

Each year many non-US individuals travel to and remain in the US for extended periods of time. Such individuals could be classified as US residents for US income tax purposes if certain criteria are met. If so classified, those individuals, although not US citizens, would be subject to US income taxation on their worldwide income (note, different criteria apply for US estate and gift taxation purposes). The following is a brief summary of the criteria used to determine US income tax resident status.

## Residency Tests

An individual who is not a US citizen may be a US resident by meeting either one of two tests: (1) the "green card test" or (2) the "substantial presence test." Even if an individual meets the substantial presence test several different exceptions could apply to the general rules discussed below, each imposing different US income tax compliance and reporting obligations.

### Green Card Test (Permanent Resident)

The "green card test" is met based on immigration status. Individuals who are lawful permanent residents of the US at any time during the calendar year become tax resident in the US. Such persons apply for, and periodically renew, their status and receive a "green card" issued by the US Citizenship and Immigration Services to establish and maintain their status.

### Substantial Presence Test

The "substantial presence test" is generally met by an individual who: (1) spent 31 days during the current year in the US, and (2) spent 183 days in the US, counting all days in the current year and 1/3 of days from the prior year, as well as 1/6 of days from the second prior year.

- Generally, a person who spends generally 120 days or less in the US each year will not satisfy the substantial presence test. (As shown in the chart on page 2,  $120 + 1/3 * 120 + 1/6 * 120 = 180$ , which is less than 183.)
  - Partial days spent in the US generally count towards the total
  - Days spent exclusively in transit between foreign countries do not count
  - Certain individuals are exempted (e.g., certain foreign government-related individuals, teachers or trainees, students and athletes attending charitable events)

- Certain other exceptions and special rules also apply
- Travel records for nonimmigrant aliens are generally available for the prior 10 years on the US Department of Homeland Security [website](#).
- An individual with a significant US presence should keep detailed travel records, as well as a log of time spent within the US for each year to substantiate his or her US income tax status.
- If an individual is a US income tax resident, then that individual is generally required to file Form 1040, US Individual Income Tax Return, on an annual basis.
- If an individual is not a US income tax resident, then no US filing is required except with respect to US source income that is reported on Form 1040NR, US Nonresident Alien Income Tax Return.

## Closer Connection Exception

- The closer connection test applies to all countries and is available to persons who would only be considered US residents because of the substantial presence test. To meet the exception, the individual must:
  - Spend less than 183 days during the current year in the US
  - Maintain a tax home in a foreign country, and
  - Have a "closer connection" during the year to one foreign country (or have had closer connections to two foreign countries)
- A "tax home" is the area of a person's main place of business, where the person permanently or indefinitely works, regardless of where the family home is located.
- One establishes a "closer connection" based on facts and circumstances, including:
  - The country of residence designated on forms and documents
  - The types of official US tax forms and documents filed (e.g., filing Form W-9, which is for US residents v. filing Form W-8, which is for nonresidents)
  - The location of the person's:
    - Permanent home
    - Family
    - Personal belongings
    - Current social, political, cultural, professional or religious affiliations
    - Business activities (other than those that are part of the tax home)

- And:
  - The jurisdiction of the person's driver's license
  - The jurisdiction in which the person votes
  - The location of charitable organizations to which the person contributes
- Individuals can claim the closer connection exception by filing Form 8840, Closer Connection Exception Statement for Aliens, which is attached to a US income tax return (Form 1040NR, US Nonresident Alien Income Tax Return, if the individual has US source income) or mailed separately to the Internal Revenue Service (IRS) by the same deadline if no income tax return must be filed.

## Tax Treaty Exception

- If an individual qualifies as both a tax resident of the US and of a country that has a US income tax treaty, the treaty normally provides special rules to determine which country is the individual's residence for income tax treaty purposes. These "tie-breaking provisions" vary from treaty to treaty, but generally (other than the US – PRC income tax treaty) the treaty will look to:
  - Location of permanent home
  - Location of center of vital interests
  - Location of "habitual abode"
  - Nationality of individual
- These factors generally apply in sequence, and treaties often provide procedures for the governments of the two countries, through "competent authority proceedings," to determine an individual's residence for tax treaty purposes.
- An individual claims the US tax treaty exception by filing Form 8833, Treaty-Based Return Position, that is attached to Form 1040NR, US Nonresident Alien Income Tax Return and reports US source income (if any).
- For dual-resident taxpayers eligible under a US tax treaty exception, US tax information disclosure forms may nonetheless be required and possibly also accompanying US tax payments, including, if applicable:
  - Report of Foreign Bank and Financial Accounts (FBAR) FinCEN Form 114\*
  - Form 5471, Information Return of US Persons With Respect to Certain Foreign Corporations
  - Form 8858, Information Return of US Persons With Respect to Foreign Disregarded Entities and Foreign Branches
  - Form 8865, Return of US Persons With Respect to Certain Foreign Partnerships

\*In the 2024 US District Court case, *Aroeste v. United States*, the court held that generally a legal permanent resident of the US by virtue of his or her green card status is required to file (FBAR) FinCEN Form 114, but if such individual is instead entitled to treatment as a resident of a non-US jurisdiction under an applicable US tax treaty exception, such individual is not required to file (FBAR) FinCEN Form 114. The government withdrew its appeal of the holding in *Aroeste*. However, many practitioners read *Aroeste* to apply narrowly and still advise dual-resident clients eligible for a US tax treaty exception to file (FBAR) FinCEN Form 114 until FINCEN provides further guidance.

- The following US information disclosure forms are generally not required under current law to be filed by a dual-resident taxpayer eligible to claim a US tax treaty exception.
  - Form 3520, Annual Return to Report Transactions With Foreign Trusts and Receipt of Certain Foreign Gifts
  - Form 3520-A, Annual Information Return of Foreign Trust With a US Owner
  - Form 8621, Information Return by a Shareholder of a Passive Foreign Investment Company or Qualified Electing Fund
  - Form 8938, Statement of Specified Foreign Financial Assets

We strongly recommend dual-resident taxpayers eligible under a US tax treaty exception consult with US tax advisers to determine their individual obligations to file US tax information disclosure forms despite their treaty tie-break status.

## Additional Information

The US IRS provides additional information regarding these rules on its [website](#). Although this publication reflects the position of the IRS and is not comprehensive, it provides a good overview of the residency rules.



Substantial Presence Test for US Tax Residence

Current Year	Present Year Days	Previous Year Days	"Two-Years-Ago" Days	Days Deemed Physically Present	US Resident?
	[BI from Current Year (must = at least 31)	{[BI from Previous Year} x (1/3)	{[BI from Two Years Ago} x (1/6)	[EI = [BI + [CI + [DI	Yes, for that particular year, if [EI = at least 183, and [BI = at least 31 days, and no "tax home" exception
2023	120				
2024	120				
2025	120	40.00	20.00	180.00	No

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