy. Providing relief to such individuals will allow them the ability to come back to the United States without fear of RA treatment and would help boost our economy (e.g., hotels, interstate travel, shopping, entertainment, attending conferences and similar events) as we rebound from the COVID-19 pandemic.

The IRS is acutely aware of the impact of COVID-19 is having on taxpayers. The IRS established a webpage (https://www.irs.gov/coronavirus) containing various resources to educate taxpayers about relief that has been passed as a result of COVID-19. One form of relief is contained in Notice 2020-18 which automatically extends the filing of U.S. income tax returns and payment of related taxes from April 15th to July 15th. The IRS also issued IR-2020-59 regarding its new People First Initiative to assist taxpayers facing the challenges of COVID-19 issues. In this same spirit, we respectfully ask that you consider the proposal to provide needed relief to alien individuals who may otherwise become RAs for U.S. income tax and reporting purposes.

We understand other countries are looking at similar issues with respect to individuals who may be unable to leave the foreign jurisdiction and potentially become subject to residency status in such foreign jurisdiction (see e.g., https://www.internationalinvestment.net/news/4012966/hmrc-special-treatment-residents-forced-overstay?utm_source=Adestra&utm_medium=email&utm_term=&utm_content=&utm_campaig

n=II%20Event%202%20-%20House%20Ad&utm_campaignid=6561&utm_cmdid=126458). In the event that a U.S. citizen could unnecessarily be subject to other another country's tax system, it would be perceived as unfair if the United States did not provide comparable reciprocity, particularly when a double-tax treaty is not otherwise available.

Proposed Relief

A. Simplest and Preferred Approach

As a bottom-line, we strongly believe that it would not be reasonable or just for the COVID-19 virus pandemic to in effect submit alien individuals currently present in the United States to either U.S. income taxation of their worldwide income or being subject to the far-reaching U.S. tax compliance regime applicable to interests in foreign financial accounts, entities and other foreign assets. Taking into account the unique and unprecedented circumstances caused by the COVID-19 virus pandemic, we therefore respectfully submit that the Treasury and IRS exercise their available powers to issue regulations or other appropriate guidance that would exclude days of presence beginning on or after January 1, 2020 through July 31, 2020 (or for a longer period of time, if later deemed necessary) from the definition of a "day" for purposes of IRC §7701(b), the Treasury Regulations promulgated thereunder (Reg. §§301.7701(b)-1 through 301.7701(b)-9, inclusive), as well as for all other provisions of the Internal Revenue Code and the Treasury Regulations that reference these rules [e.g., IRC §877(g)]. We believe this is the most simple and administrable approach. Doing so will not only provide relief for those individuals who are arguably in the United States involuntarily, but also provide relief to the IRS by substantially minimizing resources that may otherwise have to be devoted to reviewing various Federal tax and information filings alien individuals may be required to file to claim nonresident alien status ("NRA") for U.S. income tax and information reporting purposes. By limiting this exercise to a certain time period, it also reduces the risk of abuse for individuals who may be present in the United States and have the ability to return to another country.

Again, we believe that Treasury has sufficient authority to issue such guidance, but to the extent Treasury considers it requires additional authority, we consider that Congress should provide such authority and direct Treasury to use it.

B. Alternative Proposals

In the event that the Treasury and IRS do not deem it appropriate to exercise its powers to exclude days of physical presence as set forth above, we respectfully submit that the Treasury and IRS consider one or more of the following alternative proposals.

1. Expand the Medical Exception and Amend IRS Form 8843

Under current law, an alien individual who is unable to leave the United States because of a medical condition which arose while the individual was present in the United States is not treated as being present in the United States for purposes of the SPT on any day that such

individual was unable to leave the United States because of the medical condition. This has historically been a narrow exception limited to persons who require medical attention after arriving in the United States and who are "unable" to leave the United States as a result of such medical condition (e.g., serious automobile accident). Whether an alien individual was "unable" to leave the United States as a result of the medical condition that arose while in the United States is a facts and circumstances test. In this regard, for those alien individuals who are being treated for COVID-19, it may be difficult for their treating physician to determine whether the alien individual became infected while in the United States or abroad given the fact that much is still being learned about COVID-19.

Accordingly, we respectfully suggest that an alien individual who is unable to leave the United States as a result of COVID-19 for any reason, even if they do not themselves acquire the virus, be allowed to exclude their days under the medical exception. Alternatively, we would request that an alien individual who is unable to leave the United States (and their spouse and children and/or legal dependent who are present in the United States with such individual) who received treatment for COVID-19 while in the United States be deemed to suffer from a qualifying medical condition for purposes of Reg. § 301.7701(b)-3(c). In addition, we respectfully suggest that an alien individual should be deemed to be "unable" to leave the United States as a result of the COVID-19 treatment for as long as the alien individual's United States visa permits them to remain in the United States in accordance with United States immigration laws (but no longer than December 31, 2020).

For alien individuals who are relying on the pre-existing medical condition exception contained in Reg. § 301.7701(b)-3(c), Part V of Form 8843 should be revised so that a new line 19 is added. The new line 19 would be for alien individuals to confirm that they have been treated for COVID-19 and would not require the attending physician to sign the Form 8843. Instead, the filer would provide a signed letter from the attending physician upon request.

2. Expand Closer Connection Tax Home Exception and Amend IRS Form 8840

The closer connection tax home exception ("CCTH Exception") under IRC § 7701(b)(3)(B)(i) and Reg. § 301.7701(b)-2 provides that an alien individual will be considered an NRA for U.S. income tax purposes, notwithstanding the fact that such individual violated the SPT for a taxable year if, in general, such individual: (1) is present in the U.S. for fewer than 183 days in the applicable taxable year for which the CCTH Exception is being claimed; (2) maintains a tax home in a foreign country during such year; (3) has a closer connection to such foreign country than to the U.S. during such year; (4) timely files a Form 8840; and (5) has not applied for or taken affirmative steps to change his status to that of a permanent resident during such year. As a result, if an alien individual satisfies the requirements of the CCTH Exception, such individual could continue to be treated as an NRA and would only be subject to U.S. income tax on a limited basis (on non-exempt income from U.S. sources and on U.S. business income). To clarify, the CCTH does not apply in the case of a Green Card holder (nor, to an individual who has taken affirmative steps to apply for a Green Card).

We propose that the "fewer than 183 days in the current year" limitation be suspended for 2020. The intention of this change would be to in effect enable alien individuals to file Form 8840 claiming the application of the CCTH Exception to their respective situations using Form 8840 regardless of the number of days spent in the U.S. this year. Such an individual would still need to demonstrate that during 2020, he or she had a closer connection to a foreign country [or to two foreign countries pursuant to Reg. § 301.7701(b)-2(e) in which he or she maintained a tax home than to the United States.

We further propose that Line 5 of Part I of Form 8840 would be modified to incorporate the changes described above.

3. Enhance Treaty Relief and Amend IRS Form 8833

Under current law, an alien individual who meets the SPT may retain NRA status if the individual can meet the requirements of the CCTH Exception or by relying on an income tax treaty with the United States. Although there are various requirements that must be met to rely on the CCTH Exception, an individual will generally not be able to rely on such exception if they spend 183 or more days in the United States during the year in question. In such a case, a "dual resident" individual who is considered a resident of both the U.S. and a treaty country pursuant to a U.S. income tax treaty may retain NRA status for certain U.S. tax and compliance purposes so long as the requirements of the relevant treaty are met.

Under Reg. § 301.7701(b)-7(a)(3), a "dual resident" alien who claims to be an NRA under a treaty will only be treated as an NRA for purposes of computing such individual's U.S. income tax liability but will be treated as an RA for all other purposes of the Internal Revenue Code. This generally includes the extensive tax reporting requirements that apply to RAs with respect to interests in foreign business entities, foreign trusts and foreign financial accounts. Such extensive tax reporting requirements may include the filing of Form 5471, "Information Return of U.S. Persons With Respect to Certain Foreign Corporations," Form 8865, "Return of U.S. Persons With Respect to Certain Foreign Partnerships", Form 3520-A, "Annual Information Return of Foreign Trust With a U.S. Owner," FinCEN Form 114, "Report of Foreign Bank and Financial Accounts" and certain other information forms. It is possible that multiple information forms have to be completed and that detailed information (e.g., financial statements, related party transactions, ownership information) needs to be disclosed. The failure to correctly and timely file a required information form can result in significant monetary penalties, absent a showing of reasonable cause.

For those individuals who rely on an income tax treaty with the United States, we would request to minimize the compliance burdens associated with a treaty filer. We would request a relaxation of meeting the treaty tiebreaker rules under the applicable treaty such that the individual only needs to have nationality to the other country to be treated as a resident of the other country.

In addition, we respectfully suggest that an individual who claims NRA status for 2020 under a treaty retain this classification for all purposes of the Internal Revenue Code so that information forms are not required to be filed by the "dual resident" individual. Taking this approach, the burden placed on the IRS in having to review various information forms can be reduced. From the perspective of the "dual resident," the burden of obtaining, organizing and providing such information to a tax preparer who is experienced in cross-border tax compliance can be avoided. The request to treat a "dual resident" as an NRA for all purposes of the Internal Revenue Code is not a novel idea. It appears over the years that the IRS has gradually begun to take this approach. For example, in the preamble to Treasury Regulations issued in connection with Form 8938, the IRS does not require a "dual resident" individual who claims NRA status to file Form 8938, noting that the filing of such form is not essential to effective IRS tax enforcement efforts when "the taxpayer's filing of a Form 8833 with his or her Form 1040NR (or other appropriate form) will permit the IRS to identify individuals in this category and take follow-up tax enforcement actions when considered appropriate.." More recently, the IRS has taken a similar approach with Form 8621.

For "dual resident" individuals who file Form 8833 to retain NRA status by relying on an income tax treaty with the United States, the instructions to the form should be modified to clarify that such individual is treated as an NRA for ALL purposes of the Internal Revenue Code for the 2020 tax year.

4. Suspend Information Return Filing Requirements For Non-Treaty Filers.

As mentioned above, RA status would trigger potentially numerous and onerous information return filing requirements. For similar reasons expressed above in relation to treaty filers, we would request that all information return filing requirements be suspended for alien individuals who cannot rely on a treaty and who are only RAs because they were forced to over stay in the United States as a result of the COVID-19 pandemic. If such relief were not provided, we would anticipate many individuals would not be aware of these Federal tax and information filing requirements leading to many delinquent filings. Therefore, we would request that any Federal income tax or information form that an alien individual files as a result of having inadvertently become a RA be granted a very liberal interpretation of "reasonable cause" for purposes of abating any late filing or payment penalties.

5. Relax Certain Rules for Student Visa Holders and Amend Form 8843

A "student" is defined to include an alien individual who is "temporarily present in the U.S." on an F-visa or on an M-visa, or as a student on a J-visa or a Q-visa, and provided that the alien "substantially complies" with the requirements of his visa. An alien individual can only exclude days as a student for five years (however, there are certain circumstances where this may be extended). Immediate family members are classified as "exempt individuals" along with the student, but only if the student holds an F- or M-visa (and thus if the immediate family members also hold F- or M-visas). If the student holds a J- or Q-visa, the student is classified as an "exempt individual" if the student complies with the statutory requirements (i.e., that the student

"substantially complies" with his or her visa and that satisfies the relevant time limits), but the student's immediate family members are not also classified as "exempt individuals". Regulation § 301.7701(b)-8(b)(2) requires students who are eligible for the exception to the SPT to file a disclosure statement on Form 8843 with their annual Form 1040NR filing, which is generally June 15th of the year after the calendar year in question (e.g., for the 2020 taxable year, this would be June 15, 2021).

Pursuant to Reg. § 301.7701(b)-3(b)(7)(iii), an alien individual cannot exclude days of presence as a student in applying the SPT if the alien individual has been exempt as a teacher, trainee or student for any part of more than five calendar years, unless it is established to the satisfaction of the IRS (using Form 8843) that the individual does not intend to reside permanently in the United States, and has substantially complied with the U.S. student visa requirements. In this regard, many alien individuals present in the United States on student visas are currently faced with the issue of being unable to leave the United States although their school programs have either been delayed, extended, or cancelled.

We believe that an alien individual's inability to fully comply with the U.S. student visa requirements due to his or her circumstances beyond their control due to the COVID-19 virus pandemic should not be penalized. Therefore, so long as such alien individuals have not performed one of the actions deemed for this purpose to indicate an intention to reside permanently in the United States, their need to otherwise file a 2020 Form 8843 to demonstrate meeting the aforementioned five-year limitation and "substantial compliance" rules should be abrogated.

6. Exempt Certain U.S. Source Income for Exempt Individuals

Most foreign students and foreign scholars in the United States are considered to be "exempt individuals" whose days of presence in the United States do not "count" for SPT purposes and thus may remain NRAs for extended periods of time. Notwithstanding such "exempt individual" treatment, however, a flat tax of 30 percent is imposed on U.S. source capital gains in the hands of NRAs physically present in the United States for 183 days or more during the taxable year. This 183-day rule bears no relation to the 183-day rule under the SPT. Gain or loss from the sale or exchange of personal property generally has its source in the United States if the alien individual has a tax home in the United States. The key factor in determining if an individual is a U.S. resident for purposes of the sourcing of capital gains is whether the alien's "tax home" has shifted to the United States. If an alien does not have a tax home in the United States, then the alien's U.S. source capital gains would be treated as foreign-source and thus nontaxable.

An individual's "tax home" for this purpose is defined as "such individual's home for purposes of IRC § 162(a)(2) (relating to traveling expenses while away from home)" and as being "located at his regular or principal (if more than one regular) place of business or, if the individual has no regular or principal place of business because of the nature of the business, then at his regular place of abode in a real and substantial sense." In this regard, maintenance of a

U.S. "abode" should not automatically prevent an individual from establishing a tax home in a foreign country, but there is no specific definition of "abode" for this purpose. Regardless of the circumstances, we submit that an individual who is temporarily present in the U.S. on F, J, M, or Q visas should not be treated as having a U.S. "tax home" simply because they work part-time or happen to receive some form of stipend during their U.S. stay.

In any event, while the COVID-19 virus pandemic exists, alien individuals with such immigration status should not be effectively penalized if they choose to work for compensation or receive a U.S.-source scholarship of fellowship to help support themselves while they remain in the United States. We propose then not to subject alien individuals present in the U.S. on F, J, M, or Q visas to tax on their U.S.-source capital gains when such individuals receive U.S.-source scholarships or fellowships and/or are employed in the United States during 2020 regardless of the period of such individual's intended U.S. stay or the scholarship or fellowship in question.

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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

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