

U.S. Residency**Beware misconceptions about U.S. residency rules**By **Veronika Chang**

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(March 11, 2019, 9:24 AM EDT) -- We're in the throes of winter and countless Canadians spend time in Florida. But Snowbirds have a common misconception that they are limited to a stay of six months in the United States for any calendar year. U.S. immigration rules don't actually impose such a limitation but allow a Canadian citizen to stay for six months at a time without a re-entry wait period, as long as the person is a *temporary visitor*. This means a Canadian can potentially stay much longer than six months without running afoul of American laws. However, U.S. laws are not limited to immigration laws. You also have to consider their tax laws and that means the IRS.

Confusion may arise because a U.S. resident is defined differently for immigration and tax purposes. For immigration purposes, a U.S. resident is someone who legally resides in the country, either as an American citizen, permanent resident, or alien resident on a proper visa. But for tax purposes, the definition of a U.S. resident is more complicated.

So, why should a Canadian be concerned about being considered a U.S. resident for tax purposes if they are compliant with U.S. immigration laws? Because of the IRS. Under U.S. tax rules, a "United States person" is subject to U.S. tax on his or her *worldwide* income, and the term United States person means a citizen or resident of the United States.

A U.S. resident is further defined as an individual:

- (a) lawfully admitted for permanent residence (i.e., holder of a U.S. green card);
- (b) who meets the substantial presence test; or
- (c) who makes a first-year election.

What does "first-year election" mean? It refers to one who would meet the definition of a resident under (a) or (b) the following year but not the current year. If so, they can elect to be treated as a U.S. resident for the current year.

Determining your status of U.S. tax residency status under (a) and (c) is pretty straightforward. On the other hand, becoming a U.S. resident by meeting the substantial presence test requires diligently counting the days and performing some rudimentary math. It's a two-prong test. First, you must be present in the U.S. for at least 31 days during the year. The math is required for the second part.

Add up the number of days you were physically present in the U.S. this year, plus one-third of the days you were present there the previous year, plus one-sixth of the days you were present there the second previous year. Thus, if you're concerned about 2018 U.S. tax obligations, the number of days spent south of the border in 2017 and 2016 are pertinent. The sum total must equal or exceed 183 days. If so, you would meet the substantial presence test and would be considered a U.S. resident for tax purposes.

Aside from the basic math, counting the number of days present in the U.S. may require attentive bookkeeping. A person is treated as present in the U.S. on any day they are physically present in the country. But there are exceptions. For example, regular commuters who come from Canada (or

Mexico) for work don't need to count the commuting days, and those who pass through the U.S. in between two non-U.S. countries don't have to count the layover day. However, if the layover extends over 24 hours, that day counts. There are similar exemptions for the crew members of a foreign vessel and diplomats.

The magic number is 122. If a Canadian spends 122 days in the U.S. — roughly four months — they meet (or fail) the substantial presence test and are treated as a U.S. tax resident and thus, as a U.S. taxpayer.

The bottom line is that many Snowbirds easily meet the substantial presence test. Luckily, they have a way out. Snowbirds wishing to enjoy the Florida sunshine for a longer period can file a Form 8840 to claim what is considered a "closer connection to a foreign country exception" to the substantial presence test. Filing this form saves you from becoming a deemed U.S. tax resident by meeting the substantial presence test.

How are you eligible for the closer-connection exception? To figure that out, revisit the math and consider three criteria. First, Snowbirds cannot have been present in the U.S. for 183 days or more in a year. Second, they must have a tax home (i.e., your principal residence) in Canada. Third, they must have a closer connection to Canada. In addition, they are not eligible to claim the closer connection exception if they hold a green card or have applied for one.

This is why counting the number of days you spend in the U.S. has huge tax importance. Seeking proper counsel can be a big help, and so can having a calculator.

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