

INTERRELATIONSHIP BETWEEN THE INCOME TAX, ESTATE TAX, AND IMMIGRATION RULES

There is much misunderstanding in the application and interrelationship of the U.S. income tax, estate tax and immigration rules. For example, it is quite possible that a non-resident alien individual (“NRA”) may be considered to be a U.S. person for income tax purposes even though he holds a non-immigrant visa such as B-1/B-2, H-1 or L-1. A U.S. resident for income tax purposes is subject to U.S. taxation on his worldwide income. Generally, there is a credit for foreign taxes paid on that income. Thus, a non-immigrant visa status has little to do with whether the NRA is subject to income tax or the estate tax upon death.

A NRA is subject to U.S. income taxation on worldwide income starting on the first day he enters the U.S. as a green card holder (lawful permanent residency). Additionally, a NRA will be considered a resident for U.S. income tax purposes if he meets the “substantial presence test”. A person will be considered a resident of the U.S. under the substantial presence test for any calendar year in which he is present in the U.S. for 183 days or more. The 183-day figure is computed by adding together the number of days present during the current year, plus one-third of the days present during the prior calendar year, plus one sixth of the days present in the calendar year two years previous. It is necessary to be present in the U.S. 31 days during a particular calendar year to be considered a resident of the U.S. for that calendar year. Even if one meets the substantial presence test, one can be treated as a non resident for income tax purposes if one meets the following conditions:

1. One is present in the U.S. for less than 183 days during the year,
2. One maintains a tax home in a foreign country during the year, and
3. One has a closer connection during the year to one foreign country in which you have a tax home than to the U.S.

For the purposes of the substantial presence test, certain days are not included in computing the number of days present. These exceptions include days present when the nonresident alien could not leave the United States due to a medical condition that arose while the alien was present in the United States, as well as days present when the alien was exempted by regulations based on diplomatic, teacher or student status.

The estate tax rules are different from the income tax and immigration rules for residency. A NRA must be considered to be domiciled in the U.S. Domicile means physical presence in the U.S. in addition to having the intention of remaining definitively in the U.S. Factors to be considered in determining domicile include the following:

- Duration of stay in the U.S. and in other countries and the frequency of travel between countries.
- The size, cost and nature of the decedent’s house and other dwellings and whether they were owned or rented.
- The area where the decedent’s house or dwelling is located, i.e., a residential area or a resort area.
- The location of expensive and cherished personal property.
- The location of the decedent’s close family and friends.

- The places where the decedent maintained church, synagogue, or club membership.
- The location of the decedent's business interest.
- Declaration of residence or intent made in visa applications, wills, deeds of gift, trust instrument, letter and oral statements.
- Motivation, especially health, pleasure, business and avoidance of the miseries of war or political repression.

Visa status is not determinative on the question of domicile. A person's presence in the U.S. on a non-immigrant visa does not conclusively establish that he was not a domiciliary of the U.S. However, a receipt of a U.S. green card is a very strong indicator of permanent intent to be domiciled in the U.S., if the foreign investor is maintaining active business and personal relationships in the U.S. and intends to remain in the U.S. permanently.

If a NRA is considered to be an U.S. resident for estate tax purposes, he shall be subject to U.S. estate tax on his worldwide assets at the rates outlined in the attached chart. Residents and U.S. citizens are currently entitled to a credit equivalent of \$5,250,000 in assets. There is also an unlimited marital deduction between husband and wife so long as the decedent's spouse is a U.S. citizen. This problem can be avoided by decedent spouses who are green card holders at the time of decedent's death if a special trust is established called a "Qualified Domestic Trust".

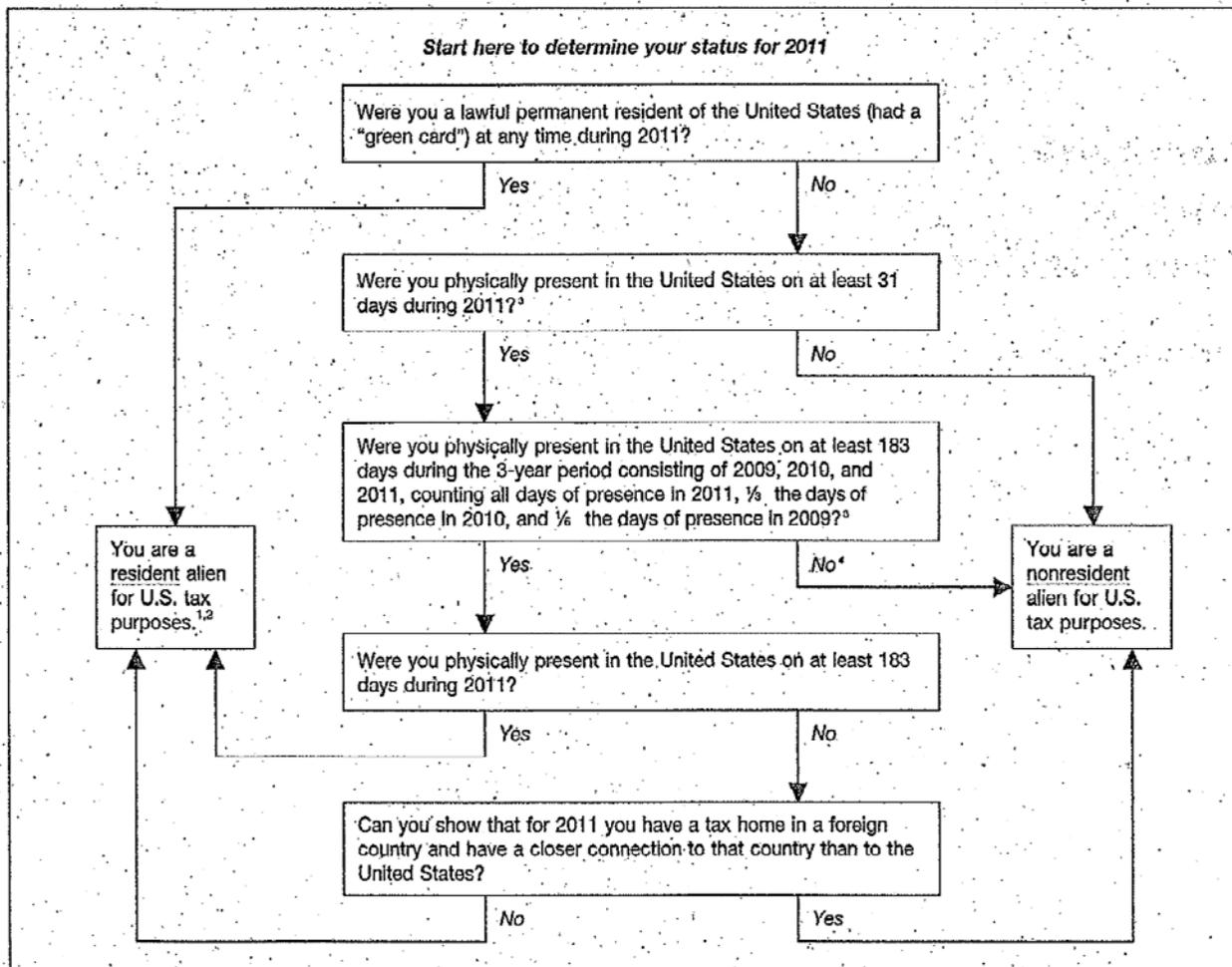
NRAs and non-domiciled residents are subject to the U.S. estate taxes on all U.S. situs assets, including real estate and stock in U.S. corporations. Bank deposits and stock of a foreign corporation are not considered to be U.S. situs assets, but investment accounts containing other bonds, stocks, and mutual funds may be taxed in the U.S. This is the reason we highly recommend the use of offshore corporations to hold U.S. situs assets. Very significantly, the credit for estate taxes of a NRA or non-domiciled resident is only equivalent to \$60,000.00 and not the \$5,250,000.00 available to U.S. residents for estate tax purposes.

We have attached Figure 1-A of IRS Publication 519 which helps establish tax residency for income tax purposes.



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Figure 1-A. Nonresident Alien or Resident Alien?



¹ If this is your first or last year of residency, you may have a dual status for the year. See *Dual-Status Aliens* in chapter 1.

² In some circumstances you may still be considered a nonresident alien under an income tax treaty between the U.S. and your country. Check the provisions of the treaty carefully.

³ See *Days of Presence in the United States* in this chapter for days that do not count as days of presence in the United States.

⁴ If you meet the substantial presence test for 2012, you may be able to choose treatment as a U.S. resident alien for part of 2011. For details, see *Substantial Presence Test under Resident Aliens and First-Year Choice under Dual-Status Aliens* in chapter 1.

the following as days of presence in the United States for the substantial presence test.

- Days you commute to work in the United States from a residence in Canada or Mexico if you regularly commute from Canada or Mexico.
- Days you are in the United States for less than 24 hours when you are in transit between two places outside the United States.
- Days you are in the United States as a crew member of a foreign vessel.
- Days you are unable to leave the United States because of a medical condition that arose while you are in the United States.
- Days you are an exempt individual.

The specific rules that apply to each of these categories are discussed next.

Regular commuters from Canada or Mexico. Do not count the days on which you commute to work in the United States from your residence in Canada or Mexico if you regularly commute from Canada or Mexico. You are considered to commute regularly if you commute to work in the United States on more than 75% of the workdays during your working period.

For this purpose, "commute" means to travel to work and return to your residence within a 24-hour period. "Workdays" are the days on which you work in the United States or Canada or Mexico. "Working period" means the period beginning with the first day in the current year on which you are physically present in the United States to work and ending on the last day in the

current year on which you are physically present in the United States to work. If your work requires you to be present in the United States only on a seasonal or cyclical basis, your working period begins on the first day of the season or cycle on which you are present in the United States to work and ends on the last day of the season or cycle on which you are present in the United States to work. You can have more than one working period in a calendar year, and your working period can begin in one calendar year and end in the following calendar year.

Example. Maria Pérez lives in Mexico and works for Compañía ABC in its office in Mexico. She was assigned to her firm's office in the United States from February 1 through June 1. On June 2, she resumed her employment in Mexico. On 69 days, Maria commuted each