

Therefore, B and C are United States shareholders within the meaning of §1.951-1(g) of this chapter, corporation R is a controlled foreign corporation within the meaning of §1.957-1 of this chapter, and corporation R's income is included in C's income as subpart F income under §1.951-1 of this chapter. B may avoid current taxation on his share of the subpart F inclusion by filing as a non-resident (*i.e.*, by following the procedure in §301.7701(b)-7(b)).

Example 2. The facts are the same as in *Example 1*, except that B also earns United States source dividend income. The United States-X income tax convention provides that the rate of United States tax on United States source dividends paid to residents of country X shall not exceed 15 percent of the gross amount of the dividends. B's United States tax liability with respect to the dividends would be smaller if he were treated as a resident alien, subject to tax on a net basis (*i.e.*, after the allowance of deductions) than if he were treated as a nonresident alien. If, however, B chooses to file as a nonresident in order to claim treaty benefits with respect to his share of R's subpart F income, his overall United States tax liability, including the portion attributable to the dividends, must be determined as if he were a non-resident alien.

Example 3. C, a married alien individual with three children, is a resident of foreign country Y, under Y's internal law. Country Y is a party to an income tax convention with the United States. C is also a resident of the United States under the Internal Revenue Code. C is considered to be a resident of country Y under the convention. The convention specifically covers, among other items of income, personal services income, dividends and interest. C is sent by her country Y employer to work in the United States from January 1, 1985 until December 31, 1985. During 1985, C also earns United States source dividends and interest and incurs mortgage interest expenses on her personal residence. The United States-Y treaty provides that remuneration for personal services performed in the United States by a country Y resident is exempt from United States tax if, among other things, the individual performing such services is present in the United States for a period that is not in excess of 183 days. The treaty provides that the rate of United States tax on United States source dividends paid to residents of Y shall not exceed 15 percent of the gross amount of the dividends and it exempts residents of Y from United States tax on United States source interest. In filing her 1985 tax return, C may choose to file either as a resident alien without claiming any treaty benefits or as a nonresident alien if she desires to claim any treaty benefit. C files as a non-resident (*i.e.* by following the procedure described in §301.7701(b)-7(b)). Because C does

not satisfy the requirements of the United States-Y treaty with regard to exempting personal services income from United States tax, C will be taxed on her personal services income at graduated rates under section 1 of the Code pursuant to section 871(b) of the Code. She will not be entitled to deduct her mortgage interest expenses or to claim more than one personal exemption because she is taxed as a nonresident alien under the Code by virtue of her decision to claim treaty benefits, and section 873 of the Code denies non-residents the deduction for personal residence mortgage interest expense and generally limits them to only one personal exemption. C will be subject to a tax of 15 percent of the gross amount of her dividend income under section 871(a) of the Code as modified by the treaty, and she will be exempt from tax on her interest income. C is not entitled to file a joint return with her spouse even if he is a resident alien under the Code for 1985.

Example 4. The facts are the same as in *Example 3*, except that C does not choose to claim treaty benefits with respect to any items of income covered by the treaty (*i.e.*, she files as a resident). Therefore, she is taxed as a resident under the Code and pays tax at graduated rates on her personal services income, dividends, and interest. In addition, she is entitled to deduct her mortgage interest expenses and to take personal exemptions for her spouse and three children. C will be entitled to file a joint return with her spouse if he is a resident alien for 1985 or, if he is a nonresident alien, C and her spouse may elect to file a joint return pursuant to section 6013.

[T.D. 8411, 57 FR 15251, Apr. 27, 1992; 57 FR 28612, June 26, 1992, as amended by T.D. 8733, 62 FR 53387, Oct. 14, 1997]

§ 301.7701(b)-8 Procedural rules.

(a) *Who must file*—(1) *Closer connection exception.* An alien individual who otherwise meets the substantial presence test must file a statement to explain the basis of the individual's claim that he or she is able to satisfy the closer connection exception described in §301.7701(b)-2.

(2) *Exempt individuals and individuals with a medical condition.* An alien individual must file a statement to explain the basis of the individual's claim that he or she is able to exclude days of presence in the United States because the individual—

(i) Is an exempt individual as described in §301.7701(b)-3(b)(3) (teacher/trainee) or (b)(4) (student);

(ii) Is an exempt individual described in § 301.7701 (b)-3(b)(5) (professional athlete); or

(iii) Has a medical condition or problem as described in § 301.7701(b)-3(c).

(3) *De minimis presence and residency starting and termination dates.* A statement must be filed by an individual who is seeking to establish—

(i) That a period of de minimis presence of ten or fewer days should be disregarded for purposes of the individual's residency starting or termination date; or

(ii) A residency termination date.

(b) *Contents of statement*—(1) *Closer connection exception*—(i) *Returns due after December 15, 1997.* The statement filed by an individual described in paragraph (a)(1) of this section, for a return relating to a taxable year for which the due date (without extensions) is after December 15, 1997, must be in the form of a fully completed Form 8840 (Closer Connection Exception Statement) or appropriate successor form.

(ii) *Earlier returns.* For returns relating to taxable years for which the due date for filing returns (without extensions) is on or before December 15, 1997, the statement filed by the individual described in paragraph (a)(1) of this section must contain the information in accordance with paragraph (b)(1) of this section in effect prior to December 15, 1997 (see § 301.7701(b)-8(b)(1) as contained in 26 CFR part 301, revised April 1, 1997).

(2) *Exempt individuals and individuals with a medical condition*—(i) *Returns due after December 15, 1997.* The statement filed by an individual described in paragraph (a)(2) of this section, for a return relating to a taxable year for which the due date (without extensions) is after December 15, 1997, must be in the form of a fully completed Form 8843 (Statement for Exempt Individuals and Individuals with a Medical Condition) or appropriate successor form.

(ii) *Earlier returns.* For returns relating to taxable years for which the due date for filing returns (without extensions) is on or before December 15, 1997, the statement filed by the individual described in paragraph (a)(2) of this section must contain the information

in accordance with paragraph (b)(2) of this section in effect prior to December 15, 1997 (see § 301.7701(b)-8(b)(2) as contained in 26 CFR part 301, revised April 1, 1997).

(3) *De minimis presence and residency starting and termination dates.* The statement filed by an individual described in paragraph (a)(3) of this section shall be dated, signed by the individual seeking to exclude de minimis presence for purposes of the individual's residency starting or termination date or to establish a residency termination date, and verified by a declaration that the statement is made under the penalty of perjury. The statement shall contain the information described in paragraphs (b)(1) (i), (ii) and (iii) of this section and the following information (as applicable)—

(i) The first day that the individual was present in the United States during the current year;

(ii) The last day that the individual was present in the United States during the current year;

(iii) Dates of de minimis presence that the individual is seeking to exclude from his or her residency starting or termination dates;

(iv) Sufficient facts to establish that the individual has maintained his or her tax home in and a closer connection to a foreign country during a period of de minimis presence;

(v) Sufficient facts to establish that the individual has maintained his or her tax home in and a closer connection to a foreign country following the individual's last day of presence in the United States during the current year or following the abandonment or rescission of the individual's status as a lawful permanent resident during the current year;

(vi) Date that the individual's status as a lawful permanent resident was abandoned or rescinded; and

(vii) Sufficient facts (including copies of relevant documents) to establish that the individual's status as lawful permanent resident has been abandoned or rescinded.

(c) *How to file.* Individuals described in paragraph (a) of this section who are required to make a return on Form 1040 or 1040NR pursuant to paragraph (a) or

(b) of § 1.6012-1 of this chapter must attach the statement described in paragraph (b) of this section to their return for the taxable year for which the statement is relevant. An individual who is not required to file either Form 1040 or 1040NR must file the statement with the Internal Revenue Service Center, Philadelphia, PA 19255 on or before the date prescribed by law (including extensions) for making an income tax return as a nonresident for the calendar year for which the statement applies. The statement may be signed and filed for the taxpayer by the taxpayer's agent in accordance with § 1.6061-1 of this chapter.

(d) *Penalty for failure to file statement*—(1) *General rule.* If an individual is required to file a statement pursuant to paragraph (a)(1), (a)(2)(ii), (a)(2)(iii) or (a)(3) of this section and fails to file such statement on or before the date prescribed by paragraph (c) of this section, the individual will not be eligible for the closer connection exception described in § 301.7701(b)-2 and will be required to include all days of presence in the United States (calculated without the benefit of §§ 301.7701(b)-3(b)(5), 301.7701(b)-3(c), and 301.7701(b)-4(c)(1)) for purposes of the substantial presence test and for determining the individual's residency starting and termination dates. If an individual is considered to be a resident because of this paragraph and the individual is also a resident of a country with which the United States has an income tax convention pursuant to that convention, the individual shall be treated in the manner provided in § 301.7701(b)-7 (a) (relating to the treatment of individuals who are dual residents).

(2) *Exception.* The penalty described in paragraph (d)(1) of this section shall not apply if the individual can show by clear and convincing evidence that he or she took reasonable actions to become aware of the filing requirements and significant affirmative steps to comply with those requirements.

(e) *Filing requirement disregarded.* Notwithstanding paragraph (d) of this section, the Secretary or his or her delegate may in their sole discretion, when it is in the best interest of the government to do so and based on all of the facts and circumstances, disregard the

individual's failure to file timely the statement described in paragraph (a) of this section in determining the individual's days of presence in the United States.

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§ 301.7701(b)-9 Effective/applicability dates of §§ 301.7701(b)-1 through 301.7701(b)-7.

(a) *In general.* Except as indicated in paragraph (b) of this section, §§ 301.7701(b)-1 through 301.7701(b)-7 apply to taxable years beginning after December 31, 1984. For the rules applicable to earlier taxable years, see §§ 1.871-2 through 1.871-5 of this chapter.

(b) *Special rules*—(1) *Green card test-residency starting date.* If an alien was a lawful permanent resident throughout 1984 (regardless of whether the individual was physically present in the United States), or was physically present in the United States at any time during 1984 while a lawful permanent resident, the individual will be considered to have been a resident of the United States during 1984 for purposes of applying the provisions of section 7701(b)(2)(A) and § 301.7701(b)-4 such that the individual will, if he meets the substantial presence or green card test in 1985, be considered a resident of the United States as of January 1, 1985, regardless of when the individual was first present in the United States in 1985.

(2) *Substantial presence test-years included.* For purposes of applying the substantial presence test for calendar years 1985 and 1986, days of presence in 1984 will only be counted for aliens who had been residents under prior law (§§ 1.871-2 through 1.871-5 of this chapter) at the end of calendar year 1984. Days of presence in 1983 will only be counted for aliens who had been residents under prior law at the end of both calendar year 1983 and 1984.

(3) *Professional athletes.* For purposes of applying the substantial presence test, only days of presence in the United States after October 22, 1986,