Omar disaster declaration affects 'day count' for USVI residency

Marjorie Rawls Roberts

On Oct. 29, the head of the U.S. Department of Homeland Security's Federal Emergency Management Agency, or FEMA, announced that federal disaster aid had been made available to the U.S. Virgin Islands due to the damage caused by Hurricane Omar from Oct. 14 to 16 to supplement the territory's recovery efforts.

At that point, the islands of St. Croix, St. Thomas, and Water Island were covered by the declaration. St. John was added on Nov. 11.

Subsequently the sum of $1.16 million in disaster assistance was approved to help the U.S. Virgin Islands Government with Hurricane Omar costs, as announced on Dec. 2, with additional federal assistance expected to be forthcoming.

The declaration of a major disaster for the U.S. Virgin Islands had another, less publicized consequence.

It gives U.S. Virgin Islands residents who were outside the territory during Hurricane Omar, or who left the territory around the time of Hurricane Omar, credit for those days as U.S. Virgin Islands days. Specifically, the Treasury Department has provided, in regulations, that an individual is considered to be present in the U.S. Virgin Islands for any day that he or she is outside the U.S. Virgin Islands because the individual leaves or is unable to return to the U.S. Virgin Islands during any 14-day period within which a major disaster occurs in the U.S. Virgin Islands for which FEMA Notice of a Presidential declaration of a major disaster is issued in the Federal Register.

In non-tax talk, this means that if you left the U.S. Virgin Islands for New York on Oct. 10 of this year, expecting to return on Oct. 14, but didn't make it back until Oct. 24, then those 14 days count as being in the U.S. Virgin Islands and not New York. Since the Hurricane Omar declaration covers Oct. 14 to 16, the relevant 14-day period could be Oct. 1 to 14 — or Oct. 16 to October 29 – or any period in between.

Day-counting is important since once the American Jobs Creation Act of 2004 went into effect on Jan. 1, 2005, many Virgin Islanders are required to count their days in the territory to qualify as residents on a year-by-year basis. If a taxpayer doesn't have a home in the mainland United States available for his or her full-time use, doesn't have a spouse or minor children living on the mainland, and isn't registered to vote in a U.S. state, then the taxpayer does not have to "count days".

However, every other U.S. Virgin Islands taxpayer must count his or her days in the territory and must meet one of four alternative physical presence tests to be a bona fide resident for tax payment and filing purposes.

A person can meet the physical presence test for residency by spending all or part of 183 days in the U.S. Virgin Islands or averaging 183 days a year in the U.S. Virgin Islands over a rolling three-year period.

A person can also meet the test by spending no more than 90 days in the United States during a taxable year. Finally, an individual can meet the test by spending more days in the U.S. Virgin Islands than in the United States and having no more than $3,000 in earned income from the United States.

However, if a person was outside the U.S. Virgin Islands when Hurricane Omar hit and stayed outside for a 14-day period, then that person would actually meet the 183-day test by spending 169 days in the U.S. Virgin Islands – plus the 14 days credited as U.S. Virgin Islands days due to the Disaster Declaration.

In "counting days", taxpayers should keep a copy of the disaster declaration — available at http://www.fema.gov/news/newsrelease.fema?id=46534 — in their tax files along with plane tickets, frequent flyer records, or other evidence of the days that they were outside the U.S. Virgin Islands during the relevant period.

(In addition to "disaster days" other days spent in the United States can also count as U.S. Virgin Islands days, most notably days spent in a hospital by a taxpayer or a close family member and medically necessary time before and after the period of hospitalization.)

In addition to meeting the physical presence tests, taxpayers must be able to demonstrate a closer connection to the U.S. Virgin Islands than anywhere else through such factors as voting in the U.S. Virgin Islands and having a home in the territory. Further, taxpayers who work must have a tax home, or principal place of business, in the territory.

— Marjorie Rawls Roberts is a tax attorney on St. Thomas. This article is not intended to provided legal advice.