BOOK EXCERPT

Understanding the Intersection of Taxation and Immigration

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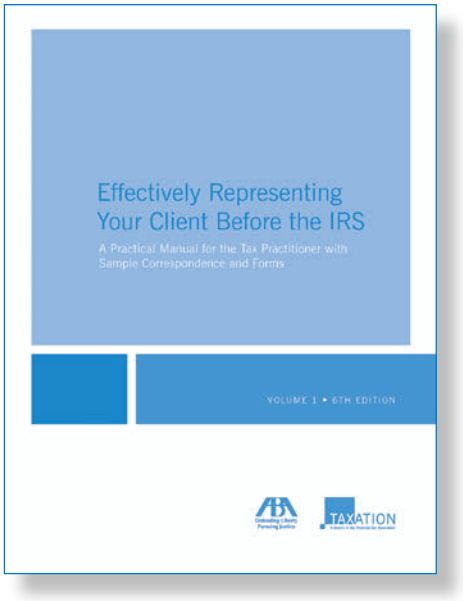

Editor's Note: The text sections below are excerpted from Chapter 28 of *Effectively Representing Your Client Before the IRS* (6th ed. 2015). Footnotes have been moved into text and other minor changes have been made to reflect *NewsQuarterly's* formatting conventions.

Resident/Nonresident Distinction for Tax Purposes

For income tax purposes, noncitizens are classified into two groups: resident and nonresident aliens. These distinctions are for tax purposes only, and how a taxpayer is classified will have several repercussions on their tax treatment—for example, a nonresident alien must file IRS Form 1040NR, and is generally taxed differently than a citizen or resident alien. Resident aliens are, in general, taxable in the same manner as U.S. citizens. Reg. § 1.871-1(a).

There are two ways to qualify for resident alien status: the legal permanent resident test, and the substantial presence test. I.R.C. § 7701(b)(1)(A). Any noncitizen who does not qualify under one of these two tests is considered a nonresident alien for tax purposes. I.R.C. § 7701(b)(1)(B).

Legal Permanent Resident ("Green Card") Test

The LPR test is generally very simple to apply—if a taxpayer is a legal permanent resident at any time of the year, they are a resident alien until such status is "rescinded or administratively or judicially determined to have been abandoned." Reg. § 301.7701(b)-1(b)(1). "Rescinded" means that a final order, no longer subject to appeal, has been issued determining that the taxpayer is to be excluded or deported. Reg. § 301.7701(b)-1(b)(2). "Abandonment" refers to a specific administrative process that may be initiated by the taxpayer, an official of the Immigration and Naturalization Service (INS), or a consular officer. Reg. § 301.7701(b)-1(b)(3).

Substantial Presence Test

Subject to some exceptions, in order to show residency under the substantial presence test, the taxpayer must be present in the United States (1) at least 31 days in the current calendar year, and (2) 183 or more total days within the current calendar year and preceding two years. I.R.C. § 7701(b)(3). Days present in preceding years are only assigned a fractional value, however, with each day counting as 1/3 of a day for the year prior to the current year, and 1/6 of a day for two years prior. The first year of residency is determined to begin the first day during the calendar year in which the taxpayer is substantially present. Reg. § 301.7701(b)-4(a).

Example. If a taxpayer was present for 365 days in Year 1 (365/6 = 60.8 days), 62 days in Year 2 (62/3 = 20.7 days), and only 31 days in Year 3, the taxpayer would only have 112.5 total days. The taxpayer would, however, meet the substantial presence test for Year 2 (365/3 = 121.6 Year 1 days + 62 Year 2 days = 183.6 days), without even considering other prior years. For an example of how the Tax Court will weigh facts in the substantial presence test, see Lujan v. Commissioner, T.C. Memo. 2000–365.

Additionally, those subject to certain exemptions will not have applicable days count towards presence—these exemptions include certain common types of student or cultural exchange visa holders. I.R.C. § 7701(b)(3)(D), (b)(5). In addition to those falling under an exemption, commuters from Mexico or Canada, those in transit between two non-U.S. locations, and those who are prevented from leaving the United States due to a medical condition do not have applicable days counted for the purposes of the substantial presence test. Reg. § 301.7701(b)-3. To claim one of these exemptions, one must timely file IRS Form 8843. *Publication 519, U.S. Tax Guide for Aliens*, Internal Revenue Service, http://www.irs.gov/uac/Publication-519,-U.S.-Tax-Guide-for-Aliens-1 (last updated Dec. 3, 2013).

There is also a more general exception to the substantial presence test, however.

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Even if the test is otherwise met, a taxpayer is generally not substantially present for purposes of tax residency if they (1) are in the U.S. for less than 183 days, (2) have an established "tax home" in a foreign country, and (3) have a closer connection to the country than to the U.S. I.R.C. § 7701(b)(3)(B). *See also* Reg. § 301.7701(b)-2. This exception will not apply if the taxpayer had a pending application to adjust status, or otherwise took steps to apply to be a legal permanent resident. I.R.C. § 7701(b)(3)(C). *See also* Reg. § 301.7701(b)-2(f) for a nonexclusive list of forms the filing of which preclude the "closer connection" exception. The applicable regulation sets out in much more detail what constitutes a "tax home," and factors which may be considered in determining closer connection. Reg. § 301.7701(b)-2(c). To claim the "closer connection" exemption from substantial presence tax residency, one must file IRS Form 8840. *Publication 519*, *supra*.

Dual-Status Aliens and the First-Year Election

A taxpayer who has both resident and nonresident status during the year can claim dual-status; in other words, they may elect to be taxed part of the year as a resident, and part as a nonresident. A dual-status alien will file both a 1040NR and a 1040 for the same year, each being limited to income earned as nonresident and resident respectively. I.R.M. 21.8.1.12. This will usually be the first and last years of residency, which makes proper calculation of when residency begins and ends crucial to determining proper taxation.

First Year

Unless the taxpayer also meets the substantial presence test in addition to the legal permanent resident test, the first year of tax residency under the legal permanent resident test begins the first day of the calendar year when the taxpayer is actually present in the United States while a lawful resident of the United States. I.R.C. § 7701(b)(2)(A)(ii). *See also* Reg. § 301.7701(b)-4(a). If the taxpayer previously met the substantial presence test before attaining legal permanent resident status, then the first year of residency would be determined under that test (see below).

In the first year of residency for a taxpayer qualifying under the substantial presence test, residency is deemed to begin the first day of that calendar year they are present in the United States. For example, if a taxpayer met the substantial presence test in 2013, and her first day in the country was March 1, her residency is deemed to begin on March 1. Up to ten days of "nominal" presence may be disregarded, where the taxpayer has a closer connection to another country than to the United States. I.R.C. § 7701(b)(3)(C). For more about the definitions of closer connection & tax home, see Reg. § 301.7701(b)-2(c), -2(d). This applies to both first and last year, if the taxpayer is qualifying under the substantial presence test.

First-Year Election

The so called "first-year election" allows a nonresident alien who is a resident alien the following year under the substantial presence test to claim resident alien status for a portion of the previous year. I.R.C. § 7701(b)(2)(A)(iv). To take this election, the taxpayer must:

- Be present in the United States for at least 31 days in the year they take the election;
- Be present in the United States for 75% of the days beginning with the first day of their 31 days and the end of the calendar year. The taxpayer may count up to five days of absence during this period to count towards this subsequent period.

Publication 515, Withholding of Tax on Nonresident Aliens and Foreign Entities, Internal Revenue Service, http://www.irs.gov/uac/Publication-515,-Withholding-of-Tax-on-Nonresident-Aliens-and-Foreign-Entities (last updated Apr. 23, 2014).

This election is not dependent upon being married. The first day of residency under the first-year election is the beginning of the triggering 31-day period. In order to claim the first-year election, the taxpayer must attach a statement to their IRS Form 1040. The statement must contain the following assertions:

- The taxpayer is making the election for the tax year in question;
- The taxpayer was not a resident the previous year;
- The taxpayer is a resident alien the subsequent year;
- The number of days present in the United States the subsequent year, as relevant to the substantial presence test;
- The days present in the U.S. in the relevant tax year that trigger the 31-day period;
- Any dates of absence in the relevant tax year that the taxpayer wishes to be applied to the five exempted days.

It is important to note that the first-year election cannot be taken until the taxpayer's resident alien status in the subsequent year has been established. To the extent that this status has not been established by April 15 of the subsequent year, it may be advisable for the taxpayer to file for an extension. Any extension should include tax that would be due if the taxpayer were considered a nonresident alien. Late filers may be able to still claim the first-year election if they can demonstrate by clear and convincing evidence that they took reasonable efforts to become aware of filing procedures and took significant steps to comply. *Id.*

Last Year

The last year of residency for an alien taxpayer under the legal permanent resident test would generally be the last day of the calendar year that they are a legal permanent resident, unless they also meet the substantial presence test (see below). Reg. § 301.7701(b)-4(b)(1). However, if the taxpayer can demonstrate

a closer connection to a foreign country in which she maintains a tax home in the calendar year when residency terminates, tax residency is deemed to cease on the first day of that calendar year. Reg. § 301.7701(b)-4(b)(2).

The last day of residency under the substantial presence test, or if the taxpayer meets both the legal permanent resident and substantial presence tests, is the last day of substantial presence in the United States.

Spousal Elections

Under certain circumstances, a nonresident alien who is married to a U.S. citizen or an alien considered a resident alien at the end of the year may themselves be treated as a resident alien if they so elect. I.R.C. § 6013(g). The election under this section is alternative to and exclusive from the first-year election for dual-status aliens. The other spouse must agree to the election. I.R.C. § 6013(g)(2). A similar election allows a spouse who is a dual-status alien and a resident alien at the end of the year (*i.e.*, first year of a residency period) to claim resident status even for the period where they would otherwise be considered nonresident. I.R.C. § 6013(h). Neither spouse can use the election again, even if they remarry. I.R.C. § 6013(g)(6), (h)(2).

Immigration Ramifications of Filing/Nonfiling

One major area where tax and immigration law intersect is in those situations where failure to file or other noncompliance with the tax code can negatively affect immigration status, and conversely where compliance with the law can have positive effects. This ranges from the effect of tax crimes on admissibility or removal, to how tax return information may be used to a noncitizen's detriment, to how compliance affects adjustment of status or naturalization.

Tax Offenses As an Aggravated Felony

One ground for either deportation or inadmissibility is when an alien is convicted of committing an "aggravated felony;" *i.e.*, one of a long list of crimes enumerated in the federal Immigration Code. INA § 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii) (deportation); *see also* INA § 212(9)(A)(i), 8 U.S.C. § 1182(a)(9)(A)(i) (admissibility). Attempts or conspiracies to commit an aggravated felony have the same ramifications as a consummated act. INA § 101(a)(43)(U), 8 U.S.C. § 1101(a)(43)(U). A plea of guilty or nolo contendere is considered a "conviction." Tseung Chu v. Cornell, 247 F.2d 929, 937 (9th Cir. 1957).

A conviction for tax evasion under 26 U.S.C. § 7201 "in which the revenue loss to the Government exceeds $10,000" is an aggravated felony for the purposes of deportation and admissibility. INA § 101(a)(43)(M)(ii), 8 U.S.C. § 1101(a)(43)(M)(ii). In addition, criminal tax convictions arising from other parts of the Internal Revenue Code are also aggravated felonies if they result in over $10,000 in losses to the Government. INA § 101(a)(43)(M)(i), 8 U.S.C. § 1101(a)(43)(M)(i). *See also* Kawashima v. Holder, 132 S.Ct. 1166, 1173 (2011). At least one circuit in an unreported case has found that a loss incurred under a joint filing status is jointly and severally attributable to either spouse. Dong Chol Kim v. Holder, 428 F.App'x 485, 485-86 (5th Cir. 2011).

Crimes of Moral Turpitude

In addition to aggravated felonies, "crimes of moral turpitude" are also grounds for deportation or inadmissibility. Unfortunately, unlike aggravated felonies, the term "crimes of moral turpitude" is not clearly defined by the code or regulations. As is relevant to tax related issues, "'[c]riminal acts involving intentional dishonesty for the purpose of personal gain are acts involving moral turpitude.'" Tseung Chu, 247 F.2d at 935 (quoting In re Hallinan, 307 P.2d 1, 2 (Cal. 1957)).

An alien who is "convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of a crime of moral turpitude" is inadmissible. INA § 101(a)(2)(A)(i)(I), 8 U.S.C. § 1182(a)(2)(A)(i)(I). Note that inadmissibility does not require a conviction. If the maximum penalty for the crime does not exceed one year, or the actual sentence imposed does not exceed six months, then the alien remains admissible.

In regard to deportation, grounds involving crimes of moral turpitude are more narrow in some ways, requiring that a conviction has occurred within the last five years (ten for a legal permanent resident who had adjusted status from a nonimmigrant visa), or that there have been two or more such convictions. INA § 237(a)(2)(A)(i), (ii), 8 U.S.C. § 1227(a)(2)(A)(i), (ii). On the other hand, there is no exception tied to length of maximum or actual sentences.

An intent to defraud the government is a prerequisite for a criminal conviction for tax evasion, and therefore has been held in numerous instances to be a crime of moral turpitude. *See* Gambino v. INS, 419 F.2d 1355, 1358 (2d Cir. 1970); Serafino v. Attorney Gen. of U.S., 186 F. App'x 302, 305 (3d Cir. 2006); Chanan Din Khan v. Barber, 253 F.2d 547, 550 (9th Cir. 1958); Tseung Chu v. Cornell, 247 F.2d 929, 933 (9th Cir. 1957).

Effect of Filing/Nonfiling on Cancellation of Removal

In the case where the alien is already present within the United States, even when there are grounds to deport, that deportation may be stopped upon a showing that "the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion." INA § 241(b)(3)(A), 8 U.S.C. § 1231(b)(3)(A).

See also 8 C.F.R. § 208.16-18 (2014). However, withholding of deportation cannot be granted when the alien has been convicted by final judgment of a "particularly serious crime" (PSC). INA § 241(b)(3)(B)(ii), 8 U.S.C. § 1231(b)(3)(B)(ii).

A PSC is yet another distinct categorization of criminal act in the immigration code, which overlaps incompletely with aggravated felonies and crimes of moral turpitude. There are two categories of PSC. First, any aggravated felony (*see above*) for which the alien is sentenced to over five years imprisonment is a per se PSC that disqualifies them from withholding of deportation relief. INA § 241(b)(3)(B)(iv), 8 U.S.C. § 1231(b)(3)(B)(iv). Also, the United States Attorney General has the discretion to, on a case by case basis, determine that an individual crime is a PSC based on the factors in the 1982 BIA case of Matter of Frentescu, 18 I. & N. Dec. 244 (BIA 1982). *See Frentescu* at 247. *See also* Blandino v. Holder, 712 F.3d 1338, 1343-44 (9th Cir. 2013). A crime need not be an aggravated felony to be a PSC if it meets the *Frentescu* factors, but aggravated felonies with a sentence under five years create a presumption the crime is a PSC that must be overcome by the alien.

The factors in *Frentescu* are:

- The nature of the conviction;
- The circumstances and underlying facts of the conviction;
- The type of sentence imposed; and
- Most importantly, whether the type and circumstances of the crime indicate that the alien will be a danger to the community

While some violations of the criminal provisions of the Internal Revenue Code may be aggravated felonies (*see above*), only some of these offenses carry a maximum sentence of five years. *See* I.R.C. §§ 7201–7217 (None are over five years.). Thus, unless the maximum sentence is imposed, each case must be analyzed on a case by case basis under *Frentescu*. Courts have not yet analyzed a tax related crime under *Frentescu*. *Frentescu*'s emphasis on the alien posing a danger to the community seems to weigh against categorizing property crimes as PSC, as opposed to crimes where there are human victims, although this is not a guaranteed outcome. At least one case has found a felony money laundering conviction to be a PSC. *See* Hakim v. Holder, 628 F.3d 151, 154 (5th Cir. 2010) (finding the connection between money laundering and drug activity brought the Attorney General's designation within the bounds of justifiable discretion).

Even if it is determined that a commission of a particularly serious crime, the alien may still qualify for relief barring deportation under the Convention Against Torture (CAT). 8 C.F.R. § 208.16-18 (2014).

Effect of Filing/Nonfiling on Adjustment of Status

A nonimmigrant may apply to change their status to an immigrant through a process called "adjustment of status." *See* INA § 245, 8 U.S.C. § 1255. This is done by filing a Form I-485. There are many different ways that nonfiling can prevent a nonimmigrant from adjusting status. First of all, as may be expected, a crime of moral turpitude that would preclude admissibility would also necessarily preclude adjustment of status. Chak Yiu Lui v. Holder, 600 F.3d 980, 984 (8th Cir. 2009). Secondly, compliance with tax laws is a helpful factor when determining whether an applicant presents good moral character.

Taxpayers should also be aware that tax returns may be heavily scrutinized in less direct contexts that can also affect adjustment of status. For example, how one characterizes their family composition on their tax return will be grounds to refute testimony from other sources, and any inconsistency can both bar adjustment of status and lead to removal. *See* Akwasi Agyei v. Holder, 729 F.3d 6, 11 (1st Cir. 2013).

Also, when an adjustment of status is done with the involvement of a sponsor, the sponsor must both have filed tax returns for the last three years, as well as provide a copy of the most recent return as an attachment to Form I-864. INA § 213A(f)(6)(A)(i), 8 U.S.C. § 1183a (f)(6)(A)(i). Any dependents claimed on the most recently filed tax returns must also be added to the I-864. 8 C.F.R. § 213a.1(1) (2014). The greater the number of dependents claimed by the sponsor, the more of a chance that the adjustment of status will fail on the basis of the applicant being likely to become a public charge. 8 C.F.R. § 213a.2(c)(2)(ii)(B) (2014).

Effect of Filing/Nonfiling on Citizenship

Good moral character is one factor that must be proven in order to successfully complete the naturalization process. 8 C.F.R. § 316.10(a)(2) (2014). Timely filing for and payment of taxes is a factor that will weigh in favor of an immigrant seeking to become a citizen through the naturalization process, in that it shows good moral character. *See* Iqbal v. Bryson, 604 F. Supp. 2d 822, 828 (E.D. Va. 2009). ■