



[4830-01-p]

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG-109813-11]

RIN 1545-BK18

Residence Rules Involving U.S. Possessions

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document contains proposed amendments to the regulations for determining whether an individual is a bona fide resident of a U.S. territory. These proposed amendments affect individuals establishing bona fide residency in a U.S. territory by allowing additional days of constructive presence in a U.S. territory.

DATES: Written or electronic comments and requests for a public hearing must be received by **[INSERT DATE 90 DAYS AFTER PUBLICATION OF THIS DOCUMENT IN THE FEDERAL REGISTER]**.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG-109813-11), room 5203, Internal Revenue Service, PO Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand-delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (REG-109813-11), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW, Washington, DC, or sent

electronically, via the Federal eRulemaking Portal at www.regulations.gov (IRS REG-109813-11).

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, Stephen Huggs, (202) 317-6941; concerning submission of comments and/or requests for a hearing, Oluwafunmilayo (Funmi) Taylor, (202) 317-6901 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background

This document contains proposed amendments to the Income Tax Regulations (26 CFR part 1) under section 937 of the Internal Revenue Code (Code). Section 937 was added to the Code by the American Jobs Creation Act of 2004 (Public Law 108-357, 118 Stat. 1418 (2004)). Section 937(a) provides rules for determining if an individual is a bona fide resident of a U.S. possession (generally referred to in this preamble as a “U.S. territory”).

On April 11, 2005, the **Federal Register** published temporary regulations (TD 9194, 70 FR 18920) and proposed regulations (REG-159243-03, 70 FR 18949) under section 937, providing rules to implement section 937 and conforming existing regulations to other legislative changes with respect to the U.S. territories. On January 31, 2006, the **Federal Register** published final regulations (TD 9248, 71 FR 4996) under section 937(a) concerning whether an individual is a bona fide resident of a U.S. territory. Section 1.937-1 was amended on November 14, 2006, and on April 9, 2008, to provide additional guidance concerning bona fide residency in the U.S. territories. See TD 9297 (71 FR 66232) and TD 9391 (73 FR 19350).

Section 937(a) provides that an individual is a bona fide resident of a U.S. territory if the individual meets a presence test, a tax home test, and a closer connection test. In order to satisfy the presence test, an individual must be present in the U.S. territory for at least 183 days during the taxable year (183-day rule), unless otherwise provided in regulations.

Section 1.937-1 provides several alternatives to the 183-day rule. An individual who does not satisfy the 183-day rule nevertheless meets the presence test if the individual satisfies one of four alternative tests: (1) the individual is present in the relevant U.S. territory for at least 549 days during the three-year period consisting of the current taxable year and the two immediately preceding taxable years, provided the individual is present in the U.S. territory for at least 60 days during each taxable year of the period; (2) the individual is present no more than 90 days in the United States during the taxable year; (3) the individual has no more than \$3,000 of earned income from U.S. sources and is present for more days in the U.S. territory than in the United States during the taxable year; or (4) the individual has no significant connection to the United States during the taxable year. The term “significant connection” is generally defined as a permanent home, voter registration, spouse, or minor child in the United States. See §1.937-1(c)(5). Section 1.937-1 also provides that certain days count as days of presence in the relevant U.S. territory for purposes of the presence test, even if the individual is not physically present in the U.S. territory (constructive presence).

Explanation of Provisions

Following the original issuance of §1.937-1, the Department of the Treasury (Treasury Department) and the Internal Revenue Service (IRS) received comments

requesting that the presence test be revisited to make it more flexible. These comments included a proposal to allow days of constructive presence for business or personal travel outside of the relevant U.S. territory. The Treasury Department and the IRS have concluded that it would be appropriate to allow additional days of constructive presence subject to certain limitations. Accordingly, these proposed regulations provide an additional rule for calculating days of presence in the relevant U.S. territory for purposes of the presence test in §1.937-1(c)(1).

Under the proposed amendment, an individual would be considered to be present in the relevant U.S. territory for up to 30 days during which the individual is outside of both the United States and the relevant U.S. territory. The proposed amendment would not apply, however, if the number of days that the individual is considered to be present in the United States during the taxable year equals or exceeds the number of days that the individual is considered to be present in the relevant U.S. territory during the taxable year, determined without taking into account any days for which the individual would be treated as present in the U.S. territory under this proposed amendment. Furthermore, the 30-day constructive presence rule would not apply for purposes of calculating the minimum 60 days of presence in the relevant U.S. territory that is required for the 549-day test under §1.937-1(c)(1)(ii). Therefore, an individual invoking §1.937-1(c)(1)(ii) must otherwise be considered to have been present at least 60 days in the relevant U.S. territory in each of the three years in order to benefit from the 30-day constructive presence rule.

Proposed Effective/Applicability Date

These amendments to the regulations are proposed to apply to taxable years beginning after the date these regulations are published as final regulations in the **Federal Register**.

Reliance on Proposed Regulations

Until these regulations are published as final regulations in the **Federal Register**, taxpayers may rely on these proposed regulations with respect to taxable years beginning on or after the date these proposed regulations are published in the **Federal Register**.

Special Analyses

Certain IRS regulations, including this one, are exempt from the requirements of Executive Order 12866, as supplemented and reaffirmed by Executive Order 13563. Therefore, a regulatory impact assessment is not required. It has also been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations, and because the regulations do not impose a collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f) of the Code, this regulation has been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Comments and Requests for Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any comments that are submitted timely to the IRS as prescribed in this preamble under the “Addresses” heading. The Treasury Department

and the IRS request comments on all aspects of the proposed rules. All comments will be available at www.regulations.gov or upon request. A public hearing will be scheduled if requested in writing by any person that timely submits written comments. If a public hearing is scheduled, notice of the date, time, and place for the public hearing will be published in the **Federal Register**.

Drafting Information

The principal author of these proposed regulations is Cleve Lisecki, formerly of the Office of Associate Chief Counsel (International). However, other personnel from the Treasury Department and the IRS participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Proposed Amendments to the Regulations

Accordingly, 26 CFR part 1 is proposed to be amended as follows:

PART 1--INCOME TAXES

Paragraph 1. The authority citation for part 1 continues to read in part as follows:

Authority: 26 U.S.C. 7805 * * *

Section 1.937-1 also issued under 26 U.S.C. 937(a). * * *

Par. 2. Section 1.937-1 is amended as follows:

1. Revising paragraph (c)(3)(i)(B) and paragraph (c)(3)(i)(C)(2).
2. Adding paragraph (c)(3)(i)(D).
3. Revising Example 1 of paragraph (g).
4. Redesignating Examples 2 through 10 of paragraph (g) as Examples 5 through 13 respectively.

5. Adding new Examples 2, 3, and 4 to paragraph (g).
6. Revising newly re-designated Example 5 of paragraph (g).
7. Adding a new sentence to the end of paragraph (i).

The revisions and additions read as follows:

§1.937-1 Bona fide residency in a possession.

* * * * *

(c) * * *

(3) * * *

(i) * * *

(B) Any day that an individual is outside of the relevant possession to receive, or to accompany on a full-time basis a parent, spouse, or child (as defined in section 152(f)(1)) who is receiving, qualifying medical treatment as defined in paragraph (c)(4) of this section;

(C) * * *

(1) * * *

(2) Period for which a mandatory evacuation order is in effect for the geographic area in the relevant possession in which the individual's place of abode is located; and

(D) Any day not described in paragraph (c)(3)(i)(B) or (C) of this section that an individual is outside of the United States and the relevant possession, except that an individual will not be considered present in the relevant possession under this paragraph (c)(3)(i)(D) for more than 30 days during the taxable year, and this paragraph (c)(3)(i)(D) does not apply for purposes of calculating the required minimum 60 days of presence in the relevant possession under paragraph (c)(1)(ii) of this section.

Furthermore, this paragraph (c)(3)(i)(D) applies only if the number of days that the individual is considered to be present in the relevant possession during the taxable year, determined without regard to this paragraph (c)(3)(i)(D), exceeds the number of days that the individual is considered to be present in the United States during the taxable year.

* * * * *

(g) * * *

Example 1. Presence test. H, a U.S. citizen, is engaged in a profession that requires frequent travel. In each of the years 2016 and 2017, H spends 195 days in Possession N and the balance of the year in the United States. In 2018, H spends 160 days in Possession N and the balance of the year in the United States. Thus, H spends a total of 550 days in Possession N for the three-year period consisting of years 2016, 2017, and 2018. Under paragraph (c)(1)(ii) of this section, H satisfies the presence test of paragraph (c) of this section with respect to Possession N for taxable year 2018 because H is present in Possession N for more than the required 549 days during the three-year period of 2016 through 2018 and is present in Possession N for at least 60 days during each of those taxable years. Assuming that in 2018 H does not have a tax home outside of Possession N and does not have a closer connection to the United States or a foreign country under paragraphs (d) and (e) of this section respectively, then regardless of whether H was a bona fide resident of Possession N in 2016 and 2017, H is a bona fide resident of Possession N for taxable year 2018.

Example 2. Presence test. Same facts as Example 1, except that in 2018, H spends 130 days in Possession N, 110 days in foreign countries, and 125 days in the United States. Because H satisfies the requirements of paragraph (c)(3)(i)(D) of this section, 30 of the days spent in foreign countries during 2018 are treated as days of presence in Possession N. Thus, H will be treated as being present for 160 days in Possession N for 2018. Under paragraph (c)(1)(ii) of this section, H meets the presence test of paragraph (c) of this section with respect to Possession N for taxable year 2018 because H is present in Possession N for 550 days (more than the required 549 days) during the three-year period of 2016 through 2018 and is present in Possession N for at least 60 days in each of those taxable years. As in Example 1, assuming that in 2018 H does not have a tax home outside of Possession N and does not have a closer connection to the United States or a foreign country under paragraphs (d) and (e) of this section respectively, then regardless of whether H was a bona fide resident of Possession N in 2016 and 2017, H is a bona fide resident of Possession N in 2018.

Example 3. Presence test. Same facts as Example 1, except that in 2018, H spends 130 days in Possession N, 100 days in foreign countries, and 135 days in the United States. Under these facts, H does not satisfy paragraph (c)(1)(ii) of this section for taxable year 2018 because H is present in Possession N for only 520 days (less than the required 549 days) during the three-year period of 2016 through 2018. The rule of paragraph (c)(3)(i)(D) of this section (treating up to 30 days spent in foreign countries as days of presence in Possession N) is not available because H fails to satisfy the condition that H be present more days in Possession N than in the United States during 2018, determined without regard to the application of paragraph (c)(3)(i)(D) of this section.

Example 4. Presence test. Same facts as Example 1, except that in 2016, H spends 360 days in Possession N and six days in the United States; in 2017, H spends 45 days in Possession N, 290 days in foreign countries, and 30 days in the United States; and in 2018, H spends 180 days in Possession N and 185 days in the United States. Under these facts, H does not satisfy paragraph (c)(1)(ii) of this section for taxable year 2018. During the three-year period from 2016 through 2018, H is present in Possession N for 615 days, including 30 of the days spent in foreign countries in 2017, which are treated under paragraph (c)(3)(i)(D) of this section as days of presence in Possession N. Although H is present in Possession N for more than the required 549 days during the three-year period, H is only present for 45 days in Possession N during one of the taxable years (2017) of the period, less than the 60 days of minimum presence required under paragraph (c)(1)(ii) of this section. The rule of paragraph (c)(3)(i)(D) of this section does not apply for purposes of determining whether H is present in Possession N for the 60-day minimum required under paragraph (c)(1)(ii) of this section.

Example 5. Presence test. W, a U.S. citizen, owns a condominium in Possession P where she spends part of the taxable year. W also owns a house in State N near her grown children and grandchildren. W is retired and her income consists solely of pension payments, dividends, interest, and Social Security benefits. For 2016, W spends 145 days in Possession P, 101 days in Europe and Asia on vacation, and 120 days in State N. For taxable year 2016, W is not present in Possession P for at least 183 days, is present in the United States for more than 90 days, and has a significant connection to the United States by reason of her permanent home. However, under paragraph (c)(1)(iv) of this section, W still satisfies the presence test of paragraph (c) of this section with respect to Possession P for taxable year 2016 because she has no earned income in the United States and is present for more days in Possession P than in the United States.

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(i) * * * Notwithstanding the foregoing, paragraph (c)(3)(i)(D) and Examples 1, 2, 3, 4, and 5 of paragraph (g) of this section apply for taxable years beginning after the date these regulations are published as final regulations in the **Federal Register**.

John Dalrymple

Deputy Commissioner for Services and Enforcement.

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