The "Presence Test" for Bona Fide Residency in Puerto Rico

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Bona Fide Resident of Puerto Rico

As we have discussed in previous articles, to be considered a bona fide resident of Puerto Rico, an individual must meet (i) a presence test, (ii) a tax home test, and (iii) a closer connection test.[1] In this article we will focus on the presence test.

Presence Test

There are five alternative ways to meet the presence test. The five ways include:

1. Be present in Puerto Rico for at least 183 days during the taxable year ("183 Day Rule");
2. Meet the following two requirements ("549 Day Rule"):
   a. Be present in Puerto Rico for at least 549 days during the three-year period consisting of the taxable year and the two immediately preceding taxable years, and
   b. Be present in Puerto Rico for at least 60 days during each of the three taxable years;
3. Be present in the U.S. for no more than 90 days during the taxable year ("90 Day Rule");
4. Meet the following two requirements ("Earned Income Rule"):
   a. Have earned income in the U.S. during the taxable year less than $3,000, and
   b. Be present in Puerto Rico for more days during the taxable year than in the U.S.;

   or
5. Have no significant connection to the U.S. during the taxable year ("No Significant U.S. Connection Rule").[2]

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[1] Code §937(a) and Treas. Reg. §1.937-1. All section references are to the Internal Revenue Code of 1986, as amended (the "Code") and the regulations promulgated thereunder.

[2] Treas. Reg. §1.937-1(c)(1).

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An individual only needs to meet one of the five alternative ways in order to meet the presence test.

Below are examples of different fact patterns discussing when an individual meets one or more of the presence test rules. Although these examples demonstrate when an individual can meet the presence test, they are not representative of when an individual qualifies as a bona fide resident of Puerto Rico. It is important to remember that, in addition to meeting the presence test, individuals must also meet the tax home test and the closer connection test. For our prior article discussing the closer connection test, click here.

David Lives in Israel & Annually Vacations in Puerto Rico

David is a U.S. citizen who lives and works in Israel. David has no home in the U.S. He is single and has no children. David is not registered to vote in U.S. elections.

Once a year, David visits Puerto Rico for ten days around Hannukah. David stays in a hotel in San Juan when he visits. Other than his annual Hannukah visits to Puerto Rico, David has no connection to Puerto Rico. David does not visit the U.S. at all during the year.

David does not meet the 183 Day Rule because he only spends 10 days in Puerto Rico each year. David does not meet the 549 Day Rule because he only spends 30 days in Puerto Rico each three-year period.

David meets the 90 Day Rule because he was not in the U.S. for more than 90 days in the taxable year. David also meets the Earned Income Rule because he had no earned income from the U.S. during the taxable year and he was present in Puerto Rico for more days during the taxable year than he was present in the U.S.

David would have a significant connection to the U.S. if: (A) he has a permanent home in the U.S., (B) he is registered to vote in any political subdivision of the U.S.; or (C) he has a spouse or minor child whose abode is in the U.S.[3] David has no home in the U.S. David is not registered to vote. David is not married, and he has no children. Consequently, David has no significant connection to the U.S. as defined under the No Significant U.S. Connection Rule.

[3] Treas. Reg. §1.937-1(c)(5)(i). Certain minor children are excepted. See Treas. Reg. §1.937-1(c)(5)(i)(C).

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David clearly meets the presence test. In fact, he meets three of the five alternative ways to qualify for the presence test. He only needs to meet one of the ways, and he qualifies for three.

Whether David would meet the tax home test [he does not] or the closer connection test [he does not] are separate questions that we do not discuss in this article.

Ken Cruises the World on His Yacht

Ken is a U.S. citizen. A few years ago, Ken sold his Internet startup company for $500 million. Now Ken spends most of his time on his yacht. Ken no longer has a job. His time is spent managing his investments. His wife lives with him, mostly on the yacht. Ken has three grown children who live in California. Ken has a home in New York and a home in California.

During each year, Ken spends 30 days in the U.S., and he spends 31 days in Puerto Rico. Ken cruises around the world on his yacht during the remaining 304 days of each year.

Ken does not meet the 183 Day Rule because he only spends 31 days in Puerto Rico each year. Ken does not meet the 549 Day Rule because he only spends 93 days in Puerto Rico each three-year period.

Ken meets the 90 Day Rule because he was not in the U.S. for more than 90 days in the taxable year. Ken also meets the Earned Income Rule because he had no earned income from the U.S. during the taxable year and he was present in Puerto Rico for more days during the taxable year than he was present in the U.S.

Ken does not meet the No Significant U.S. Connection Rule because he has two homes in the U.S.

In summary, Ken meets two of the five alternative ways to qualify for the presence test.

Julie Has Been Spending More Time in the U.S. Recently

Julie is a U.S. citizen. In 2022, Julie spent 365 days in Puerto Rico. In 2023, Julie spent 124 days in Puerto Rico and the rest of the days in the U.S. In 2024, Julie spent 60 days in Puerto Rico and the rest of the days in the U.S.

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For 2024, Julie meets the 549 Day Rule. That is, for the three-year period from 2022 to 2024, Julie was present in Puerto Rico for 549 days, and she was present in Puerto Rico for at least 60 days each of the years from 2022 to 2024. Consequently, Julie meets the presence test.

<u>José Attends University in the U.S.</u>

José is a U.S. citizen who was born in Puerto Rico. Up to the age of 18, José never left Puerto Rico. After graduating high school in Puerto Rico, José began attending university in New York. During 2024, José's second year in college, he spent 320 days in the U.S. The university that José attends closes down during the summer. José returned to Puerto Rico for 45 days during the summer of 2024. José did not work at all during 2024. José is not registered to vote.

José does not meet the 183 Day Rule because he did not spend at least 183 days in Puerto Rico during 2024. José does not meet the 549 Day Rule because he did not spend at least 60 days in Puerto Rico during 2024.

José meets the 90 Day Rule because his days of presence in the U.S. as a student are not counted as days of presence in the U.S.[4] José meets the Earned Income Rule because he had no earned income in the U.S. during 2024 and he spent more days in Puerto Rico (45) than in the U.S. (none of his student days are treated as U.S. days[5]). Lastly, José meets the No Significant U.S. Connection Rule because: (i) he does not have a permanent home in the U.S., (ii) he is not registered to vote in any political subdivision of the U.S., and (iii) he does not have a spouse or minor children with an abode in the U.S. Therefore, José meets three of the five alternative ways of meeting the presence test.

<u>Phil and Dorothy's Foreign Travel</u>

Phil and Dorothy are U.S. citizens. They moved to Puerto Rico in 2023. In 2024, they spent 140 days in the U.S., 155 days in Puerto Rico, and 70 days in Europe.

Although Phil and Dorothy only spent 155 days in Puerto Rico in 2024, for purposes of the 183 Day Rule they are considered as present in Puerto Rico for up to 30 days that they spend outside

4 Treas. Reg. §1.1.937-1(c)(3)(ii)(D).

5 *Id.*

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of the U.S. and Puerto Rico.[6] This special 30-day rule only applies if Phil and Dorothy spent more days in Puerto Rico than in the U.S. (without including the extra 30 days).[7] Without considering the extra 30 days, Phil and Dorothy spent 155 days in Puerto Rico and 140 days in the U.S. Because they spent more days in Puerto Rico than in the U.S., they are allowed to count up to 30 of the 70 days in Europe as days in Puerto Rico.

For 2024, Phil and Dorothy are treated as present in Puerto Rico for 185 days (155 + 30). Therefore, Phil and Dorothy meet the 183 Day Rule, and they meet the presence test for 2024.

Beth's First Year in Puerto Rico (But a Hurricane Hit)

Beth moved from California to Puerto Rico on June 22, 2024. She anticipated remaining in Puerto Rico for 192 days from June 22, 2024 to December 31, 2024. Thus, Beth's plan was to meet the presence test in 2024 by meeting the 183 Day Rule.

Ernesto, a powerful tropical storm, was forecast to hit Puerto Rico on August 13, 2024. Concerned about her physical safety, Beth booked a flight to leave Puerto Rico on August 12, 2024. Beth returned to Puerto Rico on August 22, 2024, when she felt it was safe to return. She remained in Puerto Rico for the rest of 2024. A FEMA notice of a Presidential declaration of a major disaster was issued in the Federal Register for Ernesto with an "incident period" of August 13, 2024 to August 16, 2024.

An individual is considered to be present in Puerto Rico on any day the individual is outside Puerto Rico because she leaves or is unable to return to Puerto Rico during any 14-day period within which a major disaster occurs in Puerto Rico and for which a FEMA notice of a Presidential declaration of a major disaster is issued in the Federal Register.[8]

Beth was physically present in Puerto Rico for only 182 days during 2024. However, all 10 days Beth was outside of Puerto Rico were within 14 days of the disaster incident period. Thus, Beth is considered to be present in Puerto Rico for all 10 days she was away. Since Beth was present

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6 Prop. Treas. Reg. §1.937-1(c)(3)(i)(D). The preamble to the proposed regulation explicitly provides that "taxpayers may rely on these proposed regulations". REG-109813-11.

7 *Id.*

8 Treas. Reg. §1.937-1(c)(3)(i)(C).

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in, or considered present in, Puerto Rico for 192 days during 2024, Beth meets the 183 Day Rule, and she meets the presence test for 2024.

Jane's First Year in Puerto Rico (But Caught COVID-19 While Visiting the U.S.)

Jane moved from Florida to Puerto Rico on June 8, 2024. On November 26, 2024, she flew to Florida to visit family for the Thanksgiving Holiday. She planned to return to Puerto Rico on Monday, November 30, 2024. She expected she would meet the 183 Day Rule because she expected she would be in Puerto Rico for 202 days in 2024.

Unfortunately, Jane caught COVID-19 while she was visiting her family. On November 28, 2024, Jane was hospitalized due to her illness. She remained in the hospital for 30 days. She was released on December 28, 2024, and she flew back to Puerto Rico on December 29, 2024.

An individual is considered to be present in Puerto Rico on any day the individual is outside Puerto Rico to receive qualifying medical treatment. Qualifying medical treatment includes inpatient care in a hospital.[9]

Jane was physically present in Puerto Rico for only 172 days during 2024. However, all 30 days Jane was in the hospital due to COVID-19 are considered as days present in Puerto Rico. Since Jane was present in, or considered present in, Puerto Rico for 202 days during 2024, Jane meets the 183 Day Rule, and she meets the presence test for 2024.

Summary

As these examples demonstrate, there are multiple ways to meet the presence test. However, as mentioned earlier, it is important to remember that the presence test is only one of three tests. An individual must also meet the tax home test and the closer connection test in order to be considered a bona fide resident of Puerto Rico. In addition, it is equally important to remember that only Puerto Rico source income qualifies for the exclusion from U.S. tax. Spending time working outside of Puerto Rico can result in myriad unintended adverse U.S. tax consequences. For our prior article discussing the U.S. tax issues when working from the U.S., click here. For our prior article discussing the U.S. tax issues when working from a foreign country, click here.

9 Treas. Reg. §1.937-1(c)(3)(i)(B).

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About Tom Duffy, C.P.A., P.A. & P.C.

Tom Duffy C.P.A., P.A. & P.C. is a Greater Chicago-based firm that specializes in international taxation with a particular focus on U.S. possessions. In addition, the firm is one of the few CPA firms in the country that specializes in representing residents of Puerto Rico during IRS examinations, specifically those taxpayers granted tax incentives under Puerto Rico's Act 60 (formerly Act 20/22).

Our foreign clients rely on our knowledge and expertise in complying with their U.S. tax obligations. Tom Duffy has over twenty years of experience in international tax planning and associated U.S. tax return preparation. The firm services clients in the United States, its possessions, and throughout the world. Tom Duffy is a member in good standing with the American Institute of CPAs. He is licensed to practice in Florida and Illinois.

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