Chapter 3
Residence Jurisdiction over Alien Individuals

§ 3.01. Historical Development

Prior to the revision of Code section 7701(b) in 1984, which introduced certain objective tests of residence, the residence status of an alien individual was determined under a "facts and circumstances" test. This test is still applicable in determining the residence of U.S. citizens and in determining the residence of alien individuals when the objective tests are inapplicable. The following case illustrates the operation of the facts and circumstances test. The test was difficult to apply in many cases, which is why Congress chose to replace it in many cases with more objective tests. The case also provides a helpful fact pattern for discussion of the operation of the objective tests.

Park v. Comm'r

79 T.C. 252 (1982), aff'd without opinion 755 F2d 181 (1985)

Editor's Summary of Facts

The Commissioner determined a deficiency in Tongsun Park's Federal income tax and an addition to the tax for failure to pay estimated tax (under Code section 6654) for each of the years 1972, 1973, 1974, and 1975. The only issue in the case is whether Park (petitioner) was a resident or nonresident alien during the years in question.

"Petitioner was born on March 16, 1935, in the City of Sinchang, County of Sunchun, which is now part of the Peoples Republic of Korea (North Korea). He is, and at all relevant times has been, a citizen of the Republic of Korea (South Korea). Petitioner has never filed a declaration of intention to become a citizen of the United States and has never filed a Form 1078 ("Certificate of Alien Claiming Residence in the United States"), or its equivalent, as referred to in section 1.871-4(c)(2), Income Tax Regs. Petitioner has at all times traveled only under passports issued by Korea."

From 1952 to 1954, Park attended high school in the United States, and from August of 1956 to June of 1963, he attended college at Georgetown and Fordham. During most of that period, Park held an F-1 (student) visa. After his schooling was completed, Park was granted a B-2 (temporary visitor for pleasure) visa and an extension of stay until August of 1963.

"After the expiration of his B-2 visa in 1963, petitioner was issued a B-1 (temporary visitor for business) visa at least as early as August 28, 1964. The expiration date of this visa, and whether it was a single or multiple entry visa, is not shown on available records. On September 4, 1968, petitioner was issued a multiple entry E-2 (Treaty investor) visa, and between that date and the latter part of 1971 he was in the United States on numerous occasions." * * *

"Petitioner was issued a multiple entry E-2 visa on October 27, 1971, and he was issued another multiple entry E-2 visa on August 10, 1972. The expiration dates of these visas are not shown on available records. On July 10, 1973, petitioner was issued a multiple entry B-1 visa which was valid through July 9,

Table 1
Days Spent by Tongsun Park
in the U.S. and Korea, 1972-1975

Year	Number of Days	
	U.S.	Korea
1972	180	159
1973	199	109
1974	198	95
1975	161	79

Counting the day of entry but not of departure.

1977. Pursuant to these three visas, petitioner entered and departed the United States during the period from December 18, 1971 through January 3, 1976 . . . [on many occasions.]"

The total number of days that Park spent in the United States and Korea during each of the years in question is shown in table 1.

"In the early 1960's, petitioner began organizing, financing, and managing, directly or through employees, business and investment activities in the United States. These activities continued at an increasing rate throughout the years in question. . . ."

"At approximately the same time that petitioner began pursuing business and investment activities in the United States, he became involved with similar activities in

Korea. As in the case of his activities in the United States, petitioner's business and investment activities in Korea continued at an increasing rate throughout the years in question."

* * *

"From February 10, 1961 through June 26, 1963, when in Washington, D.C., petitioner lived in a rented townhouse located at 3059 Q Street, N.W. On June 26, 1963, petitioner purchased a three-story brick house at 1713 22d Street, N.W., Washington, D.C. (the 22d Street house) for $60,000. To make this purchase, petitioner assumed a $15,000 mortgage on the property and secured a $45,000 mortgage loan on the property from the Washington Permanent Bank. The house was elegantly furnished, and petitioner maintained a valuable collection of art objects, which he had brought to the United States from Korea, in the house. At least as early as 1968, petitioner employed a housekeeper, a full-time cook, and a chauffeur at the 22d Street house. On June 3, 1976, . . . the house was sold . . . for $165,000. . . ."

"From October 1, 1971 to October 24, 1972, petitioner leased a house located at 1825 24th Street, N.W., Washington, D.C. (the 24th Street house), in [which] he stayed when in Washington, D.C., for a rental of $1,800 per month. . . . On October 24, 1972, petitioner purchased a house located at 2211 30th Street, N.W., Washington, D.C. (the 30th Street house), for $270,000. . . . The house contained two stories and a basement comprising a living room, dining room, study, powder room, kitchen, pantry, sitting room, dressing room, wine room, laundry room, and several bathrooms and bedrooms. The house was in need of certain improvements, and petitioner did not move into it until sometime in 1973. . . . Petitioner sold the house on June 19, 1978, for $520,000." * * *

"On December 5, 1975, petitioner purchased a large three-story house located at 2850 Woodland Drive, N.W., Washington, D.C., for $480,000. He continued to own this property through at least the end of 1977. Petitioner had planned to renovate this house and install an indoor pool, but he never occupied the house." * * *

"From November 30, 1960 through December 1974, when in Korea, petitioner usually stayed with his mother at the Park family home located at 79-6, Kahae-Dong, Chongro-Ku, Seoul. Petitioner maintained a bedroom at the family home in which he kept clothing, personal effects, and a portion of his art collection. The family maintained a household staff consisting of a driver, a cook, a gardener, a doorman, a seamstress, and a cleaning lady . . . ."

"From March 1969 through at least December 1972, petitioner leased a villa at a resort owned by the government of Korea. Petitioner sometimes stayed at the villa when in Korea, but he used it primarily for entertainment purposes. Petitioner kept some personal property at the villa, including clothing and a few works of art. He employed a butler and a cleaning lady at the villa. . . ."

"In late 1974, petitioner, his mother, and [a family corporation] jointly acquired a 22-acre estate (the Hang-Dong estate) for approximately $817,000. This property, which petitioner and the co-owners continued to own at least through the time of trial, consists of a main house, a guesthouse, a swimming pool, a large cabana, a tennis court, a guard house, and an orchid greenhouse and related laboratory facilities.

Following the acquisition of the Hang-Dong estate, petitioner maintained personal effects and a portion of his art collection at both the Hang-Dong estate and the Park family home. When petitioner was in Korea, he spent weekends with his mother at the family home, and she spent part of her time with him at the Hang-Dong estate. A household staff consisting of three gardeners, a cook, a cleaning lady, a butler, a driver, and two security guards was maintained at the Hang-Dong estate." * * *

"Beginning in 1975, petitioner maintained a permanent staff, including a houseman, a cook, a cleaning lady, a gardener, and a security guard, at a house that he owned in the Dominican Republic. Petitioner visited this house no more than twice during each of the years 1975 and 1976 . . . ."

"In 1976, when in London, petitioner stayed at a townhouse owned by one of his corporations and used in part for offices. Petitioner maintained personal effects and a portion of his art collection at the townhouse. He employed a staff of three at the London townhouse, including a butler, a housekeeper, and a chauffeur." * * *

"Petitioner was not employed by the Korean government or by any agency thereof during the period 1968 through 1975. He has never run for an elected office in Korea and has never been appointed to any office by the Korean government. During the years in question, he voted in the Korean presidential and parliamentary elections. He also voted on a referendum in Korea during those years." * * *

"During July 1976, the Public Integrity Section of the Criminal Division of the United States Department of Justice empaneled a Grand Jury to investigate the legality of certain payments allegedly made by petitioner to various Congressmen. Petitioner complied with numerous

Tongsun's Taxes

Among other things, Korean entrepreneur Tongsun Park has been accused of being an influence peddler and a Korean CIA agent, and of passing money to U.S. congressmen. Last week one more allegation was dropped into the hopper: that he owed the U.S. Government an enormous sum of money. The Internal Revenue Service filed a tax lien against Park's property, alleging that he owed $4.5 million in back taxes, interest and penalties for the years 1972 through 1975. During that period, Park allegedly spent at least $500,000 a year on cultivating, entertaining and giving gifts to members of Congress. The IRS claimed that he owed $2.1 million in taxes and penalties for 1974 alone — the year in which South Korea purportedly tried to influence the U.S. Congressional elections. Park was said to be in London last week, and he had no comment on the IRS move. But recently he told associates that it was not in his "best interests" to return to the U.S. at present.

requests for documents in his possession and, in September 1976, he attended a conference at the Department of Justice at which he was informed of the purpose of the Grand Jury investigation. . . ."

"An indictment against petitioner was handed down on August 26, 1977, charging him with various violations of Titles 18 and 22 of the United States Code. On January 11, 1978, petitioner entered into an agreement of cooperation with the Department of Justice, as a result of which the indictment against him was dismissed." * * *

"Under Korean law, residents of Korea are taxable on their worldwide income, against which may be credited the payment of foreign income taxes. Nonresidents of Korea are taxable only upon Korean source income. Wages and salaries payable by a Korean corporation are subject to withholding taxes. A resident of Korea who receives income from a non-Korean person or entity is required to file a Korean income tax return reporting such income . . . ."

"Petitioner has not taken the position that he is a nonresident of Korea or that his income is not Korean source income. Korean income taxes on the amounts that petitioner received from Korean corporations were withheld and paid by those corporations. With respect to [other amounts of income earned] petitioner did not pay income taxes to Korea or any other country. Petitioner did not file individual income tax returns with any country during the years 1970 through 1976. Petitioner has never filed an individual income tax return in the United States."

Opinion of the Court (Featherstone, Judge)

The issue for decision is whether petitioner, an alien, was a resident of the United States for income tax purposes during the years in question. A resident alien is taxable on all income from whatever source derived; on the other hand, a nonresident alien is taxable only on income derived from sources within the United States. Secs. 871 and 872; secs. 1.1-1(b) and 1.871-1(a), Income Tax Regs. Because petitioner had income that was not derived from United States sources, he is taxable on such income only if he was a resident of the United States during 1972 through 1975.

The issue of residency is factual and must be resolved through a consideration of all the relevant facts and circumstances. *Adams v. Commissioner*, 46 T.C. 352, 358 (1966); *Jellinek v. Commissioner*, 36 T.C. 826, 834 (1961). Because the determination of residency depends so heavily upon the unique personal circumstances of the taxpayer, one case does not always provide reliable guidance for the decision of another. For this reason, the cases relied upon by the parties are of limited value here.

As general guidelines for making the determination of residency, the regulations (sec. 1.871-2(b), Income Tax Regs. provide 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 income tax purposes. Whether he is a transient is determined by his "intentions with regard to the length and nature of his stay." 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 even though he may at all times intend to return to his domicile. 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." Sec. 1.871-2(b), Income Tax Regs. In applying these guidelines, an alien, by reason of his alienage, is presumed to be a nonresident, but that presumption is a rebuttable one.

To these general guidelines, it may be added that the term "resident" does not have the same meaning as "domicile," but to be a resident "does require that the taxpayer have some degree of permanent

attachment for the country of which he is an alien." *Jellinek v. Commissioner*, supra at 834. In other words, some permanence of living within borders is necessary to establish residence. *de la Begassiere v. Commissioner*, 31 T.C. 1031, 1036 (1959), affd. per curiam 272 F.2d 709 (5th Cir. 1959). One may be a resident of more than one country, *Marsh v. Commissioner*, 68 T.C. 68 (1977), affd. per order 588 F.2d 1350 (4th Cir. 1978), and neither the termination nor the abandonment of a residence in another country is considered a prerequisite to a finding of United States residence. [Citations omitted.]

Focusing on the definition of residence contained in the regulations, petitioner contends that he was a "mere transient or sojourner" and not a resident for tax purposes. He argues that the record establishes that he made a series of visits to the United States during the years in question and that each visit was for definite purposes which could be and were promptly accomplished. In further support of his position, petitioner asserts that he had extensive business and personal ties to Korea, and a deep, continuing involvement in his Korean community, which were irreconcilable with a "mere floating intention, indefinite as to time," to return to Korea. Further, petitioner emphasizes that each of his stays in the United States was limited by the immigration laws, and he contends that the record does not demonstrate the "exceptional circumstances" contemplated by the regulations as necessary to support a finding of residency in the face of such limitations. Finally, petitioner argues that respondent has failed to overcome the rebuttable presumption of alien nonresidence set forth in section 1.871-4, Income Tax Regs. * * *

Respondent takes the position that the record clearly shows that petitioner was a resident of the United States during the years 1972 through 1975.[1] He disputes petitioner's contention that the record establishes petitioner's presence in the United States for "definite" purposes susceptible of "prompt" accomplishment. Respondent argues that, at best, the evidence relied upon by petitioner indicates dual or multiple residence but does not detract from his obvious relationship with the United States.

"We think the duration and nature of his presence in this country, as evidenced by his deep and continuing involvement in business, personal, social, and political affairs, were sufficient to establish . . . residency."

Petitioner's case was well tried and briefed, and handled with professionalism, but in the final analysis, we think the record requires that respondent's position be sustained. It is true that petitioner came to the United States on visas that technically limited his stays, and he was frequently absent from the United States. Because of the international character of some of his business activities, however, he did not stay continuously in any country. We think the duration and nature of his presence in this country, as evidenced by his deep and continuing involvement in business, personal, social, and political affairs, were sufficient to establish the kind of attachment and relationship to this country that constitutes residency within the meaning of the regulations under section 871. Therefore, in the light of all the facts, we hold that petitioner was a resident of the United States during 1972, 1973, 1974, and 1975.

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[1] Part of respondent's argument on brief was that petitioner became a resident of the United States long before 1972 and did not abandon his residence in this country until he departed under the cloud of a Federal indictment in 1977. In this connection, see sec. 1.871-5, Income Tax Regs. Although the facts with respect to petitioner's pre-1972 connection with this country are relevant to our inquiry, we find it unnecessary to decide whether petitioner acquired residence in the United States at some time prior to 1972. . . .

In reaching this conclusion, we begin with the fact that, when petitioner was in the United States during 1972 through 1975, he was not a stranger in an alien land. He had spent a large part of the immediately preceding 20 years in this country. He had completed high school, attended the College of Puget Sound and Fordham University, and graduated from Georgetown University in June 1963 with a Bachelor of Science Degree in Foreign Service. During this period, petitioner became a part of the Washington, D.C., community. From 1968 and extending through 1977, for example, he was listed in the "Social List of Washington, D.C.," popularly known as the Green Book, a compendium of socially prominent individuals in Washington, D.C. He had a host of friends whom he entertained frequently, and he often attended social functions given by others. His United States business interests were growing. Petitioner's extended stay in the United States during this pre-1972 period gave him an opportunity to obtain an excellent facility in the English language, an acquaintanceship with many American people, and an understanding of this country's social, political, and cultural fabric. 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.

As early as 1963, petitioner had bought a three-story brick house on 22d Street, and he continued to own it until June 1976. From October 1, 1971 to October 24, 1972, because the entertainment facilities in the 22d Street house had become inadequate for his purposes, he rented a larger house on 24th Street for $1,800 per month. On October 24, 1972, petitioner purchased the house on 30th Street which he owned through June 19, 1978. In this house, he made extensive renovations, including the installation of a $20,000 central music system. He furnished the house elegantly with items from the 22d Street house and with newly acquired furnishings. At least as early as 1968 and through the years in question, petitioner employed a staff of servants for these houses. On December 5, 1975, he bought still another house, a three-story residence on Woodland Drive which he owned through 1977. He had planned to install an indoor pool and make other renovations in this house, but he never actually occupied it.

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 on-going 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. . . . 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.

In addition to making large residential investments, petitioner also, as detailed in our findings, engaged in extensive business activities within the United States which were consistent only with an extended stay in this country. In 1965, through his controlled corporation, Suter's, he had purchased the valuable 1530 property on Wisconsin Avenue, N.W., giving a $325,000 first mortgage. Petitioner became one of the prime movers, along with various social and political leaders in Washington, in the promotion of the George Town Club, which he used as one of the centers of his extensive social life in Washington, D.C. Suter's leased the 1530 property to the George Town Club under a 25-year lease scheduled to expire August 31, 1990. As Suter's controlling shareholder, petitioner thus established what could only have been intended to be a substantial long-term business connection with this country. This connection was not merely a capital investment; Suter's was not only entitled to rent, but it also operated the restaurant and bar in the George Town Club. And, in 1971, Suter's and petitioner leased property adjoining the 1530 property and then

subleased it to the club for expansion of its operations. Although petitioner did not concern himself with Suter's day-to-day operations, he made the major financial decisions, including the acquisition of equipment, furniture, and real property throughout the years here in controversy.

Perhaps petitioner's most extensive business undertakings in this country, however, were carried out through his wholly owned PDI which, as noted in our findings, was "fundamentally an extension of its taxpayer-owner." *Valley Finance, Inc. v. United States*, 629 F.2d 162, 173 (D.C. Cir. 1980). Its business, in part, was to serve as a matchmaker and consultant to various American firms interested in trade in Korea and Formosa. In addition, it invested large sums in the United States. . . .

Although petitioner was PDI's president and sole shareholder, he seeks to dismiss its extensive business activities on the ground that he only furnished capital while his agents and employees made all the decisions. Based on a review of PDI's operations, however, the Court of Appeals for the District of Columbia in *Valley Finance, Inc. v. United States*, 629 F.2d at 172, rejected that view:

> Despite protestations in the record, there is no evidence that a major corporate decision was ever made by anyone other than Park [petitioner in the instant case]. The Board of Directors played no meaningful role. There is serious doubt as to whether a Board existed at all prior to December, 1974. After that date, directors met infrequently. When they did meet, Board members approved corporate decisions and policies without discussion or question. * * * Individual officers performed ministerial functions at the behest of the president. They exercised no significant discretionary authority. * * *

Similarly, the record here refutes petitioner's disavowal of any real involvement in PDI's business. It is clear that PDI's activities could have been conducted only by one with a continuing relationship with this country — in this country on an extended stay for purposes which could not be promptly accomplished. Petitioner's most lucrative business activity was his representation of Connell Rice, a New Jersey corporation that sold rice to Korea and other countries. As explained in our findings, he received over $40,000 from that company in 1970. He then lost favor with the Korean government and was not employed by Connell Rice in 1971. However, petitioner revitalized his relationship in 1972, and during the years in question petitioner or his designees received sums from Connell Rice totaling approximately $8.5 million. One big factor enabling petitioner to reestablish his relationship with the Korean government in 1972, according to his testimony, was the intervention at his request of powerful United States politicians. Maintaining good relationships with those United States 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. Our findings detail some of petitioner's other extensive business dealings, including his investment in the Pisces Club and the M Street Corporation, involving hundreds of thousands of dollars in loans and loan guarantees.[2] Such deep involvement in business, as well as social and political, activities is wholly inconsistent with the status of a mere transient or sojourner.

Petitioner's main argument is based on that portion of the regulation . . . which provides that an alien individual who comes to the United States for a definite purpose, which in its nature may be promptly accomplished, is a transient and not a resident of the United States. Petitioner states on brief that he made

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[2] We do not intend to suggest that mere investment in a country by an alien constitutes residency. However, as we have discussed, it is important that the nature and breadth of petitioner's business and investment activities in the United States were such as to require continuous attention.

36 "trips" to the United States during 1972 through 1975 and stayed an average of 22 days on each "trip," the longest stay being 50 days and the shortest 4 days. Based on his testimony as to the purpose for each trip, petitioner asks us to find that the purpose of each trip could be accomplished promptly and that, therefore, under the regulation, he was not a United States resident. Respondent counters with the argument that in the years 1972 through 1975 petitioner made a series of "trips" to Korea for purposes which could be promptly accomplished, most of which were for 5 days or less, and spent considerably more time in the United States than in Korea.

We have not made the findings requested by petitioner because we think petitioner had longterm ties to this country which explain his extended presence. We are not convinced that the purposes he gave for his presence in the United States were the exclusive or dominant ones. For example, in none of petitioner's testimony on his purposes nor in the related requested findings is there any reference to the myriad business problems and decisions he dealt with in this country.

* * *

Businessmen do not enter into transactions of such magnitude without advance planning, forethought, analyses, appraisals, and comparisons. It will not do to say that one as highly intelligent, money oriented, and status conscious as petitioner left all of his business decisions to his employees and advisors. As pointed out above, the Court of Appeals for the District of Columbia in *Valley Finance, Inc. v. United States, supra*, rejected that argument with respect to PDI, and we reject it here. Petitioner may have left the ministerial details to his employees, but he made the important decisions. We think these business activities and the subsequent continuous management problems related to his investments, as well as the promotion and protection of his Connell Rice-Korean government connection, tied him to the United States. We do not think that the statute was intended to relieve aliens who engage in business and other activities as extensively as did petitioner. The length and nature of his presence in this country made him a resident.[3]

Petitioner, however, emphasizes that, during 1972 through 1975, he was present in the United States on E-2 (Treaty investor) or B-1 (temporary visitor for business) visas which, under the immigration laws, limited his stay to "a definite period." In this connection, he argues that under the last sentence of section 1.871-2(b), Income Tax Regs. . . . he was not, therefore, a resident of the United States. That sentence states, in part, that 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. Significantly, however, that provision applies only in the "absence of exceptional circumstances," and we think the facts here show exceptional circumstances.

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[3] In *Commissioner v. Nubar*, 185 F.2d 584 (4th Cir. 1950), rev'g. 13 T.C. 566 (1949), the taxpayer came to the United States on Aug. 1, 1939, on a 3-month visitor's visa which, on application was extended to Dec. 31, 1940. In Jan. 1941, he was arrested and ordered deported; appeals of that order culminated in an order that he leave the United States within 90 days after termination of hostilities in Europe. Prior to his departure, he traded extensively in stocks and bonds during 1941 through 1945. Holding that, despite the deportation order, he was a resident alien, the court said (185 F.2d at 586):

> We find nothing in the law or in the facts to justify the exemption of this alien, who had lived in our country during the war years because of the difficulties and dangers of departure, and who had availed himself of his presence here to make a fortune by trading on our exchanges, from taxes required of others by the country whose protection he had enjoyed and whose economic organization he had utilized for his profit. * * * Whether taxpayer was a non-resident within the meaning of the statute is to be determined not in vacuo, but with reference to the purpose for which the statute was passed, which was to exempt from taxation, except as to taxes which could be collected at the source, aliens over whom no effective jurisdiction in enforcement of the tax laws could be exercised. It was never intended that persons who were present within the country for long periods of time and had taken advantage of its facilities for the purpose of carrying on business, should be exempted from taxation on income derived from sources within the country merely because they were aliens. * * *

It is true that petitioner's stay in the United States was nominally restricted to limited time periods. As set forth in our findings, however, beginning at least as early as September 4, 1968, petitioner's visas were all relatively long-term multiple entry visas. For the 4 years in controversy, he had only three visas, issued October 27, 1971, August 10, 1972, and July 10, 1973, respectively. This last visa was valid for 4 years or until July 9, 1977. Under these visas, by careful observance of the immigration regulations, petitioner could go, come, or stay as he pleased substantially without restrictions, and he spent considerably more time in the United States during each of the years in question than in any other country in the world.

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 the 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. * * *

"[H]e entertained frequently and lavishly, thereby becoming closely associated with numerous Senators, Congressmen, cabinet officers, ambassadors, military personages, and other civic, business, and society leaders."

It is no doubt true that petitioner was domiciled in Korea during the years in issue, and his relationship with that country may have been sufficiently close to constitute residency. After all, he was born there and his mother lived there. His family was wealthy, and he had significant business and social ties to Korea, more fully described in our findings. But we do not agree with petitioner that his ties to Korea, vis-a-vis those to the United States during 1972 through 1975, were so strong as to negate a finding that he was a United States resident.

Except for Korean income taxes withheld from amounts that petitioner received from Korean corporations, petitioner did not pay income taxes to either the United States or Korea on any portion of the substantial income which he received during the years in question. Significantly, petitioner testified that his major contribution to his Korean corporations was in the development of new business, and this appears to have been done mainly in the United States. Further, as previously indicated . . . the fact that petitioner had ties to and may never have abandoned a residence in Korea does not preclude the conclusion that petitioner was a resident of the United States during the years in question. 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 throughout 1972, 1973, 1974, and 1975, was "of such an extended nature as to constitute him a resident." Sec. 1.871-4(c)(2)(iii), Income Tax Regs.

All About 'Koreagate'

Back in 1977, it was not so tired a conceit to give the suffix "gate" to a budding scandal. In any event, the tempest surrounding Tongsun Park came to be called "Koreagate." At one point, it threatened to engulf the Congress. Park was accused of "influence peddling" and perhaps of bribery on behalf of the Korean government. In all, 30 members of Congress were tainted by the scandal, three received a Congressional reprimand, and one (Richard Hanna, D-CA) was convicted of receiving bribes and spent a year in jail.

In response to public concerns about Park's involvement in the U.S. political process, a House ethics committee investigation was launched. When that investigation got nowhere and the chief investigator quit in a huff, House Speaker Thomas P. O'Neill and Majority Leader Jim Wright turned to the one man they thought best qualified to overcome any charges of a coverup. The man of the hour was former Watergate special prosecutor Leon Jaworski. Jaworski rooted out some improprieties, but his investigation was largely a failure. A 36-count indictment of Park was dropped, in a face-saving deal that brought Park to testify before Congress.

Tongsun Park was 41 years old in 1977. He was and is a Korean businessman who, according to *Newsweek* (August 1, 1977), "charmed his way into high-level Washington with generous gifts, lavish parties at his George Town Club and numerous campaign contributions." Leaked reports from American intelligence sources in Seoul suggested that the Korean government had directed Park "to spend money in the U.S. to create a favorable attitude among the congressmen whose votes on foreign aid and troop withdrawals are critical to Korea's well-being."

The evidence of wrongdoing was rather weak in most cases. Congressmen who admitted to having accepted "favors" from Mr. Park claimed that they had not acted illegally or even unethically. Some campaign contributions made by Park, for example, were lawful and duly reported at the time. The evidence that Park received a *quid pro quo* for his largesse never surfaced.

In 1966, Park started the exclusive George Town Club for Capital VIP's, including, according to *Newsweek*, "several Supreme Court Justices, two Cabinet members and scores of legislators." The money to finance his social life may have come from the Korean government. Kim Hyung Wook, a former head of the Korean Central Intelligence Agency who defected to the U.S., testified that he let Park use $3 million in KCIA funds to help finance the club. (Mr. Kim later disappeared mysteriously — the news accounts suggest that the KCIA was responsible.)

Kim also confirmed that Park had obtained financing through the action of the South Korean Government in making him the principal agent for sales of U.S. rice to Korea. According to *Newsweek*, "the commissions on such deals may have exceeded $5 million a year — enough to pay for two mansions, a fleet of cars (including a Rolls-Royce and a Mercedes) and a jetset life with blonde companion Tandy Dickenson." (*Newsweek* seemed obsessed with the Tandy Dickenson angle, characterizing Park as "the Asian Great Gatsby.")

Although Park probably engaged in some illegal activities, Koreagate was a classic Washington summer scandal blown out of proportion by the news media. In the end, about all that everyone could agree on was that there was a "perception" of scandal. Commenting on the life cycle of Washington summer scandals, Michael Kinsley, in his TRB column in *The New Republic* (1991), suggests that "with general agreement" a summer scandal eventually becomes a problem merely of perception, and then it

"drift[s] off into a misty afterlife realm where Tongsun Park is eternally dancing with Donna Rice while the Wedtech Orchestra plays hits from the Watergate tapes."

Obituaries Mentioning Tongsun Park

Robert B. Boettcher: "From 1971 until 1979, Mr. Boettcher directed the staff of the House Subcommittee on International Organizations. In that capacity, he was in charge . . . of gathering evidence of a scandal in which Tongsun Park, a South Korean millionaire businessman, and others were accused of unlawfully seeking to influence American political figures in providing military and economic aid to Seoul." *New York Times*, May 30, 1984. *Leon Jaworski*: "In his long legal career, Leon Jaworski served as a prosecutor at the Nuremburg trials of Nazi war criminals, built up a large, prosperous law practice and a reputation as a litigator in Houston, served as president of the American Bar Association and was counsel to the House committee that investigated the relationships of members of Congress with a South Korean rice broker, Tongsun Park." *New York Times*, December 10, 1982.

William Minshall: "A few years after he left Congress, he was one of several members of Congress whom Tongsun Park, a South Korean businessman accused of buying influence in Washington for his Government, identified as recipients of campaign contributions. . . ." *New York Times*, October 17, 1990.

Otto Ernest Passman: "Mr Passman, who became a central figure in a case of reported influence-peddling by a Korean businessman a decade ago, was first elected to Congress in 1946. Two years after he was out of Congress, he was charged with taking illegal gratuities while in the House. He was found not guilty in 1979 after a lengthy trial in Monroe of taking $273,000 from Tongsun Park, a wealthy Korean rice trader in exchange for using his influence to help him." *New York Times*, August 14, 1988.

Donald L. Ranard: "In 1976, more than a year after he retired as director of Korean affairs at the State Department, Mr. Ranard was persuaded to testify before a Congressional committee on his awareness in the early 1970's that the South Korean Central Intelligence Agency was providing funds to influence American politicians. His revelations prompted a major investigation that led to the indictment of Tongsun Park, a South Korean businessman who was a lavish entertainer of members of Congress and other legislators. In the end, Mr. Ranard felt that the Federal prosecutors had swept the scandal under the rug." *New York Times*, August 1, 1990.

Richard Sneider: "As Ambassador to Seoul from 1974 to 1978, Mr. Sneider dealt with disputes then growing between the two countries over trade, American military aid and the Congressional influence-buying scandal involving Tongsun Park." *New York Times*, August 16, 1986.

Brittingham v. Comm'r

66 T.C. 373 (1976), aff'd 598 F.2d 1375 (5th Cir. 1979)

Finding of Facts

[Material relating to seven other issues omitted.] The petitioner, Roberta M. Brittingham, is a citizen of the Republic of Mexico, whose address at the time of filing her petition herein was Monterrey, Mex. She filed no U.S. Federal income tax returns for the years 1960 through 1966. Roberta M. Brittingham is the mother of Robert and Juan and will sometimes be referred to as Roberta. . . .

Roberta was born on March 22, 1891, in Janesville, Wis., and moved to Mexico when she was 5 years old. She was a U.S. citizen at birth, and in 1943, she also became a naturalized citizen of the Republic of Mexico and remained so during the years in issue. At the time of the trial in this case, she was living in Monterrey, Mex., was bedridden, and was unable to testify.

During the years in issue, Roberta received the following income:

Year	Interest and dividend income	Long-term capital gains
1960	$117,197.37	$0
1961	106,066.44	0
1962	169,875.09	0
1963	120,897.15	7,521.21
1964	108,587.20	98,090.20
1965	153,901.00	0
1966	178,245.27	976.77

All of such income was derived from sources outside the United States, except for the long-term capital gain earned in 1966.

In 1941, 1942, and 1946, Roberta filed an Alien Registration Foreign Service Form with the U.S. Immigration and Naturalization Service. Each such form indicated that she was entering the United States for a period of 6 months for recreational purposes.

"Residence is an elusive concept. . . . A person may acquire a residence even though he does not intend to reside permanently and has a domicile elsewhere."

From 1945 to 1968, Roberta maintained an apartment in Beverly Hills, Calif. She regularly lived in such apartment and was seen there often by the mail carrier who delivered her mail for over 20 years. A phone was listed in her name in the local telephone directory for Los Angeles, Calif., from 1945 to 1968, and during the period 1963 through 1966, an average of almost 3 phone calls per month were made from Dallas Ceramic's offices in Dallas to Roberta's telephone number in Beverly Hills. She maintained a checking account in the Bank of America in Beverly Hills, Calif., and wrote approximately 35 checks on that account each month from 1961 through 1966.

At least during some of the years 1960 through 1966, Roberta held a passport issued by the Republic of Mexico. On June 27, 1965, and January 6, 1966, she filed an "Application to Extend Time of Temporary Stay" with the U.S. Immigration and Naturalization Service. The record does not disclose whether such applications were also made in prior years.

In 1965, after an investigation by the California Franchise Tax Board, Roberta filed late California resident income tax returns for 1960 and 1963. These returns include the statement that she had not filed returns for prior years because she thought she was not a resident of California. She filed timely California resident tax returns for 1964, 1965, and 1966. One question asked on each return was whether the total income reported on the California tax return was the same as the total income reported on the Federal income tax return, and if not, an explanation was required. Roberta stated that she was a nonresident alien and did not file a Federal return.

Opinion of the Court

* * * *Residence of Roberta*

The parties have stipulated the amount of Roberta's income for the years in issue. The issue to be decided is whether she was an alien resident of the United States during the years 1960 through 1966.[4] If she was a resident alien, she is taxable on income from all sources. See sec. 1.1-1(a), Income Tax Regs. However, if she was a nonresident alien, she is taxable only on her income from sources within the United States. Sec. 872.

Residence is an elusive concept which is undefined by both the Code and the legislative history of section 872. See *Weible v. United States*, 244 F. 2d 158, 163 (9th Cir. 1957). It has been frequently said that residence does not necessarily mean domicile for Federal income tax purposes. See, e.g., *Cristina de Bourbon Patino*, 13 T.C. 816, 821 (1949), affd. 186 F. 2d 962 (4th Cir. 1950); *Florica Constantinescu*, 11 T.C. 37, 41 (1948); *J. P. Schumacher*, 32 B.T.A. 1242, 1247 (1935). Thus, a person may acquire a residence even though he does not intend to reside permanently and has a domicile elsewhere. See *Marsman v. Commissioner*, 205 F. 2d 335, 338 (4th Cir. 1953). . . .

Both physical presence plus the definite intent to make one's home at that place is necessary to establish a residence. *William E. Adams*, 46 T.C. 352, 361 (1966). "[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." *Joyce de la Begassiere*, 31 T.C. 1031, 1036 (1959), affd. per curiam 272 F. 2d 709 (5th Cir. 1959); see *William E. Adams*, *supra* at 361. Likewise, mere physical presence in a country does not by itself establish residence. *Florica Constantinescu*, *supra* at 43-44. However, the unexplained continued presence in a country for a prolonged period is strong evidence of an intent to make that place one's residence. *Cristina de Bourbon Patino*, *supra* at 821-822; see *Rudolf Jellinek*, 36 T.C. 826 (1961); cf. Carpenter v. United States, 495 F. 2d 175 (5th Cir. 1974). The determination of residence is factual and must be made in light of all the facts and circumstances. See, e.g., *William E. Adams*, *supra* at 358; *Ceska Cooper*, supra at 762; *Herman Frederick Baehre*, 15 T.C. 236, 241 (1950).

Roberta relies upon section 1.871-4(b) of the regulations, which provides:

> *Nonresidence presumed.* An alien, by reason of his alienage, is presumed to be a nonresident alien.

However, the evidence presented by the Commissioner clearly rebuts the presumption of nonresidency. Roberta maintained and regularly lived in an apartment in Beverly Hills, Calif., for a period in excess of 20 years extending through the years in issue. Section 1.871-4(c) (2)(iii) of the regulations provides that the presumption may be rebutted by showing that the alien's stay in the United States "has been of such an extended nature as to constitute him a resident." A stay of over 20 years is obviously extended in nature. Furthermore, to argue that a person who regularly lives in an apartment for over 20 years is a mere transient or sojourner is clearly untenable. Roberta presented no evidence which tended to show that she was anything other than a resident of the United States.

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[4] The parties have assumed that Roberta was not a citizen of the United States during the years in issue, and we will accept that assumption as true for purposes of deciding this case. However, there is no evidence that she ever relinquished or otherwise lost her U.S. citizenship. See *United States v. Matheson*, F.2d 809 (2d Cir. 1976).

> [Although] "residence" does not require a permanent home * * * or even a definite and settled abode, * * * it does require that the taxpayer have some degree of permanent attachment for the country of which he is an alien, * * * and it has been said that it is this degree of permanence of an individual's attachment for a country in which he is at some time physically present which determines whether he is a domiciliary, a resident, or a transient of that country * * * [*Rudolf Jellinek*, 36 T.C. at 834; citations omitted.]

It is clear to us that 20 years of almost continuous presence is sufficiently permanent to classify Roberta as a resident of the United States.

Roberta also argues that she was a nonresident during the years in issue since her stay was limited to a definite period by the immigration laws. She relies upon section 1.871-2(b) of the regulations, which provides in part: "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." However, the evidence supporting this contention is very sparse. . . .

> "The unexplained continued presence in a country for a prolonged period is strong evidence of an intent to make that place one's residence."

Moreover, even if Roberta had established that her presence each year was limited by the immigration laws, we are nonetheless convinced that she was a resident of the United States during each of the years in issue. We have held on several occasions that aliens whose stay in the United States was limited by immigration laws were nevertheless residents of the United States. See, e.g., *Marsman v. Commissioner, supra*; *Ceska Cooper, supra*; *Joe May*, 39 B.T.A. 946 (1939); *J. P. Schumacher, supra*. While the facts of each of these cases may be distinguishable, such cases clearly establish that the immigration status of an alien does not conclusively determine whether she is a resident of the United States. *J. P. Schumacher*, 32 B.T.A. at 1247. Roberta lived in an apartment in the United States for over 20 years on an apparently permanent basis. No evidence was presented to show why she chose to reside in the United States for such an extended period. Although she was unable to testify at trial, her sons, who did testify extensively, provided no evidence on this issue. Based on these facts, it is apparent that "exceptional circumstances" exist in this case. While Roberta's stay may have been nominally limited by the immigration laws, the fact remains that she was able to continuously reside in the United States for over 20 years.

§ 3.02. Taxation of U.S. Residents

Prior to the adoption of the 1984 tax act, a resident was defined as an individual who intended to be a resident, as evidenced by his actions. The intent test is compatible with the political theory that governmental power comes from the consent of the governed. The 1984 tax act replaced the intent test, which was exceedingly difficult to administer, with a test that uses objective criteria to determine whether an

individual should be treated as owing allegiance to the United States.[1] An alien who is not a resident under these criteria is a nonresident alien individual for purposes of the Code.[2]

Under the Code, an alien individual is considered to be a resident of the United States if that person satisfies either the lawful-permanent-resident test or the substantial-presence test. In the typical case, an individual treated as a U.S. resident during the taxable year under either of these tests would be a U.S. resident for the entire year. An alien applying for a U.S. passport or for permanent residence status is required to file an information report that would allow the tax authorities to determine whether the applicant is subject to U.S. residence jurisdiction.[3]

Several exceptions are provided to the general rule that residence status is determined on an annual basis. For example, an individual taking up residence in the United States for the first time typically would not become a resident until he entered the United States.[4] And an individual giving up U.S. residency and establishing a foreign tax home typically would cease to be a resident when he left the United States or gave up his lawful residence status.[5] An individual otherwise treated as a resident for only part of a taxable year may elect, under some conditions, to be a resident for the entire year.[6] An individual will not be treated as a lawful permanent resident of the United States if that individual is able to claim the benefits of a U.S. tax treaty as a foreign person and does not waive those benefits, and provides notice to the Secretary of the Treasury.[7]

The rules of Code section 7701(b) do not apply in determining the residence of U.S. citizens in some cases. For example, a U.S. citizen claiming to be a resident of a foreign country in order to avail of the benefits of Code section 911 must establish foreign residency under the old facts-and-circumstances test.[8] The Congressional purpose in adopting the section 7701(b) rules was to reduce compliance problems relating to nonresident alien individuals, not to expand the availability of special tax preferences for U.S. citizens. The substantial-presence test does apply to U.S. citizens in determining whether they are also residents of the United States.[9]

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[1] IRC § 7701(b), adopted by P.L. 98-369, § 138(a) (1984).

[2] The definition of residence under IRC § 7701(b) and accompanying regulations does not apply to the estate and gift tax.

[3] IRC § 6039E. See Prop. Reg. § 301.6039E-1 (1993). Under the proposed regulations, passport applicants must provide their name, address, taxpayer identification number (TIN), date of birth, and country of residence. Applicants for immigration must also inform the tax authorities whether they had any U.S. source income during their three most recent taxable years and whether they had been present in the United States for more than 182 days in any year during that period. Additional information may also be required on the application form for immigration or for a passport. Prop. Reg. § 301.6039E-1(c) (1993).

[4] IRC § 7701(b)(2)(A) and Reg. § 301.7701(b)-4(a) (1992).

[5] IRC § 7701(b)(2)(B) and Reg. § 301.7701(b)-4(b) (1992).

[6] IRC § 7701(b)(4) and Reg. § 301.7701(b)-4(c)(3) (1992).

[7] IRC § 7701(b)(6) (flush language) (2008).

[8] The IRC § 7701(b) rules also do not apply in determining whether U.S. citizens are residents of the Commonwealth of the Northern Mariana Islands for purposes of the mirror-image exemption provided in IRC § 935. See *Preece v. Comm'r*, 95 T.C. 594 (1990).

[9] Reg. § 301.7701(b)-1(a) (1992). The residency of a U.S. citizen may be relevant in determining the source of income. See, e.g., IRC § 861(a)(1), which treats income from interest-bearing obligations of residents as income from sources within the United States.

The Code definition of residence may conflict in some cases with a definition of residence contained in a U.S. tax treaty. In such circumstances, the taxpayer may elect the treaty rule.[10] U.S. tax treaties that follow the U.S. Model Treaty have a series of tie-breaker rules for individuals who are resident in both Contracting States under the laws of those States.[11] Those tie-breaker rules would determine the residence of a dual-resident individual for treaty purposes. The Code rule would prevail, however, for purposes of the Code other than those that determine the taxpayer's own tax liability.[12] For example, in determining whether a foreign corporation is controlled by U.S. residents for purposes of subpart F, the Code definition is applicable.[13]

§ 3.02.1. Lawful-Permanent-Resident Test

The lawful-permanent-resident test is satisfied if the individual has been granted the right under U.S. immigration law to reside permanently in the United States as an immigrant.[14] This test is usually called the green card test. The "green card" is an immigration form furnished to a legal immigrant by the immigration authorities (U.S. Citizenship and Immigration Services (USCIS)) as evidence of that person's legal status as an immigrant.[15]

An individual cannot cause himself to fail the green card test simply by renouncing residence status.[16] An individual loses residence status for tax purposes only if that status has been revoked by the immigration authorities or an administrative or judicial decision has determined that the individual abandoned it.[17]

§ 3.02.2. Substantial-Presence Test

In general, an individual satisfies the substantial-presence test if (1) he is present in the United States for at least 31 days during the calendar year,[18] and (2) he satisfies the 183-day test, applied with respect to the current and two preceding calendar years.[19] The 183-day test is satisfied if the sum of the number of days the individual is present in the United States in the current year, plus one-third of the number of days the person was present in the preceding calendar year, plus one sixth of the number of days the individual

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[10] Reg. § 301.7701(b)-7(a) (1997). Under the regulations, a taxpayer cannot claim to be a U.S. resident for purposes of the Code and also claim to be a nonresident alien eligible for treaty benefits. He must elect either to forgo all treaty benefits and be taxable as a resident or to claim treaty benefits and be taxable as a nonresident.

[11] Art. 4(2). See also U.S./Spain treaty, Art. 4(2).

[12] Reg. § 301.7701(b)-7(a)(3) (1997).

[13] Id. See Staff of Joint Committee on Taxation, *General Explanation of the Revenue Provisions of the Deficit Reduction Act of 1984* (1984) at 468.

[14] IRC § 7701(b)(1)(A)(i) and Reg. § 301.7701(b)-1(b)(1) (1992).

[15] The card is Permanent Resident Card Form I-551. At one time, that card was green; the name continues, although the color of the card has been changed several times. The current card contains the holder's picture, fingerprint, and signature. It also has an expiration date, set 10 years from the date of issuance. The expectation is that the card will be refined from time to time to improve security.

[16] Reg. § 301.7701(b)-1(b)(1) (1992).

[17] Reg. § 301.7701(b)-1(b)(2)-(3) (1992).

[18] IRC § 7701(b)(3)(A)(i) and Reg. § 301.7701(b)-1(c)(4) (1992).

[19] IRC § 7701(b)(3)(A)(ii) and Reg. § 301.7701(b)-1(c)(1) (1992).

was present in the second preceding year equals or exceeds 183 days.[20] An individual present for 183 days or more in the current year would always satisfy the 183-day test.[21]

§ 3.02.2.1. Excluded Days

In determining whether an individual is present in the United States for the requisite days, certain days do not count. Days that an individual is present because of a medical emergency do not count.[22] According to the regulations, the taxpayer must *intend* to leave the United States and be prevented from doing so by the medical emergency.[23] An intent to leave may be established by showing that the person was present in the United States for a purpose that could be accomplished over a period that would not make the person a U.S. resident.[24] Holding a return airline ticket might also prove an intent to leave on the date of the ticketed flight.[25]

In addition, days that an individual from Canada or Mexico is in the United States as a regular commuter do not count.[26] Nor do the days count that a person spends within the United States in transit between two foreign points.[27] None of the days counts that an exempt person spends in the United States while enjoying that exempt status.[28] Diplomats, employees of international organizations, and any accompanying family members are exempt persons.[29] So also are certain teachers, trainees, and students who are present in the United States on a visa appropriate for that status.[30] Professional athletes present in the United States to compete in certain charitable sporting events are also exempt persons.[31]

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[20] Id. For application of the substantial-presence test, see *Salami v. Comm'r*, T.C. Memo 1997-347 (1997) (taxpayer was physically present in the United States, working as a taxicab driver in Chicago, for more than 183 days during 1992 and 1993 and was a resident under the substantial-presence test); *Josi Angel Lujan v. Comm'r*, T.C. Memo 2000-365 (2000) (holding that the taxpayer, living with his wife and children in Texas, satisfied the substantial presence test by being present in the United States for over 182 days for both of the years at issue).

[21] In addition, the closer-connection exemption to the substantial-presence test, discussed below, would not be applicable to such an individual.

[22] IRC § 7701(b)(3)(D)(ii). The medical emergency exception does not apply if the payer entered the United States to receive medical treatment or was aware of the condition requiring medical treatment prior to his entry into the United States. Reg. § 301.7701(b)-(3)(c)(3) (1997). To claim this exception, the taxpayer must complete Form 8843 (Statement for Exempt Individuals and Individuals with a Medical Condition). Reg. § 301.7701(b)-8(b)(2) (1997).

[23] See Reg. § 301.7701(b)-(3)(c)(1) and (2) (1997). [24]Reg. § 301.7701(b)-3(c)(2) (1997).

[25] Reg. § 301.7701(b)-3(c)(4)(Ex. 1) (1997).

[26] IRC § 7701(b) (7)(B) and Reg. § 301.7701(b)-3(e). A commute is "regular" if the individual commuted more than 75 percent of the working days during the working period. Reg. § 301.7701(b)-3(e)(1) (1997).

[27] IRC § 7701(b)(7)(B) and Reg. § 301.7701(b)-3(d) (1997). But business meetings in airports do count. Id.

[28] IRC § 7701(b)(3)(D)(i) and Reg. § 301.7701(b)-3(b) (1997). But days do count once the exempt status lapses. See *Anderson v. Comm'r*, TC Memo 1989-381 (citizen of Liberia and former budget director does not qualify for the exception for "foreign government-related individuals" under section 7701(b)(5) after the overthrow of Liberia's government).

[29] IRC §§ 7701(b)(5)(A)(i) (exempting "a foreign government-related individual") and 7701(b)(5)(B) (giving the definition of a foreign government-related individual).

[30] IRC § 7701(b) (5)(A)((ii)-(iii) and (C)-(E); Reg. § 1.7701(b)-3(b)(3)-(4) (1997). Various rules apply to prevent certain perpetual students and teachers from being treated as exempt persons.

[31] IRC § 7701(b) (5)(A)(iv); Reg. § 7701(b)-3(b)(5) (1997). An athlete is exempt only for days in which he performs, not for practice days, for days used to perform promotional activities, or for days used to travel between athletic events. Id.

§ 3.02.2.2. Closer-Connection Exception

Under some conditions, an individual having a tax home in a foreign country and a closer connection to that country than to the United States would qualify for the closer-connection exception to the substantial-presence test.[32] An individual qualifying for the exception would be classified under the Code as a nonresident alien.

In general, a tax home is a geographical area at or near a taxpayer's primary place of business or duty post.[33] If a taxpayer has no regular place of business or is not engaged in business, his tax home is his place of abode.[34]

To qualify for the closer-connection exception, an individual must have been present in the United States in the current year for less than 183 days.[35] In addition, the individual must establish that he has a closer connection to the country where his tax home is located than he has to the United States.[36] To avail himself of the exception, the taxpayer must file with the tax authorities a form that sets forth the basis for the claim.[37] The closer-connection exception is not available to any individual who has taken affirmative steps to become a permanent resident of the United States.[38]

§ 302.2.3. Operation of Substantial-Presence Test

The substantial-presence test comes into play only if the alien individual is present in the United States for more than 30 days in the current year and those days are not exempt days. If he is present for 183 days or more for the current year, after excluding exempt days, then he is a resident for that year without further inquiry. If the alien individual is present in the current year for more than 30 days (excluding exempt days) and less than 183 days (excluding exempt days), and is present for 183 days or more for the three-year period under the 183-day test, then he is a U.S. resident unless he is able to avoid that classification under the closer-connection exception. The operation of the substantial-presence test is illustrated by the following example.

Example 3.1: Substantial-Presence Test for Residence

A is a citizen of Brazil. He has a full-time job in that country and generally lives there with his family in a home that he has owned for more than 20 years. In year one, A comes to the United States for the first time. The sole purpose of the trip is business. A intends to stay in the United States for only 180 days, but he runs into problems with his business and is required to stay for 300 days.

In year two, A comes to the United States again on business and stays for 90 days. He returns to Brazil as planned.

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[32] Code § 7701(b)(3)(B); Reg. § 301.7701(b)-2 (1993).

[33] See IRC § 911(d)(3), referring to the definition of tax home used under IRC § 162(a)(2) (relating to the deduction while traveling away from home).

[34] Reg. § 301.7701(b)-2(c) (1993). [35]IRC § 7701(b)(3)(B)(i).

[36] IRC § 7701(b)(3)(B)(ii) and Reg. § 301.7701(b)-2 (1993). Factors to be taken into account in determining whether an individual has maintained more significant contacts with the United States than with a foreign country are listed in Reg. § 301.7701(b)-2(d) (1993). See also Reg. § 301.7701(b)-2(e) (1993).

[37] The claim is filed on Form 8840 (Closer Connection Exception Statement). See Reg. § 301.7701(b)8(b)(1) (1997).

[38] IRC § 7701(b)(3)(C). Filing Immigration and Naturalization Form I-485 or other related forms would be an affirmative step disqualifying an individual from the closer-connection exception to the substantial presence test. Reg. § 301.7701(b)-2(f) (1993).

Early in year three, A comes to the United States on business and stays for 170 days. Later in year three, he returns to the United States to take his 6-year-old son to Disney World in Florida. He plans to stay at Disney World for 10 days and then return to Brazil. On the last day of the planned visit, the son breaks his leg in an automobile accident. The son is put into a Florida hospital for treatment, where he remains for five days. To be near his son and provide the boy with necessary support, A remains in Florida. They both leave the United States as soon as possible after the son is released from the hospital. In total, A is present in the United States in year three for 180 days plus the five days that his son was under medical treatment. Under these facts, A is a U.S. resident for year one. He is present in the United States for more than 183 days and does not qualify for any exceptions to the general rule of the substantial-presence test.[39] His intent to stay less than 183 days is not relevant.

A is not a U.S. resident in year two. Under the formula of IRC § 7701(b)(3)(A), A is deemed present in the United States for 190 days (90 + 1/3 × 300). But A is actually present in the United States for less than 183 days in that year. A has his tax home in Brazil and has substantially closer ties to Brazil than to the United States. Thus A qualifies for the closer-connection exemption of IRC § 7701(b)(3)(B).[40]

A's residence status for year three is unclear. Under the formula of IRC § 7701(b)(3)(A), A is deemed present in the United States for 260 days even if the five days he remained because of the medical emergency of his son do not count toward the total (180 + 1/3 × 90 + 1/6 × 300 = 260). A may qualify for the closer-connection exception, but only if he is treated as being actually present in the United States for less than 183 days in year three. Thus, the treatment of the five days he remained on account of the medical emergency is crucial in determining his residence status. According to the Code, a day does not count toward establishing the residency of an individual if that individual was unable to leave the United States on that day "because of a medical condition which arose while such individual was present in the United States."[41] The Code does not specify whether the "medical condition" referred to must be that of the taxpayer, and the regulations provide no clarification.[42]

Questions

1. Under current U.S. law, would Tongsun Park be a resident of the United States for any of the years from 1972 to 1975? In answering that question, assume that Mr. Park was present in the United States for 50 days in 1971 and for 60 days in 1970. Is any other information necessary to determine his residency under current law?

2. Assume that Mr. Park was able to prove that he suffered from a medical condition in 1975 that required him to stay in the United States for an additional 15 days. Any effect on his residency? Would Mr. Park be a U.S. resident under the U.S./Korea tax treaty? Would he be a resident of Korea? That treaty did not go into effect until 1979. Article 3 of that treaty contains a tie-breaker rule similar to the one recommended by the OECD and contained in Article IV of the U.S./Canada treaty.

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[39] See IRC § 7701(b) (1)(A)(ii) and (3)(A). [40]See Reg. § 301.7701(b)-2(d) (1993).

[41] See IRC § 7701(b)(3)(D) and Reg. § 301.7701(b)-3(a)(2) and (c) (1997).

[42] Although the language of the Code and regulations is ambiguous, a reasonable inference is that the medical emergency must be that of the taxpayer. The Commentary to Article 15 (Income from Employment) of the OECD Model Treaty suggests that days spent in a country only on account of a medical emergency of the taxpayer or a family member should not count toward meeting the treaty version of the 183day test.

3. In footnote 19 of *Park*, the Tax Court cites *Nubar v. Comm'r*. This is a rather famous residency case. Would Mr. Nubar be a resident of the United States under the current Code? Should he be taxed as a resident? Is he a U.S. resident under the U.S./Egypt tax treaty, which went into effect at the end of 1981 and which contains the standard tie-breaker rule?

4. Would Mrs. Brittingham be considered a U.S. resident under current U.S. law? How would the lawful-permanent-resident test apply? What about the substantial-presence test? What additional facts, if any do you need to apply these tests?

5. Assume that Mrs. Brittingham spends more than 100 but less than 183 days in the United States each year. Is she a resident under the substantial-presence test?

6. Is Mrs. Brittingham a U.S. citizen? The IRS conceded that she was not. Why?

7. Would Mrs. Brittingham be a resident of the United States by treaty if the United States and Mexico entered into a tax treaty similar to the U.S. Model Treaty?

8. A taxpayer separated from his wife was planning to live in a foreign country and, based on his own activity, expects to meet the so-called 548-day rule of New York law, which is the test for residency in New York. His estranged wife expects to live in Manhattan with their child. The wife has custody of the child, but the husband has limited visitation rights. The question asked was the effect of these facts on the husband's ability to avoid qualifying as a New York resident under the 548-day rule. The "548-day rule" is contained in Tax Law Section 605(b)(1)(A)(ii). This provision states that a New York State domiciliary will not be deemed a New York State resident notwithstanding his or her domiciliary status if that person:

> (1) Within any consecutive 548-day period, is present in a foreign country or countries for at least 450 days; and
>
> (2) During the period of 548 consecutive days, the taxpayer, the taxpayer's spouse (unless the taxpayer and spouse are legally separated) and the taxpayer's minor child are not present in New York State for more than 90 days; and
>
> (3) During the nonresident portion of the taxable years within which the 548-day period begins and ends, the number of days in which the taxpayer is present in New York State does not exceed the same ratio to 90 as the number of days in that taxable year bears to 548.

The New York tax department concluded that the husband generally would not be treated as present in New York for the days that the child spent with the spouse in New York with the exception that if the child was in New York on days that the husband had visitation rights, the husband would be treated as present in New York on those days. See New York State Department of Taxation and Finance, Office of Counsel, TSB-A-12(3)I (July 5, 2012).

Do you support New York's use of domiciliary status as part of the test of residency? Do you prefer the longer New York period (548 days) to the shorter Federal period (183 days). Which rule is more lenient? Which is easier to administer?

§ 3.03 Residence under U.S. Tax Treaties

The residence of an individual is primarily a matter of domestic law. When the residence rules of treaty partners conflict, however, the typical tax treaty provides a tie-breaker rule. Article 4 of the OECD model treaty, which is contained in only slightly modified form in almost all U.S. tax treaties, provides in relevant part as follows:

> 1. For the purposes of this Convention, the term "resident of a Contracting State" means any person who, under the laws of that State, is liable to tax therein by reason of his domicile, residence, place of management or any other criterion of a similar nature, and also includes that State and any political subdivision or local authority thereof. This term, however, does not include any person who is liable to tax in that State in respect only of income from sources in that State or capital situated therein.
>
> 2. Where by reason of the provisions of paragraph 1 an individual is a resident of both Contracting States, then his status shall be determined as follows:
>
> > a) he shall be deemed to be a resident only of the State in which he has a permanent home available to him; if he has a permanent home available to him in both States, he shall be deemed to be a resident only of the State with which his personal and economic relations are closer (centre of vital interests);
> >
> > b) if the State in which he has his centre of vital interests cannot be determined, or if he has not a permanent home available to him in either State, he shall be deemed to be a resident only of the State in which he has an habitual abode;
> >
> > c) if he has an habitual abode in both States or in neither of them, he shall be deemed to be a resident only of the State of which he is a national;
> >
> > d) if he is a national of both States or of neither of them, the competent authorities of the Contracting States shall settle the question by mutual agreement.

In accordance with the above treaty language, the first step in determining the residence of an individual for treaty purposes is to ascertain whether that person is liable to tax as a resident under the respective taxation laws of the Contracting States. As a general matter, if a person is a resident of one Contracting State under its internal law and not of the other, he is treated as a resident of that Contracting State for treaty purposes.

If an individual is a dual resident under the domestic laws of the Contracting States, the second step comes into play. In that step, the treaty tie-breaker rules illustrated above are applied. There are five rules. The first rule has priority over the second, and so forth. Thus a tie-breaker rule is not applied if the issue has been resolved by a rule having a higher priority.

Rule one provides that a dual-resident taxpayer is resident for treaty purposes only in the Contracting State where the individual has a permanent home. If the individual has a permanent home available to him in both Contracting States or in neither, then rule one is not applicable.

Rule two provides that an individual who has a permanent home in both Contracting States is considered to be a resident of the Contracting State where his personal and economic relations are closest. The treaty phrase is "the location of his center of vital interests." If the center of the individual's vital interests cannot be determined or if the individual does not have a permanent home available to him in either Contracting State, then rule two is not applicable.

Rule three provides that an individual will be treated as a resident of the Contracting State where he maintains an habitual abode. If he has an habitual abode in both States or in neither of them, then rule three is not applicable.

Rule four provides that an individual who is a citizen of one and only one Contracting State will be treated as a resident of that Contracting State. This rule does not apply if the individual is a national of both Contracting States or of neither.

Rule five pushes the matter to the competent authorities. Under U.S. tax treaties, the competent authorities must *attempt* to agree to make a dual-resident individual a resident for treaty purposes of one and only one Contracting State.[43] In the unlikely event that they fail, the individual presumably will be treated as a resident of both Contracting States for treaty purposes.

[43] Article 4(2)(d) of the U.S. Model Treaty (2006) provides that the competent authorities "shall endeavor to settle the question by mutual agreement." The comparable clause of the OECD Model Treaty (2008) provides that the competent authorities "*shall settle* the question by mutual agreement." (Emphasis added.) Some recent U.S. treaties (e.g., Belgium, Canada, France, and Germany) include a mandatory arbitration clause that would require that the matter be settled.