Death and Taxes —

a monthly column on tax issues and estate planning

Marjorie Rawls Roberts, Esq.,
Marjorie Rawls Roberts, P.C.

Marjorie Rawls Roberts

Residency for Retirees – The Physical Presence Requirement

Every "bona fide resident" of the U.S. Virgin Islands (USVI) must file a tax return with and pay all taxes due to the Virgin Islands Bureau of Internal Revenue (BIR). Those persons who are not bona fide residents of the USVI but who have USVI income are required to file their Form 1040 with the IRS and the BIR and allocate taxes between the USVI and the United States. But how does a person determine whether he or she is a "bona fide resident"?

In October, 2004, the U.S. Congress passed, and President Bush signed into law, the American Jobs Creation Act. This Act and subsequently issued Treasury regulations contained far-reaching provisions that changed the definition of what constitutes a bona fide resident of the USVI for purposes of filing resident income tax returns with the BIR. Contrary to what many people think, these rules apply to everyone – not just people taking tax benefits under the USVI Economic Development Program.

The Jobs Act and the regulations introduced a "physical presence" test for residency as well as a "closer connection test" and a "tax home test" in lieu of the "facts and circumstances" test in place before 2005. The physical presence test can be met one of five ways. The most publicized ways to meet the physical presence test are where a person spends all or part of 183 days in the USVI or averages 183-days a year over a rolling three-year period. However, for persons with ongoing routine medical needs, extended family to visit, and a desire to travel extensively, spending 183 days in the USVI each year may be problematic. Luckily, the regulations included three other ways to meet the physical presence test that are particularly helpful for retirees who reside in the USVI.

One alternative requires spending no more than 90 days in the United States during a taxable year. A person who spends considerable periods at sea – the eight-month trip sailing from island to island in the Caribbean comes to mind – would not lose bona fide residency in the USVI. U.S. transit periods of fewer than 24 hours don't result in a "U.S. day".

A second alternative requires that an individual spend more days in the USVI than in the United States and have no more than $3,000 in earned income from the United States. "Earned income" doesn't include dividends, interest, or pensions. The IRS stated in the regulations that "retirees who spend several months each year stateside for vacation, for medical treatment, or to visit relatives, and some time traveling in foreign countries, may satisfy the physical presence requirement under this alternative."

Finally, if a person doesn't have a significant connection to the United States, then no day counting is required. To meet this test, a person's spouse and dependents cannot live in the United States (but no limitations exist for grown children or children for which a taxpayer does not have custody), a person must not be registered to vote in the United States, and a person must not have a home available for full-time use in the United States (with special rules for rental properties). A person can, however, have a short-term rental for part of the year in the United States, own a time-share or fractional interest there, or regularly crash in the guest room of a relative or friend.

"In this world nothing can be said to be certain, except death and taxes."
Benjamin Franklin, 1789.

Next month's column will focus on the closer connection and tax home tests. Persons who want to suggest topics for future columns should send an email to AskJorie@TradewindsHouseandHome.com

The information provided in this column is not legal advice and readers should consult with their professional advisors to determine how this information may apply to their specific circumstances.