

EXCEPTIONS TO THE US RESIDENCY SUBSTANTIAL PRESENCE TEST

Marla Waiss
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An individual will be considered a US resident for income tax purposes if he or she meets the substantial presence test for a particular year. This is a mathematical day-count test to determine whether one is a US resident for the year. An individual can also be considered a US resident if he or she has lawful permanent residence (a green card) in the United States.

To satisfy the substantial presence test, the individual must be physically present in the United States on at least 31 days in the current year and 183 days or more in the current year and the preceding two years in the aggregate, as calculated using the following multipliers: (1) the actual days in the United States in the current year, plus (2) one-third of the individual's days in the United States in the immediately preceding year, plus (3) one-sixth of the individual's days in the United States in the second preceding year. For example, someone physically present in the United States on 120 days in each of the 2017, 2018, and 2019 years would not meet the substantial presence test for the 2019 taxable year. Thus, as a rule of thumb, if an individual stays for fewer than 120 days in each year, the substantial presence should not be met.

You are treated as being present in the United States on any day you are physically present in the country at any time during the day. There are certain exceptions to this "presence" rule, including (1) days you commute to work in the United States from a residence in Canada if you regularly commute from Canada, (2) days you are in the United States for less than 24 hours when you are in transit between two places outside the United States, (3) days you are in the United States as a crew member of a foreign vessel, and (4) days you are unable to leave the United States because of a medical condition that develops while you are there. There are also several categories of exempt individuals, which include (1) an individual temporarily present in the United States under certain foreign-government-related visas; (2) a teacher or trainee temporarily present in the United States under a J or Q visa; (3) a student temporarily present in the United States under an F, J, M, or Q visa; and

Attorneys

Marla Waiss

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(4) a professional athlete temporarily in the United States to compete in a charitable sporting event. In general, these individuals can exclude days in the United States for the purposes of the substantial presence test.

To exclude days of presence under one of these categories, you must file IRS form 8843 with a US income tax return. If the individual does not otherwise have to file a US income tax return, form 8843 should be sent to the address indicated in the form's instructions by the due date for filing an income tax return. Form 8843 is also used to exclude days present in the United States as a result of a medical condition arising in the United States. If form 8843 is not timely filed, you cannot exclude the days you were present in the United States as an exempt individual or because of a medical condition that arose while you were in the United States. However, this does not apply if you can show by clear and convincing evidence that you took reasonable actions to become aware of the filing requirements and significant steps to comply with the requirements.

Even if you do not qualify for one of the exceptions noted above, you may still be treated as a non-US resident if you can meet the closer connection exception or if you qualify as a resident of another country under an income tax treaty. The more common exception is to have a closer connection to a foreign country, which is determined on the basis of an individual's circumstances. Form 8840 must be filed with the IRS to claim this exception.

Because US residents are required to file annual US income tax returns reporting their worldwide income, Canadian individuals should be aware of the US residency rules, particularly if they are spending significant time in the United States. Those spending time in the United States should consider whether they qualify for an exception to the substantial presence test, such as the closer connection exception.