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Back to the Future: A Time for Rethinking the Test for Resident Alien Status Under the Income Tax Laws

David Williams, II

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* Assistant Professor of Law, The Ohio State University College of Law. B.S. 1969, M.A. 1970, Northern Michigan University; M.B.A. 1979, J.D. 1982, University of Detroit; LL.M. (Taxation) 1984, New York University. The author gratefully acknowledges the support of The Ohio State University College of Law, which provided a research grant used to complete this Article. The author also wishes to express his gratitude to Professors Alan Samansky and John Quigley of the Ohio State University College of Law for their helpful comments. Finally, the author thanks Vicki Singleton, Esq., for her valuable research assistance and comments on earlier drafts of this Article.

I. INTRODUCTION

If the sole object of our tax law is certainty, then the quest for a bright-line, mechanical test would appear to be justified. Fairness, however, is an equally important objective. If fairness is sacrificed in our rush to formulate a bright-line test, then the law is not fully successful. The trade-off between certainty and fairness attains particular significance for non-United States citizens earning income in this country. Under United States tax laws, these individuals may be taxed as either resident aliens or nonresident aliens. This classification can be crucial because the resident alien is taxed on his worldwide income; the nonresident alien is only taxed on his United States source income. The judicial test for resident alien status has created a situation of concern because it has moved from a subjective evaluation to an objective formula. With this in mind, this Article will look at the changing federal income tax definition of a resident alien individual.

Part II reviews the background of the resident alien definition. This background provides an overview of the importance of defining an alien individual's status, as well as a close look at some of the key cases that formulated the judicial test. Part III explores the bright-line, mechanical test of Internal Revenue Code (Code) section 7701(b), which was added

in 1984.[1] This part analyzes both the test and the factors that led to its formation. Part III also addresses the questions left unanswered by the new statute, the problems it created, and the proposed regulations enacted on September 10, 1987.[2] Finally, Part IV examines solutions to those problems by looking at alternative approaches to defining a resident alien individual.

II. Background of the Resident Alien Definition

A. *The Importance of Resident Alien Status*

Within the framework of the United States tax regime, two concepts coexist: (1) domiciliary jurisdiction, which imposes tax on individuals who bear a personal relationship to the taxing country;[3] and (2) source jurisdiction, which imposes tax on foreign persons who derive income from sources within the taxing country.[4] The consumption of governmental services by resident aliens and citizens of the United States justifies the extraction of cost and, therefore, the concept of domiciliary jurisdiction. On the other hand, the opportunity afforded a foreign taxpayer to derive income that has its source in the United States justifies the cost-sharing element underlying the concept of source jurisdiction.

Under the United States tax system, taxpayers subject to taxation based on the concept of domiciliary jurisdiction are taxed on their worldwide income.[5] Thus, the total income of citizens and resident

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1. Section 7701(b) was added in the Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 138, 98 Stat. 494, 672-77 (codified as amended at I.R.C. § 7701(b)(Supp. IV 1986)), *amended by* Tax Reform Act of 1986, Pub. L. No. 99-514, §§ 1810(l), 1899A(63), 1986 U.S. Code Cong. & Admin. News (100 Stat.) 2085, 2830-31, 2962 [hereinafter Tax Reform Act of 1986]. Amendments to the Internal Revenue Code made by the Tax Reform Act of 1986 have been incorporated throughout this Article.

2. Prop. Treas. Reg. §§ 301.7701(b)-1 to -9, 52 Fed. Reg. 34230 (1987).

3. The tax is usually imposed on persons who are resident in that country. The United States and other countries impose tax on their citizens, even when they are not residents. *See generally* 5 D. Tillinghast, Tax Aspects of International Transactions (2d ed. 1984).

4. Virtually all countries impose a tax on income of persons and entities over whom they claim no domiciliary jurisdiction. This tax applies when these foreign persons or entities derive income which has its "source" in the taxing country. *See generally id.*

5. While the issue lies beyond the scope of this Article, the United States provides some relief from the possibility that the same income will be taxed twice. This is provided by treaty provision, *see, e.g.*, Model Convention for the Avoidance of Double Taxation with Respect to Taxes on Income and on Capital, Model Double Taxation Convention on Income and on Capital 19 (Org. Econ. Co-operation & Dev. Comm. Fiscal Aff. 1977), *reprinted in* 1 Tax Treaties (CCH) ¶151 (June 1980); the foreign tax credit, I.R.C. §§ 901-08 (1982 & Supp. IV 1986); and the § 911 exclusion,

aliens—whatever its source and however earned—is subject to United States taxation.[6] On the other hand, those individuals taxed pursuant to the theory of source jurisdiction only pay United States tax on income "sourced" within the United States. Therefore, nonresident aliens do not pay tax on any foreign source income.[7] For the alien individual, the determination of resident or nonresident status dictates whether the United States asserts tax jurisdiction over all of the alien's income or only that portion derived from United States sources or effectively connected with the conduct of a trade or business within the United States.[8]

While the concept of taxing individuals on their worldwide income, as opposed to only their United States source income, is viewed as the critical distinction between resident and nonresident status, other important differences exist. In the United States special tax regime, a nonresident alien individual not engaged in a trade or business within the United States is subject to United States tax on United States source income at a flat thirty percent rate.[9] This tax is collected by withholding at the source[10] on the gross amounts of United States source income—fixed or determinable,[11] annual or periodical,[12] and certain other types of income.[13] On the other hand, a resident alien individual is taxed at gradu-

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id. § 911.

6. I.R.C. § 61(a) (Supp. IV 1986).

7. The rules used to determine the sources of income are contained in I.R.C. § 861 (Supp. IV 1986), and the Treasury Department regulations relating to that section, Treas. Reg. § 1.861-1 to -16 (as amended in 1983).

8. The following example illustrates this critical issue:

> Manuel is a citizen of Mexico. In 1988, Manuel earns $100,000 as a lawyer in Mexico and $50,000 from a teaching assignment in the United States. If Manuel is deemed a resident for United States tax purposes, the United States will impose tax on his worldwide income of $150,000. On the other hand, if Manuel is deemed a nonresident, the United States will only be allowed to impose tax on his United States source income, or $50,000.

9. I.R.C. § 871(a)(1) (Supp. IV 1986). A lower rate might exist, however, if the nonresident alien individual is a resident of one of the United States treaty partners and a provision of that treaty provides for a lower tax.

10. *Id.* § 1441(a).

11. *Id.* § 871(a)(1)(A).

12. *Id.*

13. *Id.* § 871(a)(1)(B)-(D). The capital gains (excluding those derived from the disposition of United States real property interests) of a nonresident alien individual not engaged in a trade or business in the United States are exempt from United States tax, provided the alien is not present in the United States for at least 183 days during the taxable year. *Id.* § 871(a)(2). Capital gains derived from the disposition of a United States real property interest are taxed pursuant to I.R.C. § 897. *Id.* § 897 (1982 & Supp. IV 1986).

ated rates applicable to United States citizens on net income derived from both United States and foreign sources.[14]

Due to these and other differences in tax treatment of resident aliens and nonresident aliens,[15] the amount of United States tax liability may

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14. Treas. Reg. § 1.871-1 (as amended in 1983).

15. Compare the following:

Taxation of a Nonresident Alien

A. Pays United States income tax at regular rates on any income effectively connected with the conduct of a trade or business in the United States. I.R.C. § 871(b) (1982).

B. Subject to a maximum thirty percent United States withholding tax on dividends, interest, and other investment income derived from United States sources. *Id.* § 871(a) (Supp. IV 1986).

C. May receive reduction or elimination of thirty percent tax rate by favorable income tax treaty provisions. *See, e.g.*, Convention between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital Gains, Dec. 31, 1975, arts. 10-12, 31 U.S.T. 5668, 5677-81, T.I.A.S. No. 9682.

D. Not subject to tax on interest income derived from some United States bonds and from United States banks and savings institutions. I.R.C. § 871(i) (Supp. IV 1986).

E. Not subject to any United States income tax on foreign-source income except under very limited circumstances. *Id.* § 871(a), (b) (1982 & Supp. IV 1986).

F. Not subject to the foreign personal holding corporation or controlled foreign corporation rules; thus, not subject to any United States tax on his or her share of undistributed earnings of a foreign corporation. *Id.* §§ 551(a), 951(a) (1982).

G. Not ordinarily subject to any United States income tax on capital gains derived from foreign sources. Moreover, does not ordinarily pay any United States income tax on capital gains from United States sources unless they relate to United States real property or a United States business. *Id.* §§ 871(a), 872(a) & 897(a) (1982 & Supp. IV 1986).

H. Not subject to excise tax on transfers of appreciated property to a foreign corporation or a foreign trust are not subject to excise tax.

Taxation of a Resident Alien

A. Pays United States income tax at regular rates on all United States source income. *See id.* §§ 1, 81.

B. Subject to United States income tax on all foreign-source income, but may generally take a foreign tax credit for foreign taxes paid. *See id.* §§ 61, 901-08.

C. May be subject to current United States tax on a pro rata share of undistributed earnings of shares owned in a foreign corporation if the foreign corporation is either a foreign personal holding company or a controlled foreign corporation. *See id.* §§ 551(a), 951(a) (1982).

D. Pays United States tax at regular rates up to twenty-eight percent on capital gains derived from both United States and foreign sources. *See id.* § 1(j) (Supp. IV 1986). Gain is determined by reference to historic cost, even if the alien acquired the property many years before moving into the United States.

differ depending upon the income mix of the individual. Under one set of facts the tax regime applicable to resident alien individuals may yield a lower United States tax, while under a different set of facts the tax regime applicable to nonresident alien individuals may yield a lower United States tax. Since an alien may wish to choose between classification as a resident or nonresident alien of the United States (obviously depending upon which will yield the lower United States tax), the definition of a resident alien individual is significant.

B. *The IRS Code and Regulations Prior to 1984*

Notwithstanding the importance of the concept of residence, the Code did not define the terms "resident alien," "nonresident alien," "residency," or "residence" prior to the Tax Reform Act of 1984.[16] However, the regulations under section 871 attempted to provide at least some guidance. Regulation section 1.871-2(b) provides that:

> An alien actually present in the United States who is not a mere transient or sojourner is a resident of the United States for purposes of the income tax. Whether he is a transient is determined by his intentions with regard to the length and nature of his stay. A mere floating intention, indefinite as to time, to return to another country is not sufficient to constitute him a transient. If he lives in the United States and has no definite intention as to his stay, he is a resident. One who comes to the United States for a definite purpose which in its nature may be promptly accomplished is a transient; but, if his purpose is of such a nature that an extended stay may be necessary for its accomplishment, and to that end the alien makes his home temporarily in the United States, he becomes a resident, though it may be his intention at all times to return to his domicile abroad when the purpose for which he came has been consummated or abandoned. An alien whose stay in the United States is limited to a definite period by the immigration laws is not a resident of the United States within the meaning of this section, in the absence of exceptional circumstances.[17]

This concept of residency, which appeared to stress intent and presence, was supplemented by another regulation that created a rebuttable presumption: an alien, by reason of his alienage, would be presumed to

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E. Subject to thirty-five percent excise tax on transfers of appreciated property to a foreign corporation or a foreign trust. *See id.* §§ 1491-94 (1982 & Supp. IV 1986)

See Langer, *When Does a Nonresident Alien Become a Resident for U.S. Tax Purposes?*, 44 J. TAX'N 220, 220-21 (1976).

16. *See supra* note 1.

17. Treas. Reg. § 1.871-2(b) (1960).

be a nonresident alien.[18] An alien or the Government could rebut the presumption as to the alien's nonresidency by proof showing the following:[19]

1. That the alien had filed a declaration of his intention to become a citizen of the United States under the naturalization laws;
2. That the alien had filed a declaration of residence;
3. That the alien had acted or made statements showing a definite intention to acquire United States residence; or
4. That the alien had acted or made statements "showing that his stay in the United States has been of such an extended nature as to constitute him a resident."[20]

While the Code and regulations failed to clearly define resident or nonresident alien, they did provide the starting point: an alien would be presumed to be a nonresident. By examining the circumstances surrounding the alien's visit to the United States, her intention could be determined. If the facts indicated an intention to remain in the United States permanently, for an extended period of time, or if no definite intention appeared, the presumption would be rebutted and the alien would be classified as a resident alien for tax purposes.[21] If the alien entered the country intending to accomplish something promptly or with a limited visa, the presumption would stand and she generally would be taxed as a nonresident alien.[22] Since most of the crucial terms in regulation section 1.871-2 were vague and undefined,[23] the Internal Revenue Service (IRS) was left to decide case-by-case which acts and statements were strong enough to rebut the presumption of nonresidency. Coupled with the regulation's lack of direction as to which facts and circumstances should be considered relevant, this case-by-case approach resulted in a confused and uncertain state of affairs.

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18. *Id.* § 1.871-4(b).
19. *See id.* § 1871-4(c)(1).
20. *Id.* § 1.871-4(c)(1)(iii).
21. *See* Langer, *supra* note 15, at 220.
22. *See id.*
23. For example, the terms "extended stay," "promptly," and "floating intention" were not defined in the Code or the Regulations. *See generally* Note, *Defining Resident Alien Status for Income Tax Purposes*, 24 VA. J. INT'L L. 667 (1984).

C. *Case Law Determinations*

1. *Ingram v. Bowers*

One of the earliest detailed treatments of the problem of an alien individual's residency status came in *Ingram v. Bowers*,[24] a case concerning Enrico Caruso.[25] Mr. Caruso, considered the foremost singer of his time, earned money throughout the world. Although he was born in Italy and remained a subject of that country, Caruso spent approximately six months of each year in the United States. During his stays, Mr. Caruso gave concerts at the Metropolitan Opera House in New York and other cities in the United States. He also leased a suite of rooms in the Knickerbocker Hotel in New York, making it his United States headquarters.[26] Because Mr. Caruso earned considerable money in both the United States and other countries, the determination of his resident status for tax purposes was of great importance.[27] In holding that Caruso was a nonresident alien individual for tax purposes, Judge Patterson stated:

> His original residence was in Italy, and there is no satisfactory evidence of an intention to abandon that residence. His stays in the United States were transitory and, except for one or two occasions, were only for the purpose of fulfilling operatic and concert engagements. Granting that domicile and residence are not synonymous under the income tax statutes, I am persuaded that Caruso's residence as well as his domicile was in Italy.[28]
>
> The fact that Mr. Caruso spent up to six months per year living and working in the United States was not enough to establish an intent to stay here. While the court did not claim to link residence with domicile, it appears that Mr. Caruso's domicile played an extremely important part in the court's determination of his nonresident status.

2. *Commissioner v. Nubar*

In *Commissioner v. Nubar*,[29] the Court of Appeals for the Fourth Circuit reviewed a Tax Court decision involving a citizen of Egypt. Mr. Nubar entered the United States on August 1, 1939, to visit the New

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24. 47 F.2d 925 (S.D.N.Y. 1931), *aff'd*, 57 F.2d 65 (2d Cir. 1932).

25. While the case is considered here for the issue of nonresident alien individual status, it is probably more famous for its early definition of United States source income.

26. *Ingram*, 47 F.2d at 925.

27. If a resident alien, he would be taxable upon his entire net income, irrespective of the source of that income. *Id.* at 926; *see supra* note 8.

28. *Ingram*, 47 F.2d at 926 (citation omitted).

29. 185 F.2d 584 (4th Cir. 1950), *cert. denied*, 341 U.S. 925 (1951).

York World's Fair and to travel throughout the United States. He applied for, and was granted, a three month visitor's visa. After Mr. Nubar's arrival in the United States, World War II began in Europe, and Mr. Nubar encountered difficulty in returning to both Egypt and European countries in which he maintained homes. Mr. Nubar obtained extensions that allowed him to remain in the United States until the termination of hostilities in Europe.

During his stay in the United States, Mr. Nubar realized profits exceeding $600,000 by trading on the stock and commodities exchanges. Contending that he was a nonresident alien not engaged in a trade or business within the United States, Mr. Nubar paid no United States income tax on these capital gains.[30] The Commissioner assessed a deficiency of $318,220.26 for the years in question.[31] Mr. Nubar chose to litigate the matter in the Tax Court and was victorious.[32] The Government appealed this decision, and the Court of Appeals for Fourth Circuit reversed.[33] The court of appeals found that the Tax Court erred on two key points. The court held that Mr. Nubar was, in fact, engaged in a trade or business within the United States.[34] More importantly, the court determined that he should have been classified as a resident alien individual for tax purposes.[35]

The court of appeals found that the Tax Court, in applying the pertinent statute, had confused "residence" with "domicile."[36] The court further found that the Tax Court had given too little weight to the long period of time that the taxpayer had been living and doing business in the United States, and to the fact that he had intended to stay in the United States until the war in Europe ended and he could safely de-

30. Mr. Nubar relied on sections 211(a) and 211(b) of the Internal Revenue Code of 1939, I.R.C. of 1939, § 211(a), (b) (as amended in 1942) (current version at I.R.C. § 871 (1982)). *Nubar*, 185 F.2d at 585.

31. Although Mr. Nubar was in the United States from 1939 to 1945, the deficiencies only concerned the years 1941, 1943, and 1944.

32. 13 T.C. 566 (1949).

33. *Nubar*, 185 F.2d at 589. The court of appeals also denied Mr. Nubar's petition for rehearing.

34. *Id.* at 586. The following cases established that extensive trading in stocks and commodities constituted engagement in a trade or business within the meaning of I.R.C. § 211: Higgins v. Commissioner, 312 U.S. 212 (1941); Snyder v. Commissioner, 295 U.S. 134 (1935); Fuld v. Commissioner, 139 F.2d 465 (2d Cir. 1943); Adda v. Commissioner, 10 T.C. 273, *aff'd*, 171 F.2d 457 (4th Cir. 1948), *cert. denied*, 336 U.S. 952 (1949).

35. *Nubar*, 185 F.2d at 586.

36. *Id.* at 587.

part.[37] Citing an earlier case, the court stated:

> "As 'domicile' and 'residence' are usually in the same place, they are frequently used, even in our statutes, as if they had the same meaning, but they are not identical terms, for a person may have two places of 'residence,' as in the city and country, but only one 'domicile.' *'Residence' means living in a particular locality*, but 'domicile' means living in that locality with intent to make it a fixed and permanent home. *'Residence' simply requires bodily presence as an inhabitant in a given place*, while 'domicile' requires bodily presence in that place and also an intention to make it one's domicile.
>
> "We think the error into which the Tax Court fell was partially caused by a confusion of these terms in lending to the word 'residence' some attributes which really belong only to the word 'domicile', and by laying too great stress, as to 'residence', on the animus revertendi."[38]

It appears that the court in *Nubar* felt that a stronger distinction between residence and domicile should be drawn. While an individual could have a domicile abroad, that fact would certainly not prevent the establishment of a tax residence in the United States. Although the court recognized the presumption of nonresident status afforded Mr. Nubar, it found that the Government had shown enough to rebut that position and that Mr. Nubar fit directly within the language of the regulation.[39] By remaining in the United States until after the end of the war, Mr. Nubar evidenced a specific purpose, the accomplishment of which required an extended stay. In other words, he was making his home temporarily in the United States and was thus a resident for tax purposes. The court clearly found no kinship between residence and domicile; instead, it took the intent to remain in the United States for an indefinite period as indicative of residency—even though that intent grew out of elements beyond the individual's control.

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37. *Id.* at 586-87. In reaching this conclusion, the court quoted Commissioner v. Swent, 155 F.2d 513 (4th Cir. 1946), in which the Fourth Circuit observed:

> The word 'resident' (and its antonym 'nonresident') are very slippery words, which have many and varied meanings. Sometimes in statutes, residence means domicile; sometimes, as in the instant case, it clearly does not. When these words, 'domicile' and 'residence', are technically used by persons skilled in legal semantics, their meanings are quite different.

Nubar, 185 F.2d at 587 (quoting *Swent*, 155 F.2d at 515).

38. *Nubar*, 185 F.2d at 587 (quoting *In re* Newcomb's Estate, 192 N.Y. 238, 250, 84 N.E. 950, 954 (1908)).

39. *Id.* at 587-89. At the time of this case the proper regulation was Treas. Reg. 29.211-2 (1939).

3. *De la Begassiere v. Commissioner*

In *De la Begassiere v. Commissioner*,[40] one of the rare cases in which a taxpayer attempted to gain resident alien status,[41] the Tax Court extracted a physical presence element from the regulations.[42] Mrs. De la Begassiere's husband, a citizen of France who had spent little time in the United States, had expressed an intent to be a resident. In holding that Mr. De la Begassiere was a nonresident alien, the court stated:

> It is obvious . . . that a nonresident alien cannot establish a residence in the United States by intent alone since there must be an act or fact of being present, of dwelling, of making one's home in the United States for some time in order to become a resident of the United States. Some permanence of living within borders is necessary to establish residence.[43]

The *De la Begassiere* case reinforced the proposition that an individual must, at some time, be present within United States borders to be deemed a resident alien individual. The precise duration of such presence, however, was left unclear.[44]

4. Revenue Ruling 64-285

In response to a request from an alien citizen of a United States tax treaty partner, the IRS issued Revenue Ruling 64-285.[45] Recognizing that alien individuals are generally divided into two classes, resident and nonresident, Revenue Ruling 64-285 attempted to provide another link to help in the determination of status for tax purposes. After citing section 1.871-2(b) of the Regulations,[46] the Revenue Ruling cited the pre-

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40. 31 T.C. 1031 (1959).

41. In *De la Begassiere*, the taxpayer, a United States citizen, attempted to file a joint return with her husband, a citizen of France. Under section 51(b)(2) of the Internal Revenue Code of 1939, the availability of joint return filing hinged on whether or not her husband was a nonresident alien during all of the taxable years in question.

42. *De la Begassiere*, 31 T.C. at 1034-37. The regulations at that time were Treas. Reg. 29.211-2 (1939).

43. *De la Begassiere*, 31 T.C. at 1036.

44. In Chapman v. Commissioner, 9 T.C. 619 (1947); Goldring v. Commissioner, 36 B.T.A. 779 (1937); and Stallforth v. Commissioner, 30 B.T.A. 546 (1934), *aff'd*, 77 F.2d 548 (D.C. Cir. 1935), the court permitted resident alien individual status despite a relatively short period of physical presence. The short period of physical presence, however, was coupled with the purchase of a dwelling.

45. Rev. Rul. 64-285, 1964-2 C.B. 184.

46. Treasury Regulations section 1.871-2(b) states:

> One who comes to the United States for a definite purpose which in its nature may be promptly accomplished is a transient; but, if his purpose is of such a nature that an extended stay may be necessary for its accomplishment, and to that

sumption established in a prior Revenue Ruling:

> [I]f an alien has been residing in the United States for as much as one year there is a presumption that such alien is a resident of the United States and this presumption will be indulged for purposes of income taxes in the absence of known facts showing that the alien is, in fact, a transient. A year's presence in the United States by an alien does not, however, establish residence beyond a doubt. It merely raises a presumption of residence which may be rebutted by any proper evidence showing that the alien is, in fact, a transient; that is, a nonresident.[47]

Depending on one's outlook, this approach either helps clear up the picture or provides another layer of static. A presumption of nonresidency exists for all aliens. If an alien resides in the United States for a year or more, however, the presumption shifts from nonresidency to residency. Conversely, presence for less than a full year reinforces the presumption of nonresidency. Once again, additional facts and circumstances showing intent, or lack of intent, to acquire United States residency can be instrumental in rebutting either of these presumptions.

5. *Adams v. Commissioner*

Adams v. Commissioner[48] involved the tax status of individuals with extensive ties to both the United States and Canada. William Adams was born in Virginia and moved to Canada in 1924 at the age of twenty-two. He gained Canadian citizenship in 1931, and in 1936 he married Hazel May Paine, a Canadian citizen by birth. From 1936 to 1947, the Adamses lived in Simcoe, Ontario, and had five children, all born Canadian citizens.[49] Although William began his construction business in Canada in 1944, this case dealt with his tax situations during the years of 1957, 1958, and 1959. The Commissioner contended that William and Hazel Adams were resident aliens of the United States during those years; therefore, they were subject to tax on their worldwide income.[50] The basis for the Commissioner's assertion, as well as the court's determination, makes for interesting reading.

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end the alien makes his home temporarily in the United States, he becomes a resident, though it may be his intention at all times to return to his domicile abroad when the purpose for which he came has been consummated or abandoned. Treas. Reg. § 1.871-2(b) (1960).

47. Rev. Rul. 64-285, 1964-2 C.B. at 185 (citing O.D. 197, I.C.B. 164 (1919)).

48. 46 T.C. 352 (1966).

49. *Id.* at 353.

50. *Id.*

The Adamses were blessed with many assets[51] and the luxury of two cultures.[52] In deciding the couple's resident status, the court looked at William and Hazel separately. In determining William's status, the court began by noting that " '[R]esidence . . . has an evasive way about it, with as many colors as Joseph's coat.' "[53] Accordingly, the Tax Court viewed the determination as factual, involving consideration and balancing of all elements.

Recognizing that the Code and the legislative history of section 872(a) offered neither a test nor criteria to determine residence status, the court looked to the regulations.[54] After reviewing the general principles and the presumption grounded in these regulations, the court reviewed the various facts and elements. The fact that William's wife and children spent the bulk of their time in Florida, while William split his time between Florida and Canada, was significant, but not determinative.[55] William's sworn statements to federal and state authorities regarding his intention to become a resident were deemed insufficient to establish resident status.[56] In addition, the Commissioner's reliance on William's in-

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51. The Adamses' substantial assets included the following:

A. Mr. Adams was president, general manager, and owner of 92% of the stock of a Canadian bridge and road construction company.

B. Mr. Adams owned five farms in which he had invested $240,000. Mrs. Adams owned three farms that cost her over $120,000. All the farms were located in Canada and were engaged in tobacco and other general farming.

C. Mr. Adams owned a 50% interest in a partnership that operated a lumber company in Canada.

D. Mr. Adams owned a 50% interest in a parcel of unimproved real estate in Canada.

E. The Adamses owned a furnished home in Daytona Beach, Florida.

Id. at 354-55.

52. Beginning in 1954, Hazel and the children spent nine to ten months per year in Florida; William spent approximately seventy days per year in Florida. *Id.* at 355.

53. *Id.* at 358 (quoting Weible v. United States, 244 F.2d 158, 163 (9th Cir. 1957)).

54. *Id.* at 358-59. The court considered Treas. Reg. §§ 1.871-2, -4 (1960). *See supra* notes 17-20 and accompanying text.

55. *Adams*, 46 T.C. at 359. The court had previously held that a spouse may have a residence separate from that of his or her spouse or children. *See* Marsman v. Commissioner, 18 T.C. 1 (1952), *aff'd*, 205 F.2d 335 (4th Cir. 1953); Jellinek v. Commissioner, 36 T.C. 826 (1961), *acq.* 1964-1 C.B. (Part 1) 4; Hack v. Commissioner, 33 T.C. 1089 (1960), *acq.* 1960-2 C.B. 5; Rose v. Commissioner, 16 T.C. 232 (1951).

56. *Adams*, 46 T.C. at 360. The court found, however, that William had offered a plausible explanation regarding the execution of the following documents, in which William stated his intention to become a resident of Florida:

1) Application for United States immigrant visa (enabling children to attend Florida schools);

2) Florida manifestation of domicile (same reason);

tention to always return to Florida was not persuasive to the court. While the court acknowledged that such an intention carried weight in determining whether a residence, once established, has been abandoned, it found that intention cannot itself establish residence where the intent is to return only as a sojourner or transient.[57] The court concluded that William's interests in Florida and his limited stays there (roughly seventy days per year) did not prove that he was a resident for tax purposes: " '[s]ome *permanence of living* within borders is necessary to establish residence.' "[58]

Hazel Adams also attempted to claim nonresident alien status. Her choice of argument, however, differed from her husband's. Citing her plan and history of living in Florida for only forty weeks a year while her children attended Florida schools, Hazel urged that this demonstrated an intent to remain for a definite time, making her a nonresident within Treasury Regulation section 1.871-2.[59] The court ignored her reliance on this portion of the regulation. Instead, the court looked fur-

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3) Florida homestead exemption (providing local tax benefits); and

4) Florida driver operator's license and registration of a car in the state in Florida (required for a nonresident whose children were attending Florida schools).

Id.

57. *Id.* at 361.

58. *Id.* (quoting De la Begassiere v. Commissioner, 31 T.C. 1031, 1036 (1959)) (emphasis added in *Adams*). The court's detailed treatment graphically demonstrates the subjective approach in determining resident status:

> It takes more than the use of a house as a closet for golfing and other sporting gear, or even sporadically to sleep and eat, to convert it into a home. It may well be that William intended to make Florida his residence—perhaps as early as 1953—but his intent was never accompanied by the requisite physical presence. Both elements are necessary to establish residence.
>
> There is no question that prior to the years involved herein William's sole residence was in Canada for the better part of 30 years. He was married there, his children were born and raised there, the family menage was located there, he started and developed substantial business activities there, and he became part of the community in which he lived. Simcoe was the center of gravity of his life. In 1953, certain underpinnings of this superstructure were removed. But William continued to spend the bulk of his time in Canada, his principal business activities continued to be centered there, he continued to live in the family residence in Simcoe (with domestic help) during his nonworking, nontraveling hours, and his clothing and personal belongings (with very minor exceptions) remained there.
>
> Under all the facts and circumstances of this case and giving appropriate weight to the presumption of nonresidency contained in the respondent's regulations, we conclude that William was a nonresident alien of the United States during the taxable years before us within the meaning of section 872(a).

Id. at 361-62 (footnotes and citations omitted).

59. *Id.* at 362.

ther[60] and discounted Mrs. Adams' argument:

> Such an argument strains credulity. To hold that the combination of physical presence and the permanence reflected by being a homeowner and a parent *present* in a community where her children were attending school and where she had a Florida licensed car and Florida bank and savings accounts did not constitute residence would emasculate the ordinary meaning of residence. Absent any countervailing evidence, these circumstances require a finding that Hazel was assimilated into and became an integral part of the community, playing the same role as other mothers.
>
> We conclude that Hazel was a resident of the United States for Federal income tax purposes during the years in question.[61]

When the dust cleared after the *Adams* decision, the Code still had no definition of resident alien, and the regulations were unchanged. The court had, however, developed a crude but workable test. In order for an alien to be classified as a resident for tax purposes, the alien's activities had to demonstrate both a physical presence in the United States and an intention to reside in the United States with some permanence.

6. *Park v. Commissioner*

In *Park v. Commissioner*,[62] the Tax Court decided the residency of a Korean national in what is perhaps one of the most interesting and complex matters yet entertained by that court. While the facts are too complex to recite,[63] a short summary relating to the infamous Mr. Park is in order.

Tongsun Park was born in Sinchang, Korea[64] in 1935. At all relevant times, Mr. Park was a citizen of the Republic of Korea (South Korea). Mr. Park filed neither a declaration of intention to become a United States citizen, nor a Form 1078[65] or its equivalent.[66] In addition, he

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60. Treas. Reg. § 1.871-2 (1960) continues by stating, "but, if his purpose is of such a nature that an extended stay may be necessary for its accomplishment, and to that end the alien makes his home temporarily in the United States, he becomes a resident. . . ."

61. 46 T.C. at 362 (emphasis in original) (footnote omitted). Interestingly the court felt that to allow Mrs. Adams' argument would "emasculate the ordinary meaning of residence." *Id.* The court, however, articulated neither that "ordinary meaning" nor its origin.

62. 79 T.C. 252 (1982).

63. "On August 23, 1978, the court ordered that the issue of petitioner's residency, along with the issue of the sources and gross amounts of his income, be severed and tried separately from issues such as the deductions allowable to petitioner." *Id.* at 252 n.2. This Article will discuss only the issue of residency.

64. Sinchang, Korea is now part of the Peoples Republic of Korea (North Korea).

65. Form 1078 is entitled "Certificate of Alien Claiming Residence in the United

traveled only under passports issued pursuant to Korean law; he never entered the United States on a permanent residence passport. In attempting to decide Mr. Parks' residency status, the court looked at several factors, including the following: (1) education and early life in the United States (1952-1963);[67] (2) later periods in the United States (1964-1975);[68] (3) business and investment in the United States;[69] (4) business and investment in Korea;[70] (5) miscellaneous business and investment activities;[71] (6) bank accounts;[72] (7) activities as a rice agent;[73]

States" and is referred to in Treas. Reg. § 1.871-4(c)(2) (1960).

66. *See id.*

67. Mr. Park attended King College in Bristol, Tennessee, from September 1952 until October 1953. He attended Edison High School in Seattle, Washington, from October 1953 until graduating and departing the United States in May of 1954. He reentered the United States on September 13, 1955, and attended the College of Puget Sound in Tacoma, Washington, for one year. In August of 1956, he enrolled in the Foreign Service Institute of Georgetown University and received a Bachelor of Science degree in Foreign Service from Georgetown in June of 1963. In March of 1963, Mr. Park filed an "Application for Change of Nonimmigrant Status" from student to visitor for the purpose of sightseeing. His status was changed from F-1 (student) to B-2 (temporary visitor for pleasure). *Park*, 79 T.C. at 253-54.

68. After his B-2 visa expired in 1963, Mr. Park was issued a B-1 visa (temporary visitor for business) on or after August 28, 1964. On September 4, 1968, October 27, 1971, and August 10, 1972, Mr. Park was issued multiple entry E-2 visas (treaty investor). On July 10, 1973, he obtained a multiple entry B-1 visa valid through July 9, 1977. Under this visa, Mr. Park was present in the United States during the years in question for the following number of days: 180 days (1972); 199 days (1973); 198 days (1974); and 161 days (1975). In comparison, he was present in Korea during the same years for the following number of days: 159 days (1972); 109 days (1973); 95 days (1974); and 79 days (1975). *Id.* at 254-58.

69. Beginning in the early 1960s, Mr. Park began organizing, financing, and managing numerous business and investment activities in the United States, both directly and through employees. As Mr. Park's activities with these entities increased throughout the years in question, he had extensive business dealing in the United States that netted him substantial income and helped him develop powerful business, political, and military contacts. *Id.* at 258-66.

70. While Mr. Park was pursuing extensive United States business holdings, he was also developing similar activities in Korea. These activities also continued to increase throughout the years in question, resulting in earnings of at least $100,000 per year. *Id.* at 266-70.

71. Besides his business holdings and investments in the United States and the Republic of Korea, Mr. Park was an international consultant to Japan Line, which required him to maintain an office and home in London, England. He also formed corporations in Liberia and Bermuda that generated considerable income. *Id.* at 270-72.

72. Between 1961 and 1977, Mr. Park maintained a number of personal bank accounts in the United States. Mr. Park also held three certificates of deposit from the Industrial Bank of Japan in the amounts of $300,000, $1,000,000, and $650,000, respec-

(8) living accommodations;[74] (9) religious, charitable and social activities;[75] and (10) automobiles.[76] Because Mr. Park had substantial non-United States source income, the determination of his residency status carried enormous importance. Realizing that the issue of residency was factual and could only be resolved through a consideration of all relevant facts and circumstances, the court decided that only "the unique personal circumstances of the taxpayer,"[77] could provide the needed guidance. For this reason, the court gave only limited value to the cases relied upon by

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tively. In addition, Mr. Park's corporations and corporations for which he was the authorized signatory had a number of bank accounts in the United States and elsewhere. Mr. Park used these in the same manner that he used his personal account. *Id.* at 272-76.

73. Mr. Park served as an agent for the Rice Growers Association of California and Connell Rice & Sugar Co., Inc., in their efforts to sell rice to Korea. Payments to Mr. Park and his various corporations exceeded $2,000,000 per year for the years in question. *Id.* at 276-79.

74. Mr. Park was very active in the United States real estate market, primarily in the Washington, D.C., area. Between 1961 and 1975 Mr. Park leased a townhouse (1961); purchased a three-story house (1963); leased another house (1971); purchased another house (1972); purchased a condominium (1974); purchased a cooperative apartment (1974); and purchased a third house (1975). *Id.* at 279-80. In Korea, Mr. Park lived with his mother from 1960 through 1974. He later leased a villa from the Korean Government. In 1974 he purchased, with others, a twenty-two acre estate. *Id.* at 281. Finally, Mr. Park maintained a personal house and staff in the Dominican Republic, and one of his corporations held a house and staff in London. *Id.* at 282.

75. A. Religious Activities

Mr. Park was baptized at a Presbyterian Church in Seoul, Korea, and was a member of that church from 1954 through the years in question. He attended several different Korean Presbyterian Churches in the United States. His donations to the churches in the United States were minimal in comparison to those made to the churches in Korea. *Id.* at 282.

B. Charitable Activities

Mr. Park was involved with several nonprofit and charitable organizations in the United States and Korea. He made considerable donations to many and allowed some to use his properties. *Id. at* 283.

C. Social Activities

Mr. Park was an active participant in social events while in Washington, D.C., and he was listed in the "Social List of Washington, D.C." from 1968 through 1977. He entertained many members of Congress and other socially prominent Washington area residents. Mr. Park frequently hosted "functions attended by socially prominent Korean individuals and by high ranking political figures of both Korea and the United States." He also helped establish the George Town Club of Seoul. *Id.* at 283-84.

76. Mr. Park held driving licenses in the United States and Korea. Over the years Mr. Park owned several automobiles, both individually and through his corporation, Pacific Development, Inc. All were registered in the District of Columbia. *Id.* at 284.

77. *Id.* at 286.

both Mr. Park and the Government.[78]

Focusing on the definition of residence and the presumption of nonresidency contained in the regulations,[79] Mr. Park contended that he was a "mere transient or sojourner" and not a resident for tax purposes. He further contended that, while he made a series of visits to the United States during the years in question, each visit was for a definite purpose that could be and was promptly accomplished. In addition, Mr. Park argued that his extensive business and personal ties to Korea and the Korean community were inconsistent with a "mere floating intention" to return to Korea.[80] The Government disputed Mr. Park's contentions, arguing that the facts at best indicated dual or multiple residence, one of which was the United States.[81]

In deciding Mr. Park's fate, the court considered Mr. Park's property holdings and time spent in Korea and the United States, concluding that he had established a permanent attachment to the United States.[82] In assessing Mr. Park's business and political activities, the court observed that his deep involvement in the United States was "wholly inconsistent with the status of a mere transient or sojourner."[83] Finally, the court

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78. *Id.*

79. Treas. Reg. § 1.871-2(b), 4(b) (1960). *See supra* notes 17-20 and accompanying text.

80. *Park*, 79 T.C. at 288.

81. *Id.* at 288-89.

82. *Id.* at 289-98. The court stated:

> During 1972 through 1975, the years here in question, petitioner did not live as a "transient or sojourner" intending to stay for only a temporary period. Throughout those years, petitioner spent a good deal more time in the United States than anywhere else in the world, and he spent increasingly less of his time in Korea. During all 4 years he owned his own home in Washington, D.C., and home ownership reflects a degree of permanent attachment to, and integration into, the community.
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> . . .
>
> Not only was petitioner's style of living inconsistent with that of a transient or sojourner, his investment and business activities reflect with equal clarity an ongoing attachment to, and relationship with, this country. In fact, Washington, D.C., became the center of his business activity. The houses which served as petitioner's living quarters alone represented large investments of capital and credit, and some of the houses were sold for large gains. . . . Investments of such large sums obviously required thought and attention. A transient or sojourner present in the United States for a purpose which could be promptly accomplished would hardly be expected to make such large commitments, particularly for personal living quarters.

Id. at 290-91 (footnotes and citation omitted).

83. *Id.* at 293. As an example, the court adverted to Mr. Park's income as an agent

reviewed Mr. Park's social, charitable, and civic activities and found that he had intentionally assimilated himself into the Washington, D.C., community.[84]

While the court was quick to point out the complexity of this issue, as well as the professionalism of Mr. Park's presentation and preparation, the combination of factors led the court to conclude that Mr. Park was indeed a resident alien for income tax purposes. In so doing, the court closed with the following: "In our opinion, his United States homes, investments, business activities, and political, social, and other ties were so deep and extensive as to show that his stay in this country . . . was 'of such an extended nature as to constitute him a resident.' "[85] The fate of Tongsun Park certainly stresses the case-by-case analysis that the courts used to decide the issue of residency.

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for domestic rice growers. *See supra* note 73. His success in this enterprise was at least partially due to some close contacts in the Korean Government. When this relationship soured, Mr. Park enlisted the support of United States politicians, who apparently succeeded in returning Park to his former favored position. With this chain of events in mind, the court observed: "Maintaining good relationships with those U.S. political figures was thus important to this ongoing business activity in case he should need again to use this country's political processes and power. Certainly, the cultivation of such political relationships in this country could not be accomplished by a transient or sojourner." *Park*, 79 T.C. at 293.

84. *Id.* at 296-97. The court summed up Mr. Park's strong ties to the United States:

> Due to the international nature of some of petitioner's business activities and the resulting requirement that he travel often, petitioner was absent from the United States on numerous occasions; but these absences did not affect his assimilation into Washington, D.C., community. We have pointed out that he was listed in the Green Book, the compendium of socially prominent individuals in that city. He had numerous accounts in local banks through which literally millions of dollars passed during the years in issue. He borrowed money in his own name and for his corporations and personally guaranteed loans. He owned automobiles bearing personalized license plates. He attended local churches on a regular basis and was involved with local charitable and civic endeavors. In addition, he entertained frequently and lavishly, thereby becoming closely associated with numerous Senators, Congressmen, Cabinet officers, ambassadors, military personages, and other civic, business, and society leaders in Washington, D.C. This assimilation into the Washington, D.C., community is evidence that petitioner was not a transient or sojourner, but that he intended to (and did) stay in the United States for an indefinite period notwithstanding his technically limited visa status.

Id.

85. *Id.* at 297-98 (quoting Treas. Reg. § 1.871-4(c)(2)(iii) (1960)).

D. *The Judicial Test*

The foregoing cases indicate that, prior to 1984, an alien would be classified as a resident for United States tax purposes only if two key requirements were met. This two-part test required that the individual (1) actually maintained a physical presence within the United States, and (2) expressed an intention to reside in the United States with some permanence. In determining the alien's intention, the courts considered such factors as purpose and character of the alien's visit;[86] the acquisition of a United States home;[87] the alien's cultural, social, business, and investment ties with the United States;[88] relocation of the alien's family;[89] maintenance of bank accounts in the United States;[90] and the alien's filing of tax returns as a resident of his home country.[91] Moreover, the courts gave weight to the type of visa used to enter the United States. As stated in Treasury Regulation section 1.871-2(b), "An alien whose stay in the United States is limited to a definite period by the immigration laws is not a resident of the United States . . . in the absence of exceptional circumstances."[92]

The presence of individuals entering the United States under certain visas was considered limited by immigration laws.[93] Entering the United

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86. *See* Siddiqi v. Commissioner, 70 T.C. 553 (1978); Toor v. Commissioner, 36 T.C.M. (CCH) 1617 (1977).

87. *See* Park v. Commissioner, 79 T.C. 252 (1982); Escobar v. Commissioner, 68 T.C. 304 (1977); Adams v. Commissioner, 46 T.C. 352 (1966); Chapman v. Commissioner, 9 T.C. 619 (1947).

88. *See* Schoneberger v. Commissioner, 74 T.C. 1016 (1980); Croyle v. Commissioner, 41 T.C.M. (CCH) 339 (1980); De la Begassiere v. Commissioner, 31 T.C. 1031 (1959).

89. *See* Maclean v. Commissioner, 73 T.C. 1045 (1980); Barocas v. Commissioner 34 T.C.M. (CCH) 755 (1975); Fugit v. Commissioner, 34 T.C.M. (CCH) 646 (1975).

90. *See* Hoskins v. Commissioner, 52 Tax Ct. Mem. Dec. (P-H) ¶83,508 (Aug. 22, 1983).

91. *See* Croyle v. Commissioner, 41 T.C.M. (CCH) 339 (1980); Escobar v. Commissioner, 68 T.C. 304 (1977).

92. Treas. Reg. § 1.871-2(b) (1960).

93. The following types of visas denoted limited stays:

1. A-Visa, employees of foreign governments;
2. B-Visa, business visitors and tourists;
3. C-Visa, aliens in transit;
4. D-Visa, alien crew members of ships and aircraft;
5. E-Visa, treaty traders and investors;
6. F-Visa, students;
7. G-Visa, employees of international organizations;
8. H-Visa, temporary workers and trainees;
9. I-Visa, foreign correspondents;

States with one of these special visas revealed an intention not to reside in the United States. However, exceptional circumstances could overcome that evidence.[94]

Interestingly, in order to abandon resident status the same rules were applied, but in reverse. To be classified as a nonresident alien for tax purposes, the individual had to physically depart from the United States and establish an intent to abandon her United States resident status. The intent to abandon United States resident status had to be evidenced by some affirmative act.[95] Thus, for a person who had gained United States resident alien status, it was even more difficult to give it back.

Prior to 1984, the body of law pertaining to the definition of a resident and nonresident alien was essentially subjective, requiring a close analysis and a careful balancing of all the facts and circumstances of each case. This regime undoubtedly made tax planning for alien individuals difficult. Consequently, in addressing the issue Congress apparently considered the single question, "Is it difficult?" when the key issue should have been, "Is it fair?"

III. THE BRIGHT-LINE TEST OF SECTION 7701(b)

A. *Impetus for Change*

Although by 1984 many organizations and individuals advocated changing the way in which the United States defined resident aliens,[96] a

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10. J-Visa, exchange visitors; and

11. L-Visa, intra-company transfers.

See Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15) (1982 & Supp. IV 1986).

94. *See* Commissioner v. Patino, 186 F.2d 962 (4th Cir. 1950); Siddiqi v. Commissioner, 70 T.C. 553 (1978); Budhwani v. Commissioner, 70 T.C. 287 (1978); Escobar v. Commissioner, 68 T.C. 304 (1977); Cooper v. Commissioner, 15 T.C. 757 (1950); Chapman v. Commissioner, 9 T.C. 619 (1947); Rev. Rul. 64-285, 1964-2 C.B. 184; Rev. Rul. 67-159, 1967-1 C.B. 280.

95. Rev. Rul. 60-129, 1960-1 C.B. 272. *See* Dillin v. Commissioner, 56 T.C. 228 (1971); Goldring v. Commissioner, 36 B.T.A. 779 (1937). Affirmative actions showing intent to abandon include, but are not limited to: (1) relocation of the alien's family in a foreign country; (2) sale of the United States residence; (3) securing of foreign residence permits; (4) transfer of personal possessions out of the United States; and (5) lapse of affiliation with social, religious, business, and civic ties in the United States. *See* Ermogeni v. Commissioner, 35 T.C.M. (CCH) 870 (1976); Marsh v. Commissioner, 68 T.C. 68 (1977); Hoskins v. Commissioner, 52 Tax Ct. Mem. Dec. (P-H) ¶83,508 (Aug. 22, 1983). Each of the cases cited above held that the alien individual did not show evidence indicating an intention to abandon United States residency status.

96. *See, e.g.*, New York State Bar Association Tax Section Committee on U.S. Activities of Foreign Taxpayers, *Report on the Definition of "Resident" in Section 451 of the Tax Reform Bill of 1983*, 10 INT'L TAX J. 173 (1984); Note, *supra* note 23.

brief look at the House Ways and Means Committee Report[97] will serve as a good summary. Realizing that the test developed through judicial interpretation was difficult to use in planning and caused a great deal of dissatisfaction,[98] Congress felt a change was in order. The House Ways and Means Committee states the following reason for change:

> The committee believes that the tax law should provide a more objective definition of residence for income tax purposes. The committee believes that present law does not provide adequate guidance with respect to residence status. The committee understands that an objective definition may allow some aliens who should be taxable as residents to avoid resident status, and would impose resident status on some aliens who are not residents under the current rules. On balance, however, the committee finds that the certainty that the bill's objective definition provides outweighs other considerations.[99]

B. *Statutory Determinations Under Section 7701(b)*

By enacting Code section 7701(b)[100] Congress provided the first statutory definition of the term "resident." Under section 7701(b), an alien individual was treated as a resident of the United States for a calendar year if such individual satisfied one of two tests. Section 1810(l) of the Tax Reform Act of 1986[101] amended section 7701(b) by including a third way in which an alien individual could be classified as a resident for income tax purposes. Today, the definition of a resident alien is captured in section 7701(b)(1)(A) and provides for resident status if the alien (1) is lawfully admitted for permanent residence, (2) meets the substantial presence test, or (3) makes a first year election.[102] The Code

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97. H.R. REP. NO. 432, 98th Cong., 2d Sess., pt. 2, at 1523 (1984) [hereinafter 1984 HOUSE REPORT].

98. The American Bar Association, for example, listed three major objections. First, the old rules encouraged needless and inefficient litigation. Second, the Government employed an inadequate system of collecting data to properly assess the tax returns of aliens. Third, the old rules were so uncertain with respect to such a wide category of cases that many taxpayers ultimately arranged their affairs on the basis of business and personal convenience. They then reported their income as residents or nonresidents, whichever produced the lesser tax. *See Tax Law Simplification and Improvement Act of 1983: Hearings on H.R. 3475 Before the Committee on Ways and Means*, 98th Cong., 1st Sess. 223 (1983); *see also* Russo & Sharp, *A New Definition of Nonresidency: The ABA Proposal*, 60 TAXES: THE TAX MAGAZINE 779 (Nov. 1982).

99. 1984 HOUSE REPORT, *supra* note 97, at 1523-24.

100. *See* Deficit Reduction Act of 1984, *supra* note 1.

101. *Id.*

102. I.R.C. § 7701(b)(1)(A) (Supp. IV 1986). Section 7701(b)(1)(A) provides:
Resident alien.

defines a nonresident alien as any individual who is neither a citizen of the United States nor a resident of the United States within the meaning of section 7701(b)(1)(A).[103]

1. The Lawful Permanent Resident Test

Under section 7701(b)(1)(A)(i), an alien individual is afforded resident alien status for a calendar year if the individual was a lawful permanent resident of the United States at any time during that calendar year. An alien individual is deemed a lawful permanent resident of the United States if (1) such individual has been "lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws,"[104] and (2) "such status has not been revoked (and has not been administratively or judicially determined to have been abandoned)."[105]

This test, commonly referred to as the "green card rule,"[106] allows an alien individual who is issued a "green card" under the immigration laws to become a resident alien of the United States for income tax purposes on the first day that he is physically present in the United States as a lawful permanent resident.[107] Because of this statutory starting date, the alien individual can be classified as a resident alien and a nonresident alien within the same calendar year.[108] This might require the fil-

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An alien individual shall be treated as a resident of the United States with respect to any calendar year if (and only if) such individual meets the requirements of clause (i), (ii), or (iii):

(i) Lawfully admitted for permanent residence

Such individual is a lawful permanent resident of the United States at any time during such calendar year.

(ii) Substantial presence test

Such individual meets the substantial presence test of paragraph (3).

(iii) First year election

Such individual makes the election provided in paragraph (4).

103. *Id.* § 7701(b)(1)(B).

104. *Id.* § 7701(b)(6)(A).

105. *Id.* § 7701(b)(6)(B).

106. A green card is an immigration visa. The green card rule is discussed in Prop. Treas. Reg. § 301.7701(b)-1(b), 52 Fed. Reg. 34234 (1987).

107. *See* I.R.C. § 7701(b)(2)(A)(ii).

108. For example, if Jane, a citizen of Mexico, enters the United States on January 1, 1989, without a green card, but she receives a green card on May 1, 1989, she will be both a nonresident alien and a resident alien for calendar year 1989. She will be a nonresident alien from January 1 through April 30, and a resident alien from May 1 through December 31.

ing of two tax returns[109] for the same calendar year and an allocation of income, expenses, and deductions.[110]

Unlike the old rules, which required considerable physical presence within the United States, an alien under the green card rule may be classified as a resident alien of the United States for income tax purposes if present in the United States for as little as one day. In addition, a green card holder who comes to the United States for only a few days a year to keep his permanent resident status alive is a resident alien for income tax purposes.

The lawful permanent resident test represents a substantive change from the old rules.[111] The House Ways and Means Committee offered the following justification:

> The committee believes that aliens who have entered the United States as permanent residents and who have not officially lost or surrendered the right to permanent U.S. residence should be taxable as U.S. residents. These persons have rights that are similar to those afforded citizens (including the right to enter the United States at will); equity demands that they contribute to the cost of running the government as much as citizens.[112]

It is interesting to note that William Adams, who had a green card and was deemed a nonresident alien individual by the court,[113] would now be classified as a resident alien. Moreover, while the opinion in *Ingram v. Bowers*[114] does not mention the immigration status of Enrico Caruso, he too would likely be classified as a resident alien under today's lawful permanent resident test.

Under this test, once an alien acquires residence status, that status continues until the alien surrenders the green card; until the green card is revoked by the immigration authorities; or until it is administratively

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109. A 1040 NR would be required for part of the year and a 1040 for the remainder of the year. *See* Treas. Reg. § 1.6012-1(a), (b) (as amended in 1986).

110. For example, if the alien individual has non-United States source income, that income will be subject to United States taxation for the portion of the year that the individual is a resident alien but not for the portion of the year that the individual is a nonresident alien. This causes even more complications when one factors in the provisions to eliminate double taxation (for example, the foreign tax credit, I.R.C. §§ 901-08 (1982 & Supp. IV 1986)).

111. Under prior law, admission to the United States for permanent residence pursuant to the Immigration and Nationality Act did not per se establish residence for federal income tax purposes. *See* Immigration and Nationality Act, *supra* note 93.

112. 1984 HOUSE REPORT, *supra* note 97, at 1524.

113. *See supra* notes 48-61 and accompanying text.

114. *See supra* notes 24-28 and accompanying text.

or judicially determined that the alien has abandoned lawful permanent resident status under the immigration laws.[115]

While the permanent resident test makes the determination of resident status easier to make and plan around, it fails on more important points. By requiring the filing of two tax returns, for example, the law apparently increases required compliance. Yet practice under a voluntary tax regime indicates that this extra effort would in fact effectively *decrease* tax compliance. By replacing the subjective determination of the courts with an objective test, the Code also imposes resident alien tax status on individuals who have no intent to reside permanently in the United States and on individuals who spend little time in the United States. The facts and circumstances of each case are replaced by the examination of the alien's green card status. Aliens who have no home, no family, and no bank account, and who spend little time in the United States, can be classified as resident aliens. Conversely, those with all the trappings of residency,[116] with the exception of a green card, might be classified as nonresident aliens.

A twist pertaining to the last year of residency may develop under the lawful permanent resident test. If an alien is not a resident at any time during the calendar year following the loss of his green card, and he has a closer connection to a foreign country, then the year in which his green card is lost could become a split year.[117] This will occur if the green card is surrendered or revoked before the end of the calendar year. The alien individual will not be treated as a resident of the United States for the portion of the calendar year that follows the loss of his green card. Therefore, an alien individual who surrenders his green card on May

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115. Under Prop. Treas. Reg. § 301. 7701(b)-1(b)(2), 52 Fed. Reg. 34234 (1987), resident status is rescinded following the issuance of a final administrative or judicial order of exclusion or deportation regarding the alien individual. A final judicial order is an order that is no longer subject to appeal to a higher court of competent jurisdiction. Prop. Treas. Reg. § 301.7701(b)-1(b)(3) states:

> An administrative or judicial determination of abandonment of resident status may be initiated by the alien individual, the Immigration and Naturalization Service (INS), or a consular officer. If the alien initiates this determination, resident status is considered to be abandoned when the individual's application for abandonment or other appropriate form is filed with the INS or a consular officer. If the INS or a consular officer initiates this determination, resident status will be considered to be abandoned upon the issuance of a final administrative order of abandonment. If an individual is granted an appeal to a federal court of competent jurisdiction, a final judicial order is required.

Id. § 301.7701(b)-1(b)(3).

116. *See supra* notes 62-85 and accompanying text.

117. *See* I.R.C. § 7701(b)(2)(B) (Supp. IV 1986).

31, 1989, is not a resident alien during any part of 1990 and who has a closer connection to a foreign country from June 1, 1989, to December 31, 1989, will have his resident alien status ended on May 31, 1989. The alien individual will be required to file a 1989 income tax return as a resident alien for the five month period. If the alien individual is neither present in the United States nor has any United States source income for the remaining seven months, the inquiry ends. However, a ten day "de minimis presence" rule[118] could come into play. If the alien individual is present in the United States for ten days or less after the abandonment of the green card, and during such time the alien has a closer connection to a foreign country, the alien's residency termination date will not be extended.[119] In this case, the alien individual is considered a nonresident alien during that period and could be required to file a nonresident income tax return in the same calendar year in which he files as a resident alien.[120] The residency termination date will be extended until the end of the last day that the alien individual is actually present in the United States in two situations: (1) if the alien individual stays in the United States more than ten days; or (2) if the alien stays ten days or less and cannot establish a closer connection to a foreign country during that period.[121]

Besides the increased amount of compliance and complexity that this residency termination rule causes, two additional concerns arise: (1) since physical presence in the United States is not relevant to the determination of the alien individual's resident status prior to the abandonment of such status, it appears contradictory to make physical presence the relevant factor in determining the residency termination date; and (2) just as the pre-1984 Code failed to define the pertinent term resident alien, the present Code fails to define what constitutes a "closer connection" to a foreign country. To aid in determining if an alien individual has a closer connection to a foreign country, the proposed regulations provide a bit of guidance:

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118. *See* Prop. Treas. Reg. § 301.7701(b)-4(c)(1), 52 Fed. Reg. 34237 (1987).

119. I.R.C. § 7701(b)(2)(C) (Supp. IV 1986).

120. Prop. Treas. Reg. § 301.7701(b)-4(c)(2) provides:

> If an individual's residency starting date does not fall on the first day of the tax year, or the individual's residence termination date does not fall on the last day of the tax year, the individual's income tax liability should be calculated in accordance with § 1.871-13 dealing with the taxation of individuals who change residence status during the taxable year.

Prop. Treas. Reg. § 301.7701(b)-4(c)(2), 52 Fed. Reg. 34237 (1987).

121. *Id.* § 301.7701(b)-4(c)(1).

> An alien individual will be considered to have a closer connection to a foreign country than the United States if the individual or the Commissioner establishes that such individual has maintained more significant contacts with the foreign country than with the United States. In determining whether an individual has maintained more significant contacts with a foreign country than the United States, the facts and circumstances to be considered include (but are not limited to):
> (1) The location of the individual's permanent home;
> (2) The location of the individual's family;
> (3) The location of personal belongings, such as automobiles, furniture, clothing and jewelry owned by the individual and his family;
> (4) The location of social, political, cultural or religious organizations in which the individual has a current relationship;
> (5) The location of the individual's personal bank accounts;
> (6) The type of driver's license held by the individual;
> (7) The country of residence designated by the individual on forms and documents;
> (8) The types of official forms and documents filed by the individual, such as Form 1078 or Form W-9; and;
> (9) The location of the jurisdiction in which the individual votes.[122]

It appears, then, that the determination of a closer connection will entail the type of subjective analysis utilized under the pre-1984 Code. Ironically, this subjective analysis was one of the things that the section 7701(b) objective test was designed to eliminate.

2. The Substantial Presence Test

In passing section 7701(b), Congress intended at least a portion of the objective resident alien test to be numerical. Under the substantial presence test, that is clearly the case. As the House Ways and Means Committee observed,

> It is just as clearly appropriate to treat as residents individuals who spend significant time in the United States. While there is no single system that is perfect, the committee believes that a regime that depends on length of stay meets the criteria of objectivity and establishing nexus to the United States and is appropriate. Almost all individuals present in the United States for more than half a year should be taxable as U.S. residents. Moreover, individuals who repeatedly spend significant amounts of time in the United States should have to note their presence with the Internal Revenue Service; if they do not have a closer connection with a foreign country than with the United States and a tax home in that foreign country, they, too, should be taxable as U.S. residents. The committee believes

122. *Id.* § 301.7701(b)-2(d), 52 Fed. Reg. at 34235.

> that an average of 122 days of presence over a three year period is a significant amount of time for the purpose of imposing U.S. tax in such circumstances, but that an individual who is present for fewer than 31 days in a year should not be subject to this rule for that year.[123]

According to the substantial presence test, an alien individual will be classified as a resident alien of the United States for a calendar year if the following two conditions are met: First, the alien must be "present in the United States on at least 31 days during the calendar year";[124] second, "the sum of the number of days on which [the alien] was present in the United States during the current year and the 2 preceding calendar years" must equal or exceed 183 days.[125] Under the second criterion of the substantial presence test, the days in the current year are multiplied by one, the days in the first preceding year are multiplied by one-third, and those in the second preceding year by one-sixth.[126]

Because the substantial presence test focuses on the number of days in which an alien individual is physically present in the United States, the rules governing the numerical day-count are extremely important. With the exception of four situations, an individual will be treated as present in the United States on any day if such individual is physically present in the United States at any time during such day.[127] Therefore, the day of arrival in the United States as well as the day of departure from the

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123. 1984 HOUSE REPORT, *supra* note 97, at 1524.

124. I.R.C. § 7701(b)(3)(A)(i) (Supp. IV 1986).

125. *Id.* § 7701(b)(3)(A)(ii).

126. *Id.* This may be illustrated by the following example. Bobbie, an alien individual, was present in the United States for the following number of days during the following years: 60 days (1986); 90 days (1987); and 120 days (1988). In order to determine if Bobbie meets the second part of the test, the days must be multiplied by the applicable multiplier:

1988 (current year) 120 x 1 = 120
1987 (first preceding year) 90 x ⅓ = 30
1986 (second preceding year) 60 x ⅙ = 10
160

Since the sum of the days is less than 183, Bobbie will not pass the second part of the test and will not be classified as a resident alien for calendar year 1988 pursuant to the substantial presence test. If Bobbie is present in the United States for 130 days in 1989, the results for 1989 will be as follows:

1989 (current year) 130 x 1 = 130
1988 (first preceding year) 120 x ⅓ = 40
1987 (second preceding year) 90 x ⅙ = 15
185

Since the sum of the days exceeds 183, Bobbie passes the second prong of the substantial presence test; he will be classified as a resident alien for calendar year 1989.

127. *Id.* § 7701(b)(7)(A).

United States will count as days present in the United States.[128]

a. The Commuter Exception

The first exception to the substantial presence rule involves individuals from countries on the United States northern and southern borders. "If an individual regularly commutes to employment . . . in the United States from a place of residence in Canada or Mexico, such individual shall not be treated as present in the United States on any day during which he so commutes."[129] This exception allows an individual who lives in Windsor, Ontario, to cross the Detroit River daily to work in Detroit, Michigan, without fear of subjecting his non-United States source income to United States taxation. For purposes of this exception, an individual "commutes" if he travels to employment or self-employment in the United States and returns to his residence, in Mexico or Canada, within a twenty-four hour period.[130] In addition, the individual must commute more than eighty percent of the workdays during the current year to be considered "regularly commuting" and satisfy the exception.[131]

b. The "In Transit" Exception

The second exception to the presence rule involves travel through the United States. If an individual is in transit between two points outside the United States and is physically present in the United States for less than twenty-four hours, that individual will not be treated as present in the United States on any day during that transit.[132] For purposes of this narrow rule, the phrase "in transit" takes on a special meaning. Pursuant to the Proposed Regulations, "[an] individual will be considered to be in transit if he pursues activities that are substantially related to completing his travel to a foreign point of destination."[133] Thus, an individual who flies from London to Mexico City can stop in Chicago if she stays in Chicago less than twenty-four hours. If the stop in Chicago is to change planes, the exception will apply and the day will not count as a

128. This day-counting rule should be compared with the day-counting rule used for purposes of I.R.C. § 911, which provides that a full day's presence in a foreign country is a continuous period of twenty-four hours beginning at midnight and ending the following midnight. *Id.* § 911. Thus, the day of departure usually will not count as a day.

129. *Id.* § 7701(b)(7)(B).

130. Prop. Treas. Reg. § 301.7701(b)-3(e), 52 Fed. Reg. 34236-37 (1987).

131. *Id.*

132. I.R.C. § 7701(b)(7)(c) (Supp. IV 1986).

133. Prop. Treas. Reg. § 301.7701-3(d), 52 Fed. Reg. 34236 (1987).

day of presence in the United States. If, however, the individual attends a business meeting while in Chicago, the exception will not apply and the day will count as a day of presence within the United States.[134] This non-applicability of the exception stands even if the business meeting was conducted within the confines of the airport.[135] Whether a visit with a family member or friend while at the airport makes the day count as a day of presence is left unanswered by both the Code and the proposed regulations.

c. The Medical Condition Exception

Somewhat akin to the aforementioned exceptions are the medical condition and exempt individual exceptions to the substantial presence test. In enacting the medical condition exception,[136] the House Ways and Means Committee stated:

> The committee believes that aliens who cannot leave the United States because of a medical condition that arose during their stay here should not automatically be subject to U.S. taxation as residents if here for 183 days. The committee also believes, however, that the Federal Government has contributed to the creation of medical facilities in the United States that are second to none in the world, and that aliens who come to the United States for medical treatment and stay for extended periods of time should be subject to the bill's regular rules.[137]

To prevent possible abuse of this exception, the proposed regulations add clarification. In explaining the term "medical condition," a proposed regulation provides that "A day of presence will not be excluded if the individual, who was initially prevented from leaving, is subsequently able to leave the United States and then remains in the United States beyond a reasonable period for making arrangements to leave the United States."[138] This provision seeks to prevent an alien individual from

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134. *See id.* The Proposed Regulations include an example precisely covering this situation. *See id.*, § 301.7701(b)-4(d) (example 2), 52 Fed. Reg. at 34238.

135. *Id.* § 301.7701(b)-3(d), 52 Fed. Reg. at 34236.

136. I.R.C. § 7701(b)(3)(D)(ii) (Supp. IV 1986). This section provides in part:

> Exception for exempt individuals or for certain medical conditions.
>
> An individual shall not be treated as being present in the United States on any day if . . .
>
> (ii) such individual was unable to leave the United States on such day because of a medical condition which arose while such individual was present in the United States.

Id.

137. 1984 HOUSE REPORT, *supra* note 97, at 1525.

138. Prop. Treas. Reg. § 301.7701(b)-(3)(c)(1), 52 Fed. Reg. 34236 (1987).

spending more days than needed in the United States following his illness. If the individual is deemed to have spent more time than needed in the United States, the days of the illness, as well as the days after the illness, will count as days present in the United States. This determination of "a reasonable period for making arrangements" requires review of facts and circumstances and clearly invites litigation. Thus, the purported aim of the objective test would seem to be defeated.

To qualify for the above exception, the medical condition must arise while the alien individual is present in the United States. Therefore, days spent in the United States due to a pre-existing medical condition will count as days present. The proposed regulations describe a pre-existing medical condition as one which "existed prior to the individual's arrival in the United States, and the individual was aware of the condition or problem, regardless of whether the individual required treatment for the condition or problem when the individual entered the United States."[139] It appears that a distinction has been carved out between aliens coming to the United States for treatment and those who happen to be in the United States when the illness occurs. The former must pay medical bills, and their non-United States source income is subject to United States taxation; the latter need only be concerned about the medical bills.

United States citizens consider our medical facilities second to none. Therefore, it seems unfair to extract such a high price for quality treatment. As a leading international tax attorney has stated, "if there is a class of foreigners who deserve U.S. benevolence, it is the foreign sick, if for no other reason, than on grounds of fairness."[140] Unfortunately, this policy of extracting cost for the use of our medical facilities goes a step further. The regulations state:

> A day will also not be excluded if the medical condition arose during a prior stay in the United States (whether or not days of presence during the prior stay were excluded) and the alien returns to the United States for treatment of the medical condition or medical problem that arose during the prior stay.[141]

The results are far reaching. Consider the following example:

> Melvin, an alien, comes to the United States on January 1, 1989, and

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139. *Id.* § 301.7701(b)-3(c)(2).

140. Khokhar, *New Definition of a Resident Alien*, 13 TAX INT'L J. 283, 294 (1984).

141. Prop. Treas. Reg. § 301.7701(b)-3(c)(1), 52 Fed. Reg. 34236 (1987).

plans to leave on May 31, 1989. His days present will total 152.[142] If he leaves as planned, and does not return in 1989, he will be classified as a nonresident alien for income tax purposes. If Melvin becomes ill while in the United States and is unable to leave because of the illness until July 4, 1989, several results may occur.

(1) If the condition existed prior to Melvin's arrival in the United States, and Melvin knew of the illness, then the additional thirty-four days will count as days present. Melvin will then accumulate 186 days and be considered a resident alien for United States income tax purposes.

(2) If the condition arose while Melvin was present in the United States, the additional thirty-four days will not count as days present. Melvin will then accumulate only 152 days and will be a nonresident alien for United States income tax purposes.

(3) If the condition existed prior to Melvin's arrival in the United States but he was unaware of it, then it is not a preexisting condition, and the thirty-four additional days will not count as days present. Melvin will have 152 days and will be considered a non-resident alien for United States income tax purposes.

(4) If the condition arose while Melvin was present in the United States, the thirty-four additional days will not count as days present in the United States. However, if Melvin returned to the United States for treatment of this condition on November 1, 1989, and stayed until December 5, 1989, those additional thirty-five days *will* count. Melvin will accumulate 187 days present in the United States, and be considered a resident alien for United States tax purposes.

These results are inconsistent and unfair. More importantly, difficulty could arise in the enforcement of these rules. When does a medical condition or problem arise, and when does one become aware of the condition? These concerns raise subjective questions in an objective test.

Another medical area in which the Code and proposed regulations fall short centers around the individual who develops the medical condition. Referring back to the previous example, if Melvin is present in the United States from January 1, 1989, to May 31, 1989, and en route to the airport he has a car accident that hospitalizes his five-year old daughter Julie until July 4, 1989, must he leave the country or may he remain with his child? Clearly, the thirty-four additional days Julie spends in the United States will not count as days present in the United States for Julie. However, the proposed regulations, the Code, and the legislative history do not give any answer as to Melvin's status. Marshall

142. The 152 day total reflects each day in January (31), February (29), March (31), April (30), and May (31).

J. Langer has raised this issue,[143] but the IRS has yet to clarify the problem. Mr. Langer suggested that the exclusions for medical conditions were too restrictive and that the preexisting medical condition rule was vague and overbroad.[144]

d. The Exempt Person Exception

The fourth exception to the substantial presence test concerns exempt persons. As stated in the Code, any day in which an individual is present in the United States and classified as an exempt individual will not count against him for purposes of the substantial presence test.[145] To be classified as an exempt individual, an individual must fall within one of four designated categories.[146] These categories concern foreign government-related individuals,[147] teachers or trainees,[148] students[149] and certain professional athletes.[150] Since the concept of exempt days involves many aliens physically present in the United States, a closer examination of each exempt area is in order.

i. Foreign Government-Related Individuals

The Code defines a foreign government-related individual as any individual or a member of the immediate family of any individual who is "temporarily present in the United States by reason of: (i) diplomatic status, or a visa which the Secretary . . . determines represents full-time diplomatic or consular status . . .[or] (ii) being a full-time employee of an international organization. . . ."[151]

The first question to be asked involves the concept of the term "temporarily." If an individual or her family satisfies the diplomatic, consular, or international organization requirement, how long may they remain in the United States and still be considered temporarily present? While the Code fails to answer this important question, the proposed regulations state that for purposes of this section, an individual or his immediate family will be considered temporarily present as long as such individual

143. Letter from Marshall Langer to Commissioner of Internal Revenue (Nov. 9, 1987) (LEXIS, Fedtax library, Txnint file).
144. *Id.*
145. I.R.C. § 7701(b)(3)(D)(i) (Supp. IV. 1986).
146. *Id.* § 7701(b)(5)(A).
147. *Id.* § 7701(b)(5)(A)(i).
148. *Id.* § 7701(b)(5)(A)(ii).
149. *Id.* § 7701(b)(5)(A)(iii).
150. *Id.* § 7701(b)(5)(A)(iv).
151. *Id.* § 7701(b)(5)(B).

is not a lawful permanent resident[152]—regardless of the actual amount of time spent in the United States.[153] Since the lawful permanent resident classification requires the issuance of a green card that specifies a certain immigration status, government-related individuals and their families should not fall from the temporarily present status unwillingly or without warning.

The proposed regulations also define the terms "full-time diplomatic or consular status" and "international organization":

> An individual is considered to have full-time diplomatic or consular status if:
>
> (A) He has been accredited by a foreign government recognized de jure or de facto by the United States;
>
> (B) He intends to engage primarily in official activities for such foreign government while in the United States; and
>
> (C) He has been recognized by the President, or by the Secretary of State, or by a consular officer acting on behalf of the Secretary of State as being entitled to such status.[154]

An international organization is defined as "any public international organization that has been designated by the President by Executive Order as being entitled to enjoy the privileges, exemptions, and immunities provided for in the International Organization Act."[155] This allows employees of such organizations and their families to live and work in the United States without having the days count toward resident alien status.

The definition of "immediate family" could cause problems. Since this is a United States law, the definition of "immediate family" would follow the United States interpretation. The proposed regulations define "immediate family" as "the individual's spouse and unmarried children (whether by blood or adoption) who are under 21 years of age, who reside regularly in the household of the exempt individual, and who are not members of some other household."[156] In addition, immediate family does not include attendants, servants, and personal employees of the employed exempt individual.[157] This definition is more limited than the

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152. *See supra* notes 104-22 and accompanying text.

153. Prop. Treas. Reg. § 301.7701(b)-3(b)(2)(i), 52 Fed. Reg. 34235 (1987).

154. *Id.* § 301.7701(b)-3(b)(2)(iii).

155. *Id.* § 301.7701(b)-3(b)(2)(ii). The International Organizations Immunities Act, 22 U.S.C. § 288 (1982 & Supp. IV 1986), certifies such organizations as the United Nations, the Organization of American States, the Organization of African Unity, the International Labor Organization and the Food and Agriculture Organization.

156. Prop. Treas. Reg. § 301.7701(b)-3(b)(8), 52 Fed. Reg. 34236 (1987).

157. *Id.*

concept of immediate family followed by other nations, which often includes a more extended family.[158]

In addition, individuals who fall within the foreign government-related individual category will generally be holders of A and G visas.[159] Under the immigration laws, A and G visa holders are entitled to bring domestic servants into the United States.[160] Since the language of the statute and the proposed regulations do not include nonresident alien domestic servants in the category of exempt individuals, the days that the domestic servants spend in the United States will count toward resident alien status under the substantial presence test.

In enacting the foreign government-related individual exemption, Congress assumed that such individuals' presence in the United States would be of a limited nature.[161] As stated above, however, the language of the proposed regulations[162] makes it clear that such individuals may be present in the United States for as little as one month or as long as twenty-five years without losing their nonresident alien status. One may realistically assume that most employees of international organizations are career employees who stay in the United States well beyond any normal definition of "limited" or "temporarily."

This complete exclusion from resident alien status for foreign government-related individuals represents an about-face in light of the prior rulings of the Tax Court and the IRS. In the past, both the courts and the IRS have reviewed the facts and circumstances and ruled that alien taxpayers holding a G-4 visa could be classified as resident aliens.[163] The impact of the new law leaves little doubt as to the treatment of foreign government-related individuals who were nonresident aliens under the prior law. The law, however, presents a problem for those foreign government-related individuals who were classified as resident aliens under the prior law and who have filed their United States tax returns as resident aliens for those past years. Are they required to switch and file their future tax returns as nonresident aliens or continue as resident aliens? The statute and the proposed regulations fail to provide any guidance.

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158. Arab, Asian, and African nations in particular have more expanded definitions of family than does the United States. *See, e.g.*, J. BARTON , J. GIBBS, V. LI, & J. MERRYMAN, LAW IN RADICALLY DIFFERENT CULTURES (1983).

159. *See supra* note 93.

160. Immigration and Nationality Act, *supra* note 93, at § 1101(a)(15)(A), (G).

161. *See* 1984 HOUSE REPORT, *supra* note 97, at 1526.

162. *See supra* note 153 and accompanying text.

163. *See* Escobar v. Commissioner, 68 T.C. 304 (1977); Priv. Ltr. Rul. 77-40-001 (Apr. 27, 1977); Priv. Ltr. Rul 77-40-002 (Apr. 27, 1977).

ii. Teachers, Trainees, and Students

The second and third categories of exempt individuals deal with the area of education. Days present in the United States as teachers, trainees, and students will not count for purposes of the substantial presence test.[164] The Code defines a teacher or trainee as "any individual . . . who is temporarily present in the United States under subparagraph (J) of section 101(15) of the Immigration and Nationality Act (other than as a student) and . . . who substantially complies with the requirements for being so present."[165] To be classified as a student, an individual must meet a three-part test. The individual must be "temporarily present in the United States. . . under subparagraph (F) of section 101(15) of the Immigration and Nationality Act, or as a student under subparagraph (J) of section 101(15), and . . . who substantially complies with the requirements for being so present."[166]

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164. I.R.C. § 7701(b)(5)(A)(ii), (iii) (Supp. IV 1986).

165. *Id.* § 7701(b)(5)(C). Section 101 (15)(J) of the Immigration and Nationality Act (codified at 8 U.S.C. § 1101(a)(15)(J)), classifies a nonimmigrant alien as:

> an alien having a residence in a foreign country which he has no intention of abandoning who is a bona fide student, scholar, trainee, teacher, professor, research assistant, specialist, or leader in a field of specialized knowledge or skill, or other person of similar description, who is coming temporarily to the United States as a participant in a program designated by the Director of the United States Information Agency, for the purpose of teaching, instructing or lecturing, studying, observing, conducting research, consulting, demonstrating special skills, or receiving training and who, if he is coming to the United States to participate in a program under which he will receive graduate medical education or training, also meets the requirements of Section 1182(j) of this title, and the alien spouse and minor children of any such alien if accompanying him or following to join him. . . .

8 U.S.C. § 1101(a)(15)(J) (1982).

166. I.R.C. § 7701(b)(5)(D) (Supp. IV 1986). Section 101(15)(F) of the Immigration and Nationality Act (codified at 8 U.S.C. § 1101(a)(15)(F)), classifies a nonimmigrant alien as:

> an alien having a residence in a foreign country which he has no intention of abandoning, who is a bona fide student qualified to pursue a full course of study and who seeks to enter the United States temporarily and solely for the purpose of pursuing such a course of study at an established college, university, seminary, conservatory, academic high school, elementary school, or other academic institution or in a language training program in the United States, particularly designated by him and approved by the Attorney General after consultation with the Secretary of Education, which institution or place of study shall have agreed to report to the Attorney General the termination of attendance of each nonimmigrant student, and if any such institution of learning or place of study fails to make reports promptly the approval shall be withdrawn. . . .

8 U.S.C. § 1101(a)(15)(F) (1982).

In both definitions, the term "temporarily present" has the same meaning as that applied to government-related individuals.[167] The proposed regulations attempt to clear up the requirement of substantial compliance by stating the following:

> An individual described in paragraph (b)(3) [Teacher or Trainee] or (4) [Student] of this section will be deemed to substantially comply with the visa requirements relevant to residence for tax purposes if the individual has not engaged in activities that are prohibited by the Immigration and Nationality Act and the regulations thereunder and could result in the loss of F or J visa status. An individual will not be deemed to comply substantially with the visa requirements relevant to residence for tax purposes merely by showing that the individual's visa has not been revoked. An independent determination of substantial compliance may be made by the Internal Revenue Service for any individual claiming to be an exempt individual under paragraph (b)(3) or (4) of this section. For example, if an individual with an F visa (student visa) is found to have accepted unauthorized employment or to have maintained a course of study that is not considered by the Internal Revenue Service to be full time, he will not be considered to comply substantially with his visa requirements regardless of whether his visa has been revoked.[168]

While the length of stay within the United States for foreign government-related individuals is not limited, the new law provides a special limitation for teachers, trainees, and students. The statute provides that no individual will be exempted as a teacher or trainee in any current year if, "for any 2 calendar years during the preceding 6 calendar years, such person was an exempt person" by nature of his status as a teacher, trainee, or student.[169] If the individual's total compensation was the type of compensation described in section 872(b)(3),[170] then the test is any

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167. *See supra* note 161 and accompanying text.

168. Prop. Treas. Reg. § 301.7701(b)-3(b)(6), 52 Fed. Reg. 34236 (1987).

169. I.R.C. § 7701(b)(5)(E)(i) (Supp. IV 1986).

170. Section 872(b)(3) of the Code provides for exemption from taxation of :

> Compensation paid by a foreign employer to a nonresident alien individual for the period he is temporarily present in the United States as a nonimmigrant under subparagraph (F) or (J) of section 101(a)(15) of the Immigration and Nationality Act, as amended. For purposes of this paragraph, the term "foreign employer" means—
>
> (A) a nonresident alien individual, foreign partnership, or foreign corporation, or
>
> (B) an office or place of business maintained in a foreign country or in a possession of the United States by a domestic corporation, a domestic partnership, or an individual who is a citizen or resident of the United States.

Id. § 872(b)(3) (1982).

two calendar years during the preceding four calendar years.[171] In addition, an individual cannot exclude days of presence as a student under the substantial presence test

> if the individual has been exempt as a teacher, trainee, or student for any part of more than five calendar years, unless it [can be] established to the satisfaction of the district director that the individual does not intend to reside permanently in the United States and has substantially complied with the requirements of the student visa providing for . . . temporary presence in the United States.[172]

As stated above, the proposed regulation provides guidelines for interpretation of the phrase "substantial compliance."[173] In determining if an individual has demonstrated an intent to reside permanently in the United States, the facts and circumstances to be considered include (1) "[w]hether the individual has maintained a closer connection with a foreign country,"[174] and (2) "[w]hether the individual has taken affirmative steps . . . to adjust the individual's status from nonimmigrant to lawful permanent resident."[175] The proposed regulations also provide something akin to a transactional rule by stating that the limitation on teacher, trainee, and student exemptions will only apply to those periods that occur after 1984.[176] Therefore, "an alien who is present as a student during the calendar years 1982-1990 will not be subject to the five-year rule for students until 1990."[177]

Before considering the last category of exempt individuals, two questions should be addressed. First, can there be any justification for allowing the families of foreign government-related individuals, teachers, trainees, and students to piggy-back the exempt individuals, while this same privilege is denied to families of those requiring medical treatment in the United States? It appears that the families of the latter category would certainly be more representative of temporary presence with no intent to reside than the former category. Second, since medical treatment and education are two of the United States most outstanding qualities, why are individuals who enter the nation's boundaries to receive

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171. *See supra* note 169 and accompanying text.

172. Prop. Treas. Regs. § 301.7701(b)-3(b)(7)(i), 52 Fed. Reg. 34236 (1987). *See* I.R.C. § 7701(b)(5)(E)(ii) (Supp. IV 1986).

173. *See supra* note 168 and accompanying text.

174. Prop. Treas. Reg. § 301.7701(b)-3(b)(7)(i)(A), 52 Fed. Reg. 34236 (1987). *See also supra* note 122 and accompanying text.

175. Prop. Treas. Reg. § 301.7701(b)-3(b)(7)(i)(B), 52 Fed. Reg. 34236 (1987).

176. *Id.*

177. *Id.*

them treated so differently? If an alien individual wishes to enter the United States to partake in the fine educational facilities offered here, she will be allowed to remain a nonresident alien for tax purpose for a minimum of five years. On the other hand, an alien individual who comes to the United States seeking treatment in our outstanding medical facilities could find his status for income tax purposes elevated to that of resident alien within a little more than six months. Could the justification for this unequal treatment lie in the contrasting potential for tax revenue from these two groups? Those who enter the United States for medical treatment probably have more non-United States source income than those who venture here for educational purposes.[178] The quicker the net of resident alien status is tossed over those entering the United States for medical treatment, the quicker their non-United States source income will be subject to United States taxation. Since those seeking educational benefits probably have little non-United States source income, there is no motivation to include them within the resident alien net.

iii. Foreign Professional Athletes

Congress created the final category of exempt individuals, involving foreign professional athletes, at the request of the Professional Golf Association.[179] The statute provides that "[any] professional athlete who is temporarily in the United States to compete in a charitable sports event described in section 274(k)(2)" will not have those days count in establishing resident alien status pursuant to the substantial presence test.[180] The proposed regulations add the following:

> For purposes of computing the days of presence in the United States, only days on which the athlete actually competes in a charitable sports event described in section 274(l)(1)(B) shall be excluded. Thus, days on which the individual is present to practice for the event, or to perform promotional or other activities related to the event, shall not be excluded for

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178. This argument might also apply with regard to many employees of international organizations based in the United States.

179. *See* USA Today, February 4, 1987, at 5C.

180. I.R.C. § 7701(b)(5)(A)(iv) (Supp. IV 1986). One may assume that Congress intended to refer to section 274(l)(1)(B) instead of section 274(k)(2). The charitable sports events exempted in section 274(l)(1)(B) include those:

> (i) which [are] organized for the primary purpose of benefiting an organization which is described in section 501(c)(3) and exempt from tax under section 501(a),
>
> (ii) all of the net proceeds of which are contributed to such organization, and
>
> (iii) which utilize volunteers for substantially all of the work performed in carrying out such event.

I.R.C. § 274(l)(1)(B) (Supp. IV 1986).

purposes of the substantial presence test.[181]

This exempt category represents one of the often-mentioned special interest group amendments that reach a very limited population. Because of its narrow reach, its inclusion in the bill is suspect.

Successful professional golfers can earn a great amount of money both in the United States and abroad. Every week a professional golf tournament is played somewhere in the world. Most tournaments are played from Thursday through Sunday, lasting a total of four days. The total purse for a tournament extends from the low six-figure numbers to the low seven-figure numbers, with the winner's share reaching as high as $250,000. While Professional Golfers Association tournaments contribute certain amounts to charities, this in no way represents a contribution by foreign or American professional golfers. Foreign golfers who compete in these events, however, will not have these days count toward resident alien status pursuant to the substantial presence test. Because of this exemption, a foreign golfer can spend an entire calendar year in the United States without being classified as a resident alien. If a golfer participates in forty-seven full tournaments during the year, the maximum number of days that will count during resident alien status will be 177 days.[182] Since 183 days is the magic number, the individual is a nonresident alien for tax purposes for that calendar year; it is irrelevant whether the individual has a home in the United States, bank accounts in the United States, social ties in the United States, and makes a great deal of money in the United States. While it is true that this behavior would tend to catch up with the foreign golfer after a number of years,[183] a loophole does exist: the statute provides that any individual who is present in the United States for less than 183 days during the current year and can establish, for that current year, that he or she has a tax home in a foreign country and a closer connection to that foreign

181. Prop. Treas. Regs. § 301.7701(b)-3(b)(5), 52 Fed. Reg. 34236 (1987).

182. If a golfer plays in forty-seven tournaments and each tournament last four days, he will spend 188 days in the United States that will not be counted under the substantial presence test.

183. Consider the result for a foreign golfer under the substantial presence test calculations, *see supra* note 126, if that individual was present for 177 days in 1988, 120 days in 1989, and 120 days in 1990. In 1988, the golfer will be present for 177 days; therefore, he will have nonresident status. In 1989, the golfer will be considered present for a total of 179 days (120 days for 1989, 59 days (⅓ x 177) for 1988). The golfer again will have nonresident status. In 1990, however, the golfer will be considered present for a total of 189 days (120 days for 1990, 40 days (⅓ x 120) for 1989, and 29 days (⅙ x 177) for 1988). Because this total exceeds 183 days, the golfer will likely be considered a resident alien for 1990.

country than to the United States, shall not be treated as meeting the substantial presence test with respect to that current year.[184]

The foreign professional golfer, or any alien individual, can thus escape resident alien status by being present less than 183 days each year, maintaining a tax home in a foreign country, and having a closer connection to that foreign country than to the United States. Since the closer connection and tax home concepts turn on facts and circumstances, the determination under this provision is subjective—the precise analysis that the statute was designed to eliminate. As mentioned above,[185] the proposed regulations provide guidelines for the determination of a closer connection to a foreign country.[186] The definition of tax home and foreign country are also contained in the proposed regulations.[187] For purposes of this statute, the term "foreign country" means:

> any territory under the sovereignty of the United Nations or a government other than that of the United States. It includes the territorial waters of the foreign country, . . . the air space over the foreign country, and the seabed and subsoil of those submarine areas which are adjacent to the territorial waters of the foreign country and over which the foreign country has exclusive rights, in accordance with international law, with respect to the exploration and exploitation of natural resources. It also includes the possessions and territories of the United States.[188]

While the proposed regulations defer to section 911(d)(3) for the tax home definition,[189] they do say the following about the concept of a tax home:

> (1) *Definition.* For purposes of section 7701(b) and the regulations thereunder, the term "tax home" has the same meaning that it has for purposes of section 911(d)(3) (without regard to the second sentence therein) and the regulations thereunder. Thus, under section 7701(b), an individual's tax home is considered to be located at his regular or principal (if more than one regular) place of business, or if the individual has no regular or principal place of business because of the nature of the business, then at his regular place of abode in a real and substantial sense.
>
> (2) *Duration and nature of tax home.* The tax home maintained by the alien individual must be in existence for the entire current year. The tax

184. I.R.C. § 7701(b)(3)(B) (Supp. IV 1986). This provision of section 7701 applies to all alien individuals, not just foreign professional athletes. *See supra* notes 120, 122 and accompanying text (discussing concept of closer connection to a foreign country).

185. *See supra* note 126 and accompanying text.

186. Prop. Treas. Reg. § 301.7701(b)-2(d), 52 Fed. Reg. 34235 (1987).

187. *Id.* § 301.7701(b)-2(b), (c), 52 Fed. Reg. at 34234-35.

188. *Id.* § 301.7701(b)-2(b), 52 Fed. Reg. at 34234.

189. *Id.* § 301.7701(b)-2(c), 52 Fed. Reg. at 34235.

> home must be located in the same foreign country for which the individual is claiming to have the closer connection described in paragraph (d) of this section.[190]

One might easily construct a scenario in which a foreign professional golfer could combine these two provisions[191] and spend most of his time, over a number of years, in the United States without being classified as a resident alien for tax purposes.[192] Although the foreign professional golfer and the alien entering the United States seeking needed medical treatment each may have a great deal of non-United States source income, they are treated differently.[193] The alien seeking medical treatment is entering to take advantage of the excellent medical facilities, while the foreign professional golfer is entering to take advantage of the fine country clubs and lucrative opportunities to make money as a professional golfer. By excluding the days the golfer competes in tournaments and including the days the alien receiving treatment spends in the United States, the Code cast the resident alien web unfairly. The alien seeking medical treatment could spend 183 days in the United States and be classified as a resident alien, while the professional golfer could spend 365 days, play in forty-seven tournaments and not be deemed a resident alien. The alien seeking medical treatment will subject his worldwide income to United States taxation, while the athlete's non-United States source income is exempted. It is likely that, under prior law, both would be classified as nonresident aliens. Thus, the new provision's attempt at certainty has certainly resulted in great unfairness.

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190. *Id.* While the concept of "tax home" is beyond the scope of this Article, section 911(d)(3) reads as follows:

> *Tax Home*
>
> The term "tax home" means, with respect to any individual, such individual's home for purposes of section 162(a)(2) (relating to traveling expenses while away from home). An individual shall not be treated as having a tax home in a foreign country for any period for which his abode is within the United States.

I.R.C. § 911(d)(3) (1982). The second sentence is disregarded for purposes of section 7701(b). I.R.C. § 7701(b)(3)(B)(ii) (Supp. IV 1986).

191. I.R.C. § 7701(b)(3)(B) and § 7701(b)(5)(A)(iv).

192. Taking the example in note 183, *supra*, the foreign professional golfer could escape resident alien status in 1990 and every year thereafter as long as he could establish a foreign tax home and a closer connection to that foreign country. This could be the case even if he had 177 days presence in each year.

193. The foreign professional golfer probably earns money by playing in tournaments in other countries, as well as from endorsement in his home country. Given the cost of medical treatment in the United States, the alien seeking treatment here is more than likely wealthy, with profitable investments abroad.

e. Criticism of the Substantial Presence Test

In sum, one might direct four distinct criticisms to the substantial presence test. First, its application is extremely complex. From a basic 183 day test to determine resident alien status, the factors of exempt individuals, exempt days, cumulative presences and multiplier are added to muddy the waters. Any situation other than the garden variety alien individual who spends more than 183 days in a calendar year in the United States could create a very complicated situation.

Second, the substantial presence test potentially breeds litigation. While the elimination of uncertainty and litigation was one of Congress' main goals in drafting this statute, it clearly failed in this aim. If the alien individual is in the United States for less than 183 days in any calendar year, a determination of tax home and the closer connection concept come into play. Both of these require a subjective determination based on facts and circumstances. Other areas that could foster litigation include the definition of preexisting medical condition,[194] the term "temporarily present in the United States,"[195] the concept of substantial compliance,[196] and the term "intend to permanently reside."[197]

Third, compliance could be problematic. Like the lawful permanent resident test, the substantial presence test can cause an individual to have a split year for tax reporting purposes.[198]

Finally, the substantial presence test might produce patently unfair results. Such situations include the unequal treatment of aliens seeking medical treatment, the advantage given certain professional athletes, and the penalty imposed on alien parents whose children become ill while the family is visiting the United States. Some notable examples should further bring the unfairness point home.

One example involves the unfair treatment that results because of the inflexible nature of counting days. Commenting on the statute and the proposed regulations, Marshall J. Langer urged that certain fractional days of presence should not be rounded up to whole days.[199] He suggests that an alien should be able to exclude partial days of physical presence in the United States when in transit between a foreign point and a point in the United States.[200] Mr. Langer stressed that the practice of round-

194. *See* I.R.C. § 7701(b)(3)(D) (Supp. IV 1986).
195. *See id.* § 7701(b)(5)(B), (C), (D).
196. *See id.* § 7701(b)(5)(C), (D).
197. *See id.* § 7701(b)(5)(E)(ii).
198. *See supra* notes 117-21 and accompanying text.
199. *See* Letter, *supra* note 143.
200. *Id.*

ing up and counting the fractional days could provide a harsh result for Australian and Asian business people visiting the United States on a regular basis.[201]

Another example of the harsh treatment resulting from the strict day counting of the substantial presence test revolves around a foreign journalist whose responsibilities include covering the United States.[202] The journalist's spouse and children and all social contacts are in the home country. The journalist spends four days every two weeks in the United States for a total of 104 days per year. While in the United States, the journalist stays at a hotel and has few social contacts. In May of the

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201. *Id.* To illustrate his point, Mr. Langer offers the following example:

> Harry Hogan, an Australian citizen and resident, left Sydney for San Francisco on Wednesday, August 5, 1987 at 10:00 a.m. local time on United Airlines flight 818. Since he crossed the international dateline he arrived at San Francisco an hour earlier than he left, on Wednesday, August 5, 1987 at 9:00 a.m. Pacific Daylight Time.
>
> Wednesday, August 5, 1987, is not the problem. Hogan spent a substantial part of that day in San Francisco and should have to count it. The problem concerns Tuesday, August 4, 1987, a day on which Hogan spent 24 full hours in Australia. He gave a speech that evening in Sydney and slept that night in Australia before leaving for the airport the following morning. The proposed regulations would require Hogan to count Tuesday, August 4, 1987 as a day spent in the United States because his plane, United Airlines flight 818, landed at Honolulu International Airport at 11:00 p.m. on Tuesday, August 4, 1987, Hawaiian Standard Time. Hogan and other in-transit passengers were forced to go through U.S. immigration and customs procedures in Honolulu before continuing on to San Francisco.
>
> Returning to Australia a few weeks later, Hogan once again is CREDITED with an unanticipated day. He left Los Angeles on Thursday, August 20, 1987 at 9:00 p.m. Pacific Daylight Time on United Airlines flight 811. Again crossing the international dateline, he arrived in Sydney on Saturday, August 22, 1987, at 10:00 a.m. local time. His plane stopped at Honolulu on Thursday, August 20, 1987 at 11:00 p.m. and it left Honolulu on Friday, August 21, 1987, at 1:00 a.m. Hawaiian Standard Time. The proposed regulations would require Hogan to count Friday, August 21, 1987, as a day spent in the United States.
>
> On his round-trip flight, Hogan had two unanticipated days in the United States. If he travels to the United States six times during 1987 he will have twelve extra days in 1987; these same days will count as four extra days in 1988 and two extra days in 1989.

Id. By allowing an alien to exclude partial days of physical presence in the United States if he is in transit during an intermediate stopover between a foreign point and a point in the United States, the Code could correct this harsh result. However, neither the statute nor the proposed regulations has addressed the issue.

202. This example appears in a student note, *A Proposal for a Revised Income Tax Definition of Resident Alien Individual*, 27 VA. J. INT'L L. 153, 183 n.135 (1986). The numbers have been changed from those used in the original article.

current year, the journalist is forced to spend four months in the United States covering an important development. Afterward, the journalist returns to the four days per two weeks routine. Under the old law, the journalist, an I visa holder, would have been considered a nonresident for tax purposes. The journalist clearly had no intent to reside in the United States, and all her social and family ties were away from the United States. However, under section 7701(b)'s substantial presence test, the journalist has spent 183 days or more in the United States; therefore, she will be considered a resident alien.

While these examples indicate the unfair and harsh treatment of aliens in relation to United States taxpayers, a better illustration reveals the inconsistent results for similarly situated aliens. Each group is composed of temporary alien migrant workers. Both groups have spouses, children, homes and all social ties in their home country, and work approximately six months in the United States and the remaining six months in their home country. The first group works from October 1, 1988, until March 30, 1989, while the second works from January 1, 1989, to July 2, 1989. Pursuant to the substantial presence test, a member of the first group will be present in the United States for ninety-two days in 1988 and ninety days in 1989 and will not have resident alien tax status for either year. On the other hand, a member of the second group will amass 183 days in the United States in 1989, and will be classified as a resident alien for tax purposes. Under the old test, both groups would have been classified as nonresident aliens. Notwithstanding the operation of the cumulative presence portion of the substantial presence test, the first group will be present less than 183 days in any current year and could thereby fall within the section 7701(b)(3)(B) exception. While the issue of unequal treatment for two similar groups is present, the real issue lies in whether it is fair to treat either group as "resident" since the stay of both groups is temporary and no group member intends to reside in the United States.

The final example of harsh treatment concerns those foreign professional athletes who are not covered by the section 7701(b)(5)(A)(iv) exception. Consider, for example, a Mexican citizen who plays professional baseball for the Chicago Cubs. The Mexican will spend three to five weeks in Arizona for spring training. The professional baseball season extends for 162 games, no more than ten of which the Cubs will play outside the United States. If league championship and World Series games are added, the athlete will spend more than 183 days in the United States. Although the Mexican citizen's wife, children, home, and all social ties remain in Mexico (to which the athlete will return immediately after the season ends), he will be classified as a resident alien for

income tax purposes. Imagine further that the Mexican athlete has lucrative endorsement contracts in Mexico. The money earned from those contracts is now subject to United States taxation. Under the old law, the Mexican athlete would not be considered a resident.

Taking the case a step further, suppose the Mexican athlete is traded to the Toronto Bluejays the next year. Counting spring training, exhibition games, the regular season, and the playoffs, the athlete will spend approximately 110 days in the United States in the second year.[203] While the 110 days is not enough alone, the cumulative presence aspect of the test could give him 183 or more combined days for the current year.[204] While the statute provides an exception if the alien is present in the United States for less than 183 days during the current year, it is at best a qualified exception. The alien must demonstrate that he has a closer connection to a foreign country and a tax home in a foreign country.[205] Because his family, home, and social ties are in Mexico, the closer connection to Mexico should present no difficulty. Based on prior rulings, the Mexican's tax home will be in Canada.[206] Since the exception requires that the tax home be in the foreign country in which the closer connection exists, the Mexican athlete will fail the test and therefore be considered a resident alien for the second year as well. This would be the case even though his home and family were in Mexico and he played for a team located in Canada.

The new bright-line, day-counting, substantial presence test appears to provide certainty; yet, it obviously results in harsh and unfair treatment. While the old test called for a subjective determination, the treatment was considerably fairer. It appears that Congress recognized this but simply felt that the new objective definition was better. In light of statements like the following, one must wonder whether Congress' goal was fairness or simply certainty:

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203. The result of 110 days is determined as follows: 21 days (minimum) for spring training in Florida; 81 days (minimum) during regular season in the United States (assuming that the team plays 162 games, half of which are on the road in the United States); and 8 days (maximum) for games that could be played in the United States during the playoffs.

204. This is determined by adding the current days (110), one-third of the prior year's days (⅓ x 183 = 61), and one-sixth of the second prior year's days (⅙ x 183 = 30) for a total of 201.

205. I.R.C. § 7701(b)(3)(B)(ii) (Supp. IV 1986).

206. *See* Wills v. Commissioner, 411 F.2d 537, 540 (9th Cir. 1969) (upholding Tax Court's determination that professional baseball player's tax home was Los Angeles while he played for the Los Angeles Dodgers); Gardin v. Commissioner, 64 T.C. 1079, 1085 (1975); Rev. Rul. 54-147, 1954-1 C.B. 51.

> The committee understands that an objective definition may allow some aliens who should be taxable as residents to avoid resident status, and would impose resident status on some aliens who are not residents under the current rules. On balance, however, the committee finds that the certainty that the bill's objective definition provides outweighs other considerations. . . .[207]

3. The First Year Election Test

Section 1810(l) of the Tax Reform Act of 1986[208] amended section 138 of the Tax Reform Act of 1984[209] to allow certain alien individuals to elect to be treated as United States resident aliens.[210] This new addition to section 7701(b) is the third way in which an alien individual can be classified as a resident. To qualify, an alien individual must comply with a complex four part test.

First, the alien cannot be classified as a resident alien because of the substantial presence test or the lawful permanent resident test in the calendar year for which the election is being made.[211] Second, the alien must not have been a resident in the calendar year immediately preceding the calendar year for which the election is being made.[212] Third, in the calendar year immediately following the election year, the alien must be classified as a resident pursuant to the substantial presence test.[213] The fourth requirement has two parts. The alien must be present in the United States during the election year for a period of at least thirty-one consecutive days.[214] The second part of the fourth requirement is one of those dreaded concoctions for which drafters of the Internal Revenue Code are famous and which strikes fear into the hearts of laymen, students, and tax practitioners alike. It states that, in addition to a thirty-one consecutive day presence in the election year, the alien must be:

> present in the United States during the period beginning with the first day of such 31-day period and ending with the last day of the election year (hereinafter referred to as the "testing period") for a number of days equal to or exceeding 75 percent of the number of days in the testing period (provided that an individual shall be treated for purposes of this

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207. 1984 HOUSE REPORT, *supra* note 97, at 1523-24.
208. *See supra* note 1.
209. *Id.*
210. I.R.C. § 7701(b)(4) (Supp. IV 1986).
211. *Id.* § 7701(b)(4)(A)(i).
212. *Id.* § 7701(b)(4)(A)(ii).
213. *Id.* § 7701(b)(4)(A)(iii).
214. *Id.* § 7701(b)(4)(A)(iv)(I).

subclause as present in the United States for a number of days during the testing period not exceeding 5 days in the aggregate, notwithstanding his absence from the United States on such days).[215]

To illustrate, imagine an alien who meets requirements one, two, and three and who is present in the United States from May 1, 1989, to June 1, 1989. The alien's presence during this period satisfies the thirty-one consecutive day rule. The period lasting from May 1, 1989 (the first day of the thirty-one day period), until December 31, 1989 (the last day of the election year), is called the "testing period." During this time the alien must spend seventy-five percent of his days, or totalling 184 days, in the United States.[216] The alien may be absent from the United States for a total of five days during the testing period, but no absence is permitted during the thirty-one consecutive day period. If an alien exceeds these limits, the days will not be counted as days present. Therefore, the actual days present needed to reach the seventy-five percent mark is 179, not 184.

Certain other factors govern this election. First, once the election is made it can only be revoked with the consent of the Secretary of the Treasury.[217] Thus, an alien should carefully consider an election under this provision. The election must be made on the individual alien's tax return for the election year.[218] However, the election cannot be made until the individual has complied with the test of section 7701(b)(4)(A)(iii), which requires the alien individual to meet the substantial presence test in the year following the election year.[219] Since an alien will need 183 days present in the calendar year following the election year to comply with the substantial presence test, the earliest date on which the election can be made is normally the first or second of July.[220] Since tax returns are normally due on April 15 of each year, an alien

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215. *Id.* § 7701(b)(4)(A)(iv)(II). This is referred to as the period of continuous presence.

216. The period from May 1, 1989, to December 3, 1989, comprises 245 days. 75% of 245 is 183.75. Because fractions under section 7701(b) are rounded up, this figure would equal 184.

217. I.R.C. § 7701(b)(4)(F) (Supp. IV 1986).

218. *Id.* § 7701(b)(4)(E).

219. *Id.*

220. It might be possible to have an earlier date. If the alien was present in the United States 180 days during 1988 and meets all the requirements of section 7701(b)(4)(A), the substantial presence test could actually be met on the 123rd day of 1989: 123 days plus one-third of 180 (60 days) equals 183 days present. Therefore, the election could be filed during the first week of May. An extension, however, would still be in order.

would need an extension to comply with the statute.

For purposes of both the thirty-one day and seventy-five percent tests, an individual will be deemed not present in the United States for any day during which the individual is an exempt individual because he or she is "(i) A foreign government-related individual, (ii) a teacher or trainee, (iii) a student, or (iv) a professional athlete who is temporarily in the United States to compete in a charitable sports event described in section 274(k)(2)."[221]

If the individual meets the requirements and elects to be a resident alien under the first-year election test, the individual will be treated as a resident for the portion of the election year that begins on the first day of the earliest testing period during the year in which the individual meets both the thirty-one day and continuous presence test of section 7701(b)(4)(A)(iv).[222] As stated in the proposed regulations:

> If an individual is present for more than one thirty-one day period of presence and satisfies the continuous presence requirement with regard to each period, the individual's residency starting date shall be the first day of the first thirty-one day period of presence. If an individual is present for more than one thirty-one day period of presence but satisfies the continuous presence requirement only for a later thirty-one day period, the individual's residency starting date shall be the first day of the later thirty-one day period of presence.[223]

To better illustrate the operation of the election provision, the Senate Report provides the following example:

> An alien individual vacations in the United States from January 1 through January 31, 1986. He returns to the United States on October 15, 1986, and begins working on a permanent basis for a U.S. company on that day. For the remainder of 1986, he is absent from the country for 10 days only, from December 20 through December 29. He satisfies the substantial presence test in 1987. He was not a U.S. resident in 1985.
>
> The individual may elect to be treated as a U.S. resident for 1986 under the new provision. His residency starting date is October 15, 1986, because that is the first day of the earliest period in 1986 for which both the 31-day and 75-percent tests are satisfied. (The 75-percent test is not satisfied with respect to the presence period commencing on January 1, 1986).[224]

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221. I.R.C. § 7701(b)(5)(A) (Supp. IV 1986); *id.* § 7701(b)(4)(D).

222. *Id.* § 7701(b)(4)(C).

223. Prop. Treas. Reg. § 301.7701(b)-4(c)(3)(iii), 52 Fed. Reg. 34237-38 (1987).

224. S. REP. No. 313, 99th Cong., 2d Sess. 956 (1986). The proposed regulations under section 301.7701(b)-4 contain other examples to illustrate this test. *See* Prop.

Despite its complexity, the first-year election test is sound. Nevertheless, two minor problems might cause concern. Pursuant to section 7701(b)(4)(E), if the alien has not satisfied the substantial presence test for the year following the election year by the time her return is due, she must postpone filing her return for the election year until she satisfies the substantial presence test. While the proposed regulations support this rule, they also require that the alien make a payment on the date that the extension request is filed. The proposed regulations state:

> [T]he alien individual may request an extension of time for filing the return until after he has satisfied such test, *provided* that he pays with his extension application the amount of tax he expects to owe for the election year computed as if he were a nonresident alien throughout the election year.[225]

The language above seems to imply that if an alien does not pay tax for the election year computed on a nonresident alien basis, when she files her extension, her resident alien election on the return that she eventually files for the election year will be invalid. While this position is advanced by the proposed regulations, the statute does not support it. Since most individuals would not elect resident alien status unless it would result in lower taxes, the drafters of the proposed regulations have no support for the claim that legislative intent is fulfilled by this provision. Normally, all this will accomplish is the overpayment of taxes, which will be refunded to the alien individual when her tax return is filed.

The second problem concerns an omission. Although the proposed regulations outline the procedure for making the first year election,[226] they fail to set a procedure for making a resident alien election for the eligible spouse and minor children who are not required to file a tax return. If the working spouse makes the resident alien first year election in his own right, he is entitled to claim a personal exemption for his spouse and dependent children who are also resident aliens for the election year. Neither the statute nor the proposed regulations, however, offer instructions as to the proper way to proceed. In the absence of guidance, it might be wise to take the advice forwarded by Thomas Bissell, who suggests that,

> [I]t may be prudent for the tax return preparer to file blank returns for the spouse and children, although presumably if no such returns are filed, "delinquent" returns claiming the [resident alien] election could be filed

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Treas. Reg. § 301.7701(b)-4(d), 52 Fed. Reg. 34238 (1987).

225. Prop. Treas. Reg. § 301.7701(b)-4(c)(3)(iv)(A), 52 Fed. Reg. 34238 (1987).

226. *See id.*

for them if the IRS raises the issue in auditing the personal exemptions claimed by the wage-earning spouse.[227]

4. The Annual Statement Rule

While the lawful permanent resident, substantial presence, and first year election provisions provide straightforward ways in which an alien individual can become a resident alien for tax purposes, an alien can also back into resident status. The statute provides that individuals who fall outside the substantial presence test because of certain enumerated positions[228] shall be required to file annual statements setting out the basis for their preference status.[229] The statute permits the Secretary of the Treasury to prescribe regulations concerning who must file, what they must file, when they must file, and the penalty for failure to file.[230] The proposed regulations outline the who, what, and when of this provision in great detail.[231] However, the penalty section of the proposed regulations contains a tax trap for the unwary.[232] It states:

> If an individual is required to file a statement pursuant to paragraph (a)(1), (a)(2)(ii), or (a)(3) of this section and fails to file such statement on or before the date prescribed by law (including extensions) for making an income tax return, 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 benefit of § 301.7701(b)-3(b)(3), (4), or (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.[233]

Thus, an alien individual who is physically present in the United States as a qualified student must file a statement to that effect each year. The alien must also state her intention to have those days excluded pursuant to the exempt individual exception. If she fails to comply with these requirements, the days will count as days present, notwithstanding the ex-

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227. Bissell, *The Treasury's Proposed Regulations on Nonresident Alien Status*, 17 TAX MGMT. INT'L J. 283, 288 (1988).

228. The enumerated positions are: (1) exempt individuals pursuant to section 7701(b)(3)(D)(i); (2) allowable medical days pursuant to section 7701(b)(3)(D)(ii); and (3) fewer than 183 days with a closer connection to a foreign country pursuant to section 7701(b)(3)(B).

229. I.R.C. § 7701(b)(8) (Supp. IV 1986).

230. *See id.*

231. *See* Prop. Treas. Reg. § 301.7701(b)-8, 52 Fed. Reg. 34240-41 (1987).

232. *Id.* § 301.7701(b)-8(d), 52 Fed. Reg. at 34241.

233. *Id.*

empt individual language in the statute.

While there appears to be statutory authority for this penalty,[234] it is quite severe. For those alien individuals who do not closely follow the volume of tax legislation in our country, or who are not advised by international tax professionals, the results can be unexpected and devastating. It appears logical and fair to impose civil penalties for this failure to submit annual statements; still, the loss of the nonresident status granted in the statute appears excessive.

The final section of the proposed regulations provides the effective date for the entire proposed regulation.[235] It indicates that the rules outlined in the proposed regulations shall apply for taxable years beginning after December 31, 1984.[236] Consequently, the filing of annual statements and the penalties imposed for failure to file operate for the taxable years 1985 and 1986, even though the proposed regulations were not issued until September 8, 1987. While the penalty itself is harsh, its retroactivity is harsher still. Retroactive application of this annual filing of statements means that, according to the IRS, those alien individuals subject to the requirement had to file without benefit of a stated procedural method. Consider the plight of a foreign individual subject to the annual statement rule who had exempt status as a student in years 1985 and 1986. Although neither the Code nor the Regulations offered guidance as to the proper method of filing annual statements in those years, the IRS can nevertheless penalize these individuals by counting seemingly exempt days toward days present in the United States. Moreover, such statements are required even if no return is required, and the substantial presence exception would not be available to them if they failed to file a timely statement. This result is clearly unfair; the annual statement requirement should, therefore, apply only to years following the 1987 taxable year.

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234. *See supra* note 229. However, this provision only grants the Secretary authority to require statements from exempt individuals, allowable medical condition individuals, and aliens who accumulate fewer than 183 days in the country. The regulations also require annual statements from aliens using the ten-day de minimis rule and from departing aliens. There appears to be no statutory authority regarding these latter two groups of alien individuals.

235. Prop. Treas. Reg. § 301.7701(b)-9, 52 Fed. Reg. 34241 (1987).

236. *Id.*

IV. Alternative Approaches to a Resident Alien Definition

A. *Repealing Section 7701(b)*

Recognizing that the desired results of certainty and the elimination of litigation have not been met, the enactment of section 7701(b) must be viewed with a degree of nostalgia for the prior rules. The intended objective test of section 7701(b) is full of unclear terms, unfair results, and subjective determinations. While the prior rules that define resident aliens were filled with case law, litigation, and expense, and allowed only limited planning opportunities, they nevertheless offered a better system. The subjective test that required an individual to maintain a physical presence within the United States and to express an intention to reside in the United States with some permanence was cumbersome and slow. Yet, it at least involved a fair application of basic concepts. Allowing the courts to look at facts and circumstances, such as the purpose of the alien's visit, the relocation of the alien's family, and the location of the alien's cultural, social, business, and investment ties, provides an equitable determination of one's resident status for tax purposes.

While quicker in application and conducive to planning, the mechanical test of section 7701(b) fails the test of basic fairness. Aliens who should be nonresident for tax purposes will be resident under this test, while those who should be resident for tax purposes will be nonresident. This could be corrected with the judicial scrutiny provided by the old rules, which were less likely to result in these erroneous classifications precisely because their application depended on the facts and circumstances of each case. It is unlikely that Congress will consider repealing section 7701(b) and its proposed regulations in favor of a return to the case law approach. If Congress adheres to the maxim that "any statute is better than none," then it is incorrect. While certainty and the opportunity to plan are important, they must be balanced against fairness.

B. *Foreign Definitions of Resident Alien*

In searching for alternatives to section 7701(b), it may prove helpful to compare our statutory definition of a tax resident with that used by other countries. Australia, Canada, and the United Kingdom operate worldwide tax regimes similar to the United States, and, after considerable review, each has chosen to remain with a subjective, rather than a purely objective, test.

1. Australia

The tax regime of Australia classifies individuals as tax residents in two ways, "residence of individuals generally" and "constructive residence." Under the first category, an individual who "resides" in Australia is primarily a resident of Australia.[237] Under Australian law, the determination of whether a person "resides" in Australia, or any given country, is a question of fact and degree; no one rule determines the issue in every case.[238] Neither citizenship nor nationality is the sole, determinative factor.[239]

If an individual does not reside in Australia within the common definition of "reside," he may nevertheless fall within the category of a resident of Australia for tax purposes if he meets one of the three statutory constructive resident tests.[240] Under the first test, a person domiciled in Australia is deemed a resident unless he can demonstrate a permanent place of abode elsewhere.[241] Whether one has a permanent place of abode outside Australia is thus determined subjectively. The second statutory test attributes constructive residence to those actually present in Australia for a period totalling more than six months in a calendar year.[242] This presence can be continuous or intermittent.[243]An individual may rebut constructive residence by proving that Australia is not his usual place of abode and that he does not intend to establish a residence there.[244] This test appears to combine a statutory presumption with a subjective rebuttal. Finally, an individual may also be deemed a resident under the constructive resident test "if he contributes (or is the spouse or child under 16 of a person who contributes) to the superannuation fund for Commonwealth government offices."[245]

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237. *See* Income Tax Assessment Act, AUST. ACTS P. § 6(1) (1936); *see also* CCH AUST. LTD., 1987 AUSTL. MASTER TAX GUIDE ¶21-010 (1987).

238. Commissioner of Taxation v. Miller, 73 C.L.R. 93 (Austl. 1946).

239. AUSTL. MASTER TAX GUIDE, *supra* note 237, at ¶ 21-010.

240. *Id.*

241. *Id. See* Income Tax Assessment Act, AUSTL. ACTS P. § 6(1)(a)(i).

242. Income Tax Assessment Act, AUSTL. ACTS P. § 6(1)(a)(i); AUSTL. MASTER TAX GUIDE, *supra* note 237, at ¶21-020.

243. Income Tax Assessment Act, AUSTL. ACTS P. § 6(1)(a)(ii); AUSTL. MASTER TAX GUIDE, *supra* note 237, at ¶21-020.

244. Income Tax Assessment Act, AUSTL. ACTS P. § 6(1)(a)(iii); AUSTL. MASTER TAX GUIDE, *supra* note 237, at ¶21-020.

245. AUSTL. MASTER TAX GUIDE, *supra* note 237, at ¶21-020. *See* Income Tax Assessment Act, AUSTL. ACTS P. § 6(1)(a)(iii).

2. Canada

The terms "resident" and "residence" are not defined under Canadian law. However, an individual is deemed a resident for tax purposes if he "sojourned" in Canada for a total of 183 days or more.[246] While the 183 day benchmark appears to resemble the substantial presence test of section 7701(b), there is a striking difference: Canada requires an individual to be "sojourned" in Canada, and the determination of whether one is "sojourned" demands a subjective analysis. "[S]pending less than 183 days in Canada does not necessarily make a person a nonresident,"[247] nor does spending 183 days or more in Canada necessarily make one a resident. The principles of common law or case law are applied to the facts of each case to determine if an individual is a resident.[248]

The landmark Canadian case of *Thomson v. Minister of Nat'l Revenue*[249] looks to a continuous relationship between a person and a place arising from the circumstances.[250] In establishing residential ties of a continuing state of relationship, the Canadian courts look at such factors as maintaining and owning a dwelling in Canada, the location of an individual's immediate family, maintaining personal property, social ties, insurance, and investment ties in Canada.[251] In addition, the lack of residential ties in Canada, coupled with the maintenance of residential ties elsewhere, are important factors, even though the courts recognize that an individual can be a resident of more than one country.[252] The Canadian reliance on facts and circumstances to define residency resembles the manner in which "resident" was determined in the United States. While some believe that Canada lags behind and follows the United States lead in many respects, their resistance to change in this area provides them with a much more equitable approach to a difficult problem.

3. The United Kingdom

The United Kingdom has no statutory definition of residence; it is a question of fact to be determined by the courts.[253] Among the factors that

246. R. BEAM & S. LAIKEN, INTRODUCTION TO FEDERAL INCOME TAXATION IN CANADA 26 (8th Ed. 1987); Income Tax Act, CAN. REV. STAT. ch. C63, § 250(1) (1970).

247. R. BEAM & S. LAKEN, *supra* note 246, at 26.

248. *Id.*

249. 2 D.T.C. 812 (Can. Tax. Ct. 1946).

250. *Id.*

251. R. BEAM & S. LAIKEN, *supra* note 246, at 26-27.

252. *Id.* at 27.

253. BUTTERWORTH'S U.K. TAX GUIDE 1986-1987, ¶ 32:02 (J. Tiley ed. 1986).

the courts consider are the past and present habits of the individual,[254] "the frequency, regularity and duration of visits to the [United Kingdom],[255] the purpose of the visits,[256] any ties with the United Kingdom,[257] nationality,[258] and whether or not a home is maintained in the United Kingdom.[259] In considering the British approach, the following is instructive:

> [Residence] is not a term of invariable elements, all of which must be satisfied in each instance. It is quite impossible to give it a precise and inclusive definition. It is highly flexible, and its many shades of meaning vary not only in the contexts of different matters but also in different aspects of the same matter.[260]

Like Australia and Canada, the United Kingdom has chosen to maintain a subjective test, instead of following the United States in establishing a quick-fix objective test.

C. *Amending Section 7701(b)*

Congress likely has no intention of repealing section 7701(b) and returning to the old way of defining resident; the cry for a statutory definition was too loud and too strong. It is equally unlikely and impractical for Congress to take a page out of another country's tax regime and incorporate it into United States tax law. Our laws must fit our circumstances and situations. Nevertheless, another solution involving a three-part correction is available.

First, the lawful permanent resident test and the first year election provision should be retained. However, the final regulations should reflect solutions to the problems caused by, or that have not been solved by, these tests. Second, the substantial presence test should represent a rebuttable presumption of residence, not a hard and fast rule. An individual's presence for 183 days should create a presumption of residence that the individual can rebut given the proper facts and circumstances. This pro-

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254. Levene v. Commissioners of Inland Revenue, [1928] A.C. 217, 226-27 (Viscount Sumner).

255. BUTTERWORTH'S U.K. TAX GUIDE, *supra* note 253, at ¶32:03; Commissioners of Inland Revenue v. Brown, 11 T.C. 292 (1926); Commissioners of Inland Revenue v. Zorab, 11 T.C. 289 (1926).

256. Commissioners of Inland Revenue v. Lysaght, [1928] A.C. 234.

257. Kinloch v. Commissioners of Inland Revenue, 14 T.C. 736 (1929).

258. Levene v. Commissioners of Inland Revenue, [1928] A.C. 217, 230.

259. Cooper v. Cadwalader, 5 T.C. 101 (1904).

260. Thomson v. Minister of Nat'l Revenue, [1946] S.C.R. 209, 224 (Can.) (Rand, J.).

vides the IRS with a weapon, but at the same time allows the individual taxpayer to demonstrate her intent, or lack of intent, to establish residency in the United States. The final correction calls for the elimination of special interest amendments that unnecessarily benefit a small group of individuals. Permitting professional golfers to exclude days in which they play tournaments in the United States, while denying aliens who come to the United States for medical treatment to do so, is unconscionable. Such a provision undermines the fairness that is sorely needed if a voluntary compliance tax regime is to endure.

V. CONCLUSION

It appears that the demand for a statutory definition of a resident alien resulted in the drafting of a statute without sufficient care having been taken to identify all potential issues. While a bright-line, mechanical test might often appear easier to administer, that alone cannot justify it. Tax law must foster fairness, even at the cost of litigation, complexity, and lack of planning opportunities. The change from prior law to the present law represents a move away from fairness, and not necessarily a move toward more efficient administration. This Article has attempted to support one overarching proposition: Section 7701(b) must be repealed or amended. No matter which alternative is selected, careful study and more skillful drafting will be needed in future attempts to arrive at a statutory test. Any statute is not necessarily better than no statute at all.