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Internal Revenue Code Section 7701(b): A More Certain Definition of Resident

Rolf E. Kroll

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Internal Revenue Code Section 7701(b): A More Certain Definition of Resident

I. Introduction

Millions of people enter the United States each year.[1] Some come to America to avoid political instability,[2] others come to be with family already in this country.[3] Each receives the constitutional benefits of free speech, religion, and privacy[4] granted to all people within United States jurisdiction. It is a modern day axiom that those enjoying the benefits of living in this country pay for the privilege through the imposition of federal income tax.

The proper time to tax has always been a central issue in the analysis of federal taxation.[5] Related to the timing question is the equally difficult problem of determining the appropriate circumstances under which a tax may be imposed on those whose residential status is undetermined. People who were not born in this country or who are not citizens by blood are faced with a number of important questions concerning their resident tax liability. At what point does a person sufficiently enjoy United States benefits and privileges in order to justify imposition of a tax?[6] Is the receipt of such benefits even necessary for the proper imposition of taxes?[7]

The question of an alien's residential status encompasses the traditional tax questions of gain, control, and timing, and augments them with a jurisdictional issue that by its nature demands resolution before any other.[8] The United States may not impose a tax

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1. *See* 1978 IMMIGRATION & NATURALIZATION SERVICE ANN. REP. 41 [hereinafter cited as I.N.S. ANN. REP.].

2. *See* NAT'L COMMISSION FOR MANPOWER POL'Y, MANPOWER AND IMMIGRATION POLICIES IN THE UNITED STATES, SPECIAL REP. NO. 20 (1978). The Immigration and Nationalization Service classifies these aliens as nonimmigrant. This is a broad category encompassing all who are admitted to the United States for a specific reason. Thus it is difficult to determine exactly how many aliens enter the United States each year specifically for asylum.

3. *Id.*

4. U.S. CONST. amend. I, IV, V, IX, XIV.

5. M. CHIRELSTEIN, FEDERAL INCOME TAXATION 71 (3d ed. 1982) [hereinafter cited as CHIRELSTEIN].

6. Though some courts have held receipt of benefit is not a prerequisite to taxation, *e.g.*, Benitez Rexach v. United States, 390 F.2d 631, 632 (1st Cir. 1968), it is at least a factor to be considered in the determination of whether a person should be subject to tax as a United States citizen. *See* United States v. Lucienne D'H de Benitez Rexach, 558 F.2d 37 (1st Cir. 1976).

7. *See Benitez Rexach*, 390 F.2d 631 (1st Cir. 1968).

8. The question of residence is really one of jurisdiction. For a clear discussion of these

before it has sufficient jurisdictional contacts with the alien either through his citizenship or residence.[9] Thus, analysis of the jurisdictional contacts necessary to impose taxation further complicates the already difficult issues involved in determining proper taxation of aliens.

Until 1984 the complexity involved in determining aliens residence was reflected in both conflicting case law[10] and piecemeal legislation.[11] This made prediction of the likely tax consequences of contact with the United States difficult and uncertain. This confused state of the law, with its concomitant difficulties in administration led to enactment of section 7701(b) of the Internal Revenue Code.[12]

The purpose of this discussion is four-fold. First, it seeks to articulate the central concepts underlying taxation of nonresidents and residents. In so doing, the discussion evdeavors to show the importance of section 7701(b). Second, it attempts to canvas the case law and pertinent regulations and rulings and highlight the ambiguities therein. Third, the discussion will address the essential features of section 7701(b) and illustrate Congress' new approach to the problem of determining resident status for aliens. Finally, the policy implications of section 7701(b) are examined and suggestions for further improvement are made.

II. Taxation of Residents and Nonresidents

Though federal income tax is essentially a tax on transactions,[13] the concept does not exist in a vacuum. In order for an otherwise taxable transaction to be subject to United States federal tax, it must first be recognized as part of the community of transactions in which either the income's source or the parties to the transaction are so closely connected with the United States, that imposition of United States tax would be appropriate. The two theories of jurisdiction under which taxes may be imposed focus on the source of in-

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basic concepts see, E. OWENS, INTERNATIONAL ASPECTS OF U.S. INCOME TAXATION, PART TWO: TAXATION OF NONRESIDENT ALIENS AND FOREIGN CORPORATIONS ON U.S. SOURCE INCOME 3 (1980) [hereinafter cited as OWENS].

9. It follows logically that if the United States does not have jurisdiction to tax an alien, issues of timing, gain, and control are necessarily moot.

10. The *Benitez Rexach* decision is arguably in conflict with *Lucienne D'H de Benitez*. The jurisdictional standards imposed by the respective cases differ on the question of whether receipt of citizenship benefits is a *quid pro quo* to United States taxation. *See Benitez Rexach*, 390 F.2d at 632. *But see Lucienne D'H de Benitez Rexach*, 558 F.2d at 42.

11. *See infra* notes 23-26 and accompanying text.

12. The legislative history for I.R.C. § 7701(b) (P-H 1984) is found in H.R. REP. NO. 432, 98th Cong., 2d Sess. 1523, *reprinted in* 1984 U.S. CODE CONG. & AD. NEWS 468.

13. CHIRELSTEIN, *supra* note 5, at 71. The author states that income tax is a tax on *transactions* instead of being a tax on income in the economic sense. Dividends, interest and rents, gains on sales of property, salaries, wages and fees are all taxable because they occur through the medium of "exchange." *Id.* (emphasis in original).

come[14] and the residential status of the taxpayer.[15] The first theory is based on the notion that if an individual's income is derived from the United States, then some restitution must be made to the United States as compensation for the opportunity to produce the income. The source rules impose tax on nonresident individuals who are not otherwise subject to tax.[16] This holds true in some instances even when the income is only indirectly derived from United States sources.[17]

The second theory concerns the residential status of the taxpayer. This jurisdictional concept has been the source of much confusion and is therefore the focus of this discussion. An individual who is classified as a nonresident alien is taxed only on his United States source income. The extent to which he is taxed on this source income depends upon whether the activity producing the income is a passive investment activity[18] or an active trade or business.[19] In no instance, however, is a nonresident alien taxed on income which has no connection to the United States. In contrast, both United States citizens[20] and resident aliens are taxed on their world-wide income.[21] Thus, the difference between a person treated as a resident alien and a person treated as a nonresident alien is substantial. It can mean the difference between taxing all of a person's world-wide income or taxing only United States income. Given the importance of nonresident alien status for tax purposes, the question of what criteria are used to evaluate an alien's residential status becomes vitally important.

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14. *See* P. McDANIEL & H. AULT, INTRODUCTION TO UNITED STATES INTERNATIONAL TAXATION 49, 58 (1977).

15. *See* R. POSTLEWAITE & M. COLLINS, INTERNATIONAL INDIVIDUAL TAXATION 21-29 (1982) [hereinafter cited as POSTLEWAITE & COLLINS].

16. *Id.* at 21.

17. Typically, the nonresident alien is taxed only on income that is directly traceable to a source in the United States. The marginal rate of this tax will then be determined by the alien's level of participation in that source. If the alien is an active participant in a trade or business, he will be taxed at the marginal rate appropriate to the dollar amount of his gain. If his participation is at a level of passive investment, he will be taxed at the statutory rate of thirty percent. I.R.C. § 871(a) (West 1984). Under § 864(c)(4)(B), however, certain types of foreign income are subject to taxation on the grounds that they are effectively connected to a United States trade or business. POSTLEWAITE & COLLINS, *supra* note 15, at 21 n.1.

18. The distinction between the passive investment activity and active trade or business is used throughout the Code. *See* I.R.C. § 212 (P-H 1984) (deduction for expenses incurred in the production of income); *see also* I.R.C. § 165 (P-H 1984) (deductions for expenses incurred in an active trade or business).

19. *See* OWENS, *supra* note 8, at 4.

20. At first glance, determination of citizenship appears to be an easy matter. But for the unsophisticated taxpayer who is poorly versed on Supreme Court immigration decisions, it can be a convoluted and arbitrary process. *See* Schneider v. Rusk, 377 U.S. 163 (1964). *See also*, POSTLEWAITE & COLLINS, *supra* note 15, at 3 n.1, 9.

21. *Id.* at 4.

III. Pre-Code Guidance

Prior to enactment of section 7701(b), there were three sources of guidance for the would-be nonresident concerning determination of his residential status. First, regulations promulgated by the Treasury Department were by far the most influential source of legislative guidance for both the Internal Revenue Service and the taxpayer.[22] The Internal Revenue Service Rulings served as a secondary source of information on the issue. Finally, case law, through its analysis of the Regulations and Rulings, served to interpret the two legislative sources of guidance and to highlight the inadequacy of their subjective approach.

A. Treasury Regulations and Rulings

Residence is defined by Federal Treasury Regulations (Regulations) in section 1.8971-2.[23] The Regulations state that anyone who is not a mere sojourner or transient in the United States be considered a resident and be subject to the resultant tax consequences.[24] This determination was to be made on the basis of a two-pronged test. Under the Regulations, an individual's residential status depends upon the objective criteria of the length and nature of his stay,[25] and upon his subjective intentions concerning those criteria.[26]

The inherent subjectivity involved in ascertaining another person's intentions is sufficient in and of itself to ensure that determination of an individual's residential status will be marred by uncertainty. The Regulations, however, went further in their pursuit of a viable residence test. They promulgated a set of presumptions concerning the length and nature of the alien's stay in the United States.[27] Unfortunately, because the presumptions were rebuttable by the taxpayer on a showing of sufficient evidence to the contrary, uncertainty and consequent litigation increased.[28] The difficulties

22. *See, e.g.*, Treas. Reg. § 1.871-2 (1957), T.D. 6258, *republished in* T.D. 6500 (1960).

23. Treas. Reg. § 1.871-2(b) (1957) states that an alien is a resident of the United States when he is "actually present in the United States . . . [and] not a mere transient or sojourner . . . ."

24. Thus it was wise for the would-be nonresident to choose a definite departure date within a reasonably short time after arrival. *See* POSTLEWAITE & COLLINS, *supra* note 15, at 5 n.9.

25. Treas. Reg. § 1.871-2(b) (1957).

26. *Id.*

27. The Regulations state that if an alien comes to the United States, "for a definite purpose which in its nature may be promptly accomplished he is a transient." Treas. Reg. § 1.871-2(b) (1957).

28. *See* Joyce de La Begassiere, 31 T.C. 1031 (1959), *aff'd per curiam* 272 F.2d 709 (5th Cir. 1960) (nonresident status is determined on basis of visa status). In this case the court stated in dicta that "some permanence within borders" was all that was necessary to establish residence. Yet the court was unable to find such permanence because petitioner had not bought a house and did not reside in any one place. *Id.* at 1036.

presented by the rebuttable presumption approach used by the Regulations[29] and their focus on the alien's intent[30] raised serious questions concerning the validity of this approach.[31] Congress supplied answers to these questions through enactment of section 7701(b).

The Treasury Regulations were supplemented by a number of Internal Revenue Service Rulings (Rulings).[32] The Rulings tend to address specific questions and problems. Accordingly, their utility is restricted to situations they were intended to cover.[33] Moreover, like the Regulations, the Rulings do not constitute law. They are guides concerning what the Internal Revenue Service believes the law is or should be in a given situation. Nevertheless, the Rulings played a part in creating the legal context that prompted Congress to implement section 7701(b).

Revenue Ruling 69-611, 1969-2 C.B. 150 is one of the few rulings of general application. It offers guidance on the issue of residence. It creates a presumption that an alien who stays in the United States for more than one year is a resident.[34] Unfortunately, this presumption has support in neither the Regulations nor common law.[35] Moreover, the presumption can be rebutted by the taxpayer with evidence that he is a transient.[36] Thus, while the Rulings are another source of guidance concerning determination of an alien's residential status, the problems of overspecificity and lack of support in the Regulations and common law undermine their utility.

B. Case Law

Many of the ambiguities and conflicts present in the Regula-

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29. The last sentence of Treas. Reg. § 1.871-2(b) (1957) reads as follows: "An alien whose stay in the United States is limited to a definite period by immigration laws is not a resident of the United States within the meaning of this section, *in the absence of exceptional circumstances*." *Id.* (emphasis added)

30. *See* Treas. Reg. § 1.871-2(b) (1957).

31. *See generally* Joyce de La Begassiere, 31 T.C. 1031 (1959) (Kern, J. dissenting).

32. *See, e.g.*, Rev. Rul. 69-611, 1969-2 C.B. 150 (presumption that a year's presence establishes residence).

33. *See, e.g.*, Rev. Rul. 76-82, 1976-1 C.B. 192 (dealing with alien commuters).

34. Rev. Rul. 69-611 states in part that

> "[i]f an alien has been residing in the United States for as much as one year there is a presumption that such alien is a resident of the United States for the purpose of income taxes in the absence of facts showing that the alien is, in fact, a transient.

Rev. Rul. 69-611, 1969-2 C.B. 150.

35. *Commission on U.S. Activities of Foreign Taxpayers, Report on the Definition of Resident in Section 451 of the Tax Reform Bill of 1983 (H.R. 4170), reprinted in* TAX NOTES, June 18, 1984, at 1318 [hereinafter cited as TAX NOTES].

36. The rebuttable evidence clause of Rev. Rul. 69-611 reads as follows: "A year's presence in the United States by an alien, does not, however, establish residence beyond doubt. It merely raises a presumption of residence that may be rebutted by any proper evidence showing that the alien is, in fact, a transient, that is a nonresident." Rev. Rul. 69-611, 1969-2 C.B. 150.

tions and Rulings have lead to litigation before United States courts. As a result, courts play a substantial role in shaping the law in this field.

Courts in addressing the criteria necessary to tax an alien as a resident[37] have discussed both the application of the presumptions of residency based on the alien's "declaration of intent to establish residence in the United States"[38] as well as the problems inherent in presumptions of nonresidency based on visa status.[39] Courts have also addressed issues of interpretation of residence,[40] motivation for leaving the country,[41] and the timing of an individual's visits.[42] Thus, case law is the most extensive single source of information relevant to determination of an alien's residential status. It is not, however, any less burdened with the uncertainty found in the Regulations and Rulings. Nevertheless, a more detailed discussion of the state of the common law prior to enactment of section 7701(b) is necessary for a clear understanding of the problems prompting the statute's creation.

The impact of common law on the relevant legislative enactments has been extensive. Courts have not only interpreted these sources of guidance, but on occasion have ignored them,[43] and even overruled them.[44]

1. Residence Status Based on Citizenship.—Schneider v. Rusk[45] exemplifies the occasional conflict between the legislature and the judiciary over questions of citizenship and residence. In *Schneider*, the Supreme Court held that section 352(a)(1) of the Immigration and Nationality Act of 1952,[46] which purported to terminate the citizenship of naturalized citizens remaining abroad over a specified length of time, unjustifiably discriminated against the constitutional rights of naturalized citizens.[47] Shortly after the *Schnei-*

37. *See generally Benitez Rexach*, 390 F.2d at 631.

38. Commissioner v. Nubar, 185 F.2d 584, 587 (4th Cir. 1950), *cert. denied*, 341 U.S. 925 (1951).

39. Joyce de La Begassiere, 31 T.C. 1031, 1038 (1959) (Kern, J. dissenting).

40. *Id.*

41. Dillin v. Commissioner, 56 T.C. 228 (1971).

42. *Id.* at 229.

43. Rev. Rul. 69-611, 1969-2 C.B. 150 finds no support at common law and no analog in the Treasury Regulations. *See* TAX NOTES, *supra* note 35, at 1319.

44. In Schneider v. Rusk, 377 U.S. 163 (1964), the Supreme Court found unconstitutional an immigration statute which automatically terminated the citizenship of naturalized United States citizens. This had the effect of requiring the retrospective payment of taxes in some cases. *See, e.g., Lucienne D'H de Benitez Rexach*, *supra* note 6.

45. 377 U.S. 163 (1964).

46. P.L. No. 82-414, 66 Stat. 163, 269 (1952) (codified as amended at 8 U.S.C. § 1481(a)(1)). This section provided for automatic termination of citizenship of naturalized American citizens when such citizens resided continuously for three years in the country of their birth or former nationality. Section 352(a)(2) of the Act terminates the citizenship of United States nationals when they have resided continuously abroad for five years.

47. *Schneider*, 377 U.S. at 168-69.

der decision, the Internal Revenue Service promulgated Ruling 70-506[48] detailing the consequences of the court's holding in *Schneider*. The Ruling made clear that the *Schneider* approach would be adopted for purposes of determining residency on the basis of citizenship. Consequently, mere absence from United States territorial boundaries no longer sufficed to expatriate a naturalized citizen. Affirmative renunciation of citizenship rights was required before the termination of such rights and their concomitant duties would be recognized.[49] The *Schneider* holding and Revenue Ruling 70-506 begged the question of what constitutes an affirmative relinquishment of citizenship.

United States v. Lucienne D'H de Benitez Rexach[50] attempts to answer this question by establishing at least one standard for relinquishment of citizenship for tax purposes. Basing its decision on the *Schneider* holding, the court in *Lucienne* attempted to impose retrospective taxation on the taxpayer on the basis of citizenship. Not surprisingly the decision came on the heels of Revenue Ruling 70-506. Under the criteria established by the Immigration and Nationality Act of 1952,[51] the respondent was no longer a United States citizen.[52] However, pursuant to *Schneider*, the State Department sent respondent a letter of notification that her expatriation was void and that she was still considered a United States citizen. The respondent replied that "she had accepted her denaturalization without protest and thereafter considered herself to be an American citizen."[53]

Under the Regulations, the alien's intent governs with respect to his or her residential status. But in this case, citizenship rather than residence was being imposed. The distinction between residence and citizenship was doubtlessly lost on the taxpayer, for to her the end result was the same. The United States was demanding payment of back taxes.

The First Circuit was fully aware of the implications of its decision. The court noted that "were *Schneider* used to compel the payment of back taxes by all persons who mistakenly thought themselves to have been validly expatriated, the calculus might shift markedly."[54] Though the *Schneider* decision was being used for pre-

48. Rev. Rul. 70-506, 1970-2 C.B. 1.

49. It has been long established that one of the primary duties of citizenship is the obligation to pay taxes. Cook v. Tait, 265 U.S. 47 (1924).

50. 558 F.2d 37 (1st Cir. 1976).

51. The petitioner had remained in France, the country of her birth, for over three years and had therefore lost her citizenship under § 352(a) of the Immigration and Nationality Act of 1952. *See supra* notes 44-47.

52. 558 F.2d at 39.

53. *Id.* at 40.

54. *Id.* The court stated in dicta that, "[T]he rights stemming from American citizen-

cisely this reason the analysis did not shift, and the *Schneider* rationale was used to justify collection of back taxes. The court stated that it thought that "the balance of the equities mandated that back income taxes be collectible for periods during which the involuntarily expatriated persons affirmatively exercised a specific right of citizenship."[55] Thus, the court hinged its opinion on the fact that the respondent had exercised citizenship rights[56] thereby making the retrospective imposition of tax equitably palatable. This is evidenced by the court's statement that "since the expatriate in fact received benefits of citizenship, the equities favor the imposition of Federal income tax liability."[57]

In isolation, the holding in *Lucienne* appears reasonable. The exercise of citizenship rights will bring about imposition of taxes. The court's decision, however, raises some difficult and important questions. Is the standard imposed by the court a minimum standard? Is the imposition of tax dependent on the taxpayer's receipt of citizenship benefits? Ironically, the answer to this question appears to have been given by the same court eight years earlier in a case involving the respondent's own husband.

The case was *Benitez Rexach v. United States*.[58] In *Benitez Rexach*, taxpayer was a native of Puerto Rico who became an American citizen through the Jones Act of March 2, 1917.[59] In July 1958 taxpayer executed a written renunciation of his American citizenship. Subsequently, a certificate of loss of nationality was duly approved. Taxpayer, then a resident and citizen of the Dominican Republic, engaged in extensive contractual activity for the Republic's dictator, Trujillo. In 1961 Trujillo was assassinated. Soon thereafter, taxpayer applied for a passport to the United States. He claimed that his renunciation of citizenship was not voluntary but had been coerced by threats. After extended appeal,[60] taxpayer's

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ship are so important, that absent special circumstances they must be recognized even for years past." *Id.* The court went on to note that among the important benefits the petitioner received as a function of American citizenship was the knowledge that her children would be born with the rights to become American citizens. *Id.* at 42 n.6.

55. The only "right of citizenship" exercised by the petitioner disclosed on the record was her maintenance of a passport. *Id.* at 42.

56. *Id.*

57. It appears that virtually any exercise of any citizenship right is sufficient to impose taxation. In light of the court's earlier decision in *Benitez Rexach*, 390 F.2d at 631 (receipt of citizenship benefits is unnecessary to impose taxation), its present decision adds little guidance to the potential alien taxpayer at a cost of further ambiguity concerning the number of contacts with the United States necessary to impose a tax.

58. 390 F.2d at 631.

59. P.L. No. 64-368, 39 Stat. 951 (1917) (codified as amended at 48 U.S.C. § 731 (1982)).

60. The United States counsel denied petitioner's application for passport, and the petitioner took his appeal to the State Department. The Board of Review on the Loss of Nationality eventually granted acceptance to the application. *Benitez Rexach*, 390 F.2d at 632.

passport request was granted and his loss of nationality was cancelled.

Because taxpayer's loss of nationality certificate was cancelled, he was considered to be a United States citizen for the years since his renunciation. On these grounds, the Commissioner of the Internal Revenue Service assessed taxpayer with an income tax on his earnings made in the Dominican Republic.

The taxpayer admitted that, as a matter of law, he was a United States citizen, thus removing citizenship from the issues before the court. Instead, taxpayer based his entire defense on the fact that the United States was "freed of its obligations to him as a citizen and he in fact lived and existed as an alien to the United States during the period in question."[61] The First Circuit was not persuaded by this argument. The court found that a taxpayer need not receive benefits in order for taxation to be appropriate.[62] All that was necessary was a relationship between the citizen and the state. As the court noted,

> We cannot agree that reciprocal obligations are mutual at least in the sense that taxpayer contends. It is sufficient that the government's [obligations] stem from its *de jure* relationship without regard to the subjective *quid pro quo* in any particular case. We will not hold that the assessment of benefits is a prerequisite to the assessment of taxes.[63]

The *Benitez Rexach* case lends three lessons to the alien interested in the tax consequences of his contacts with the United States. First, while a declaration of intent to expatriate ends a taxpayer's obligation to pay tax on the basis of citizenship, the effect of such declarations can be undone. Second, without such a declaration, a taxpayer's citizenship will be recognized as valid, even if his intent and reasonable beliefs are opposed to such recognition. Finally, though receipt of citizenship benefits may make the assessment of taxes more equitable, such receipt is not essential to imposition of such taxes. For the average traveler who does not seek expert counsel, this set of guidelines is a veritable maze of legal uncertainty.

2. Mechanisms to Gleen Intent: Visa Status and Duration.— Until 1984 the taxpayer's intent concerning his residence and citizenship had always been relevant to a court's residence determination. The problem presented by using this intent criterion concerned the methods through which it could be determined. Traditionally the taxpayer's intent was gleened from two objective criteria—the dura-

61. *Id.*
62. *See supra* notes 55, 57.
63. *Benitez Rexach*, 390 F.2d at 632.

tion of the taxpayer's stay,[64] and the status of the taxpayer's visa.

In *Commissioner v. Nubar*,[65] Nubar made his desire to be a nonresident alien known from the outset. His visa status supported his declarations of intent. At no time did Nubar's visa status classify him as a United States resident. As early as 1949, however, he asked for an extension of his visa for one year or until the end of the war.[66] Ultimately Nubar remained in the United States for over six years during the period from 1939 through 1945. During his stay in the United States, Nubar traded extensively on the stock market,[67] amassing over 600,000 dollars. Despite the fact that his visa and his written and verbal declarations were to the effect that he was not a resident or citizen of the United States, the court held that Nubar was a United States resident for tax purposes.[68]

Underpinning the *Nubar* decision was Treasury Regulation 111 29.2 11-2.[69] The court felt that Nubar did not classify as a mere transient. Although there was no doubt in the court's mind that Nubar wished to leave the country, the question was when. Quoting directly from the Regulations, the court stated that "a mere floating intention, indefinite as to time, to return to another country is not sufficient to constitute him a transient."[70] Nubar's intent to be a nonresident alien was clearly established, and his business in the United States was of an inherently impermanent nature.[71] However, the objective duration of Nubar's stay convinced the court that his nonresident visa status should not bar taxation.[72]

The use of objective criteria is essential if there is to be any consistency in the determination of an alien taxpayer's intent concerning his residence. However, the objective standards concerning the length and nature of a taxpayer's stay, as well as the status of his visa, may, on occasion, conflict both with his declarations of intent concerning citizenship, and with each other. For example, the length of the taxpayer's stay has served to override the presumption created by his visa status.[73] There have also been cases in which a declara-

64. This theme reflects the influence of Rev. Rul. 69-611, 1969-2 C.B. 150 (one year's presence presumes residence).

65. 185 F.2d 584 (4th Cir. 1950), *cert. denied*, 341 U.S. 925 (1951).

66. *Id.* at 585.

67. The record from *Nubar* shows the taxpayer's extensive stockmarket trading. *Id.*

68. *Id.* at 586.

69. Treas. Reg. § 29.211-2 tracks with the present § 1.871-2(b) (1957), which uses the same language.

70. *Nubar*, 185 F.2d at 587.

71. Nubar's original purpose in coming to the United States was to travel and see the World's Fair. *Id.* at 585.

72. The court also stated that Nubar's original purpose to see the World's Fair was superseded by the inherently indefinite purpose of waiting until the war was over and travel was safe. *Id.* at 586.

73. *See, e.g.*, Rudolf Jellinek, 36 T.C. 826 (1961) (nonresidency found despite declarations of intent to stay permanently in the United States).

tion of intent to establish permanent residence has been deemed a sufficient basis for taxation despite the absence of any real contacts with the United States.[74]

Thus, as the cases show, use of the same criteria in evaluating an alien taxpayer's intent may not be sufficient to ensure equitable and consistent adjudication of residence cases. It is of equal importance that these criteria be applied consistently.[75] Given the ephemeral and fleeting nature of an individual's intent, and the built-in limitations of a subjective approach, it is unlikely that consistent and equitable adjudication can result from even the most conscientious application of the same evidentiary tools.

3. Defining Resident.—Whenever there is a use of terms not in general circulation, or when such terms are used in a specific context, there is bound to be confusion concerning the meaning of those words. The law surrounding nonresident aliens is no exception.

Can a person be a United States resident without having a residence in any one particular place in the United States? This issue was addressed by the dissent in *United States v. Joyce De La Begassiers*.[76] In this case, the majority turned to the dictionary for the definition of "resident." The court found the word "usually implies more or less permanence of abode."[77] The definition must have appealed to the court because one of the court's primary criticisms of the petitioner's argument was his failure to name "any place in the U.S. where Jacques ever established any residence, ..."[78]

The dissent took issue with this definition and with the majority's assertion that "some permanence of living within borders is necessary to establish residence."[79] Judge Kern argued that the majority misunderstood the meaning of residence by asserting that maintenance of a place of abode was a prerequisite for residence rather than a factor to be considered. Both positions have merit.

The majority's argument gives a more concrete standard to follow and thus encourages voluntary compliance. In addition, the ma-

74. *See* Hechavaria v. United States, 374 F. Supp. 128 (S.D. Ga. 1974).

75. The court's decision in William E. Adams, 46 T.C. 352 (1966), presents a good example of the conflicting results achieved even through use of the same criteria. In this case two Canadian citizens, William and Hazel Adams, purchased a Florida home. Hazel spent nine to ten months there while her children attended Florida schools. The other two to three months were spent in the couple's Canadian home, title to which was in Hazel's name. William spent about seventy days per year in the United States. Despite William's declarations of intent to reside in the United States, the limited nature and extent of William's stay was deemed insufficient to overcome the presumption of nonresidence provided by his alienage. *But see Hechavaria, supra* note 74 (alien seaman who made declaration to reside in the United States was held to be a resident despite limited ties to and presence in the United States).

76. 31 T.C. 1031 (1959).

77. *Id* at 1035.

78. *Id.* at 1036.

79. *Id.* at 1038 (Kern, J. dissenting).

jority's approach not only offers more guidance to taxpayers but it is also easier to administer. The dissent's position, on the other hand, seems to be the better conceptual argument. For federal income tax purposes, the alien's location within United States borders is the important factual determination, not his particular location within a given community. If the reverse were true, the salesman who lived from hotel room to hotel room with no home of his own would be a nonresident. Such a result does not comport with Congressional treatment of such travel.[80]

Conceptual confusion is not the only form of misunderstanding surrounding the word "resident." Courts have been subject to outright mistake. As the Fourth Circuit stated in *Nubar*, "[t]he Tax Court in applying the statute has confused residence with domicile . . . ."[81] Misunderstanding the terms used in these cases serves to compound the confusion surrounding the definition of resident.

4. Administration.—A final consideration prompting Congress to change its approach to the problem of determining an alien's residence status was the difficulty in administering the various tests and presumptions found in the Regulations and Rulings. Section 7701(b) challenged the basic approach to the problem, with ease of administration as one of its major goals.

The moment the issue of intent is raised, an extensive factual investigation is practically inescapable. Under the Regulations and Rulings, such an investigation is often required. This process takes time and money. With over 750,000 illegal aliens[82] and 250,000 nonimmigrant aliens[83] coming into the United States each year, the cost of determining their residential status is extreme in light of the meager return on the investment.

The case most often cited for this proposition is *Tongsun Park v. Commissioner*.[84] In *Tongsun*, the court was forced to make extensive findings of fact concerning the various business and personal contacts the taxpayer had with the United States before it could render its decision.[85] Although *Tongsun* represents an extreme ex-

80. *See* I.R.C. § 162 (West 1984).

81. 185 F.2d at 587.

82. I.N.S. ANN. REP., *supra* note 1, at 49. Under Immigration and Nationalization statistics, illegal aliens are those who cross United States borders illegally or who enter the country legally but overstay their visas.

83. Nonimmigrant aliens are those aliens who come to the United States for a specific purpose, such as tourism or to see family. These aliens may not stay indefinitely, but may, and often do choose to change their residence status in order to remain permanently in the United States. *See* NAT'L COMMISSION FOR MANPOWER POL'Y, MANPOWER AND IMMIGRATION POLICIES IN THE UNITED STATES, SPECIAL REP. NO. 20, 112-18 (1978).

84. 79 T.C. 252 (1982).

85. The *Tongsun Park* court was forced to review all the taxpayer's material contacts with the United States for a twelve-year period in order to reach its decision. This extended

ample of the administrative difficulties posed by the pre-Code approach, its message was clear. Courts were calling for legislative action to help with the administrative burden caused by these cases. Section 7701(b) was the answer to this call.

The enactment of section 7701(b) was a reaction. This is to be distinguished from legislation advanced in new areas or legislation in step with previous law. This point is significant when analyzing the structure, approach, and effect of section 7701(b). The legislative definition sacrifices fairness in certain circumstances in favor of certainty. This is partially attributable to the problems which the statute was designed to address. Nevertheless, in an attempt to keep the statute within the limitations of equity and fair dealing, the statute makes exceptions to its overwhelmingly objective approach. These exceptions raise two basic questions. First, do the exceptions achieve their goal of making the statute essentially fair? If so, is the cost of that fairness the same ambiguity and uncertainty that plagued the law in this area before enactment of the statute? Before the substantive questions relevant to the overall effect of the statute can be addressed, a brief outline of the essential features of the statute is necessary.

IV. Structure and Approach of Section 7701(b)

The overriding purpose of section 7701(b) is to provide a more objective definition of residence, thereby facilitating tax planning, return preparation, and enforcement.[86] The section's structure and approach lend themselves to this goal.[87] Thus, while subjective inquiry is required in certain situations,[88] the statute does succeed in creating a more objective set of standards for imposition of residence status on aliens.

Section 7701(b) takes a two-pronged approach to the definition of residence. The first prong addresses those whose intent to reside in the United States establishes the necessary contacts to impose taxation without engaging in the extended factual inquiry required under the Regulations.[89] The second part of the test covers those individuals who make no statement concerning their intent to reside in the

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inquiry took over thirty-three pages of text. *Id.* at 252-86.

86. *See* H.R. REP. No. 432, 98th Cong., 2d Sess. 1523, *reprinted in* 1984 U.S. CODE CONG. & AD. NEWS 468.

87. *See generally* I.R.C. § 7701(b) (P-H 1984).

88. I.R.C. § 7701(b)(3)(B) (P-H 1984) establishes the "closer connection" test. This test exempts aliens present in the United States for less than a half year from the substantial presence test. The test may involve extensive factual inquiry to determine whether the alien is in fact closer to the United States than to another country.

89. Unlike Treas. Reg. § 1.871-2(b) (1957), this approach includes all those who have been lawfully admitted for permanent residence and establishes a per se rule that such individuals be taxed as residents.

United States, but nevertheless take advantage of the benefits of living in this country.[90] An alien lawfully admitted for permanent residence will be deemed a resident from the time he was present in the United States as a lawful resident.[91] Resident status is also imposed on those who are present in the United States for a period of time that meets the substantial presence test.[92] The result of this approach is a greater inclusion of aliens in the resident category.

A. Timing

Because of the obvious emphasis on objectivity, the section's provisions concerning timing are extremely important.

1. First Year of Residency.—Section 7701(b) provides for unique treatment of an alien's first and last years of residence. The tax consequences of an alien's first year of residence[93] are apportioned. The alien is taxed only for the portion of the first year that he is treated as a resident.[94] The date on which an alien becomes a resident is determined differently for those lawfully admitted for permanent residence than for those whose residence is determined by their substantial presence in the United States. Aliens admitted for permanent United States residence are accountable for federal income tax beginning with the first day they are lawfully present in the United States as a permanent resident.[95] Aliens taxable on the basis of their substantial presence in the United States are taxable on their first year of residency as of the first day they were present in the United States, regardless of their residential status at the time.[96]

2. Last Year of Residency.—The Code apportions the alien taxpayer's last year of residence in the same way it apportions the first. The alien taxpayer is not liable for tax on any portion of his last year of residence after he has ceased to a resident.[97] Like the treatment of an alien taxpayer's first year of residence, the final day of an alien's presence in the United States may depend on the statu-

90. I.R.C. § 7701(b)(1)(A)(ii) (P-H 1984) reflects Congress's intent that "[a]lmost all individuals present in the United States for more than half a year should be taxable as United States residents." *Id.*

91. I.R.C. § 7701(b)(1)(A)(i) (P-H 1984).

92. I.R.C. § 7701(b)(1)(A)(ii) (P-H 1984). *See infra* note 131 and accompanying text for a discussion of the substantial presence test.

93. I.R.C. § 7701(b)(2)(A)(i) (P-H 1984) defines the first year of residence.

94. I.R.C. § 7701(b)(2)(A)(i) (P-H 1984).

95. I.R.C. § 7701(b)(2)(A)(ii) (P-H 1984).

96. I.R.C. § 7701(b)(2)(A)(iii) (P-H 1984).

97. I.R.C. § 7701(b)(2)(A)(i-iii) (P-H 1984). This is the only equitable way to treat an alien's last year of residence. It will cause significantly less friction in the international community than another rule taxing the entire calendar year, particularly in instances in which, for example, the alien ceased to be a United States resident on January 23 and was forced to pay a tax based on residency in another country.

tory basis of his residence. If the alien is a lawfully admitted resident, his final day of residence is the last day he is present in the United States in conformity with permanent residence requirements of the Code.[98] If the alien's residence is based merely on the length of his stay in the United States, his residency terminates simultaneously with his last day of physical presence in the United States.[99]

Unlike the Code's treatment of the first year of residence, however, the Code imposes two additional requirements that must be met before the alien's termination of residence will be deemed effective. First, the taxpayer must show he has a "closer connection to a foreign country than to the U.S."[100] Second, the alien taxpayer may not classify as a resident at any time during the next calendar year.[101]

The Code attempts to ameliorate the potential hardships of these requirements in two ways. First, by disregarding an alien's nominal presence in the United States after he terminates his residency,[102] and second, by adding a subjective element to the definition of presence in the United States during the calendar year following the termination of residency.[103] This laudable attempt to achieve an equitable result may inject more complication and uncertainty into the definition of an alien's last year of residence than is warranted. The closer connection test is not at all clear. The confusion caused by the test is augmented by its combination with the tax home concept which is laden with uncertainties of its own. The two provisions do, however, ameliorate some otherwise harsh and odd results.[104]

3. Substantial Presence Test.—The substantial presence test

98. *Id.*

99. The residency starting date for the alien will be the last day he was physically present in the United States in compliance with the substantial presence test.

100. I.R.C. § 7701(b)(2)(B)(ii) (P-H 1984).

101. I.R.C. § 7701(b)(2)(B)(iii) (P-H 1984).

102. Under I.R.C. § 7701(b)(2)(C)(ii) (P-H 1984) a maximum of ten days "nominal presence" in the United States is allowed after termination of residency before the validity of the termination date will be challenged. This allows an alien who has effectively severed all ties with the United States to return for a brief period to tie up loose ends without fear of inequitable tax consequences.

103. I.R.C. § 7701(b)(2)(C)(i) (P-H 1984) is used to alleviate some of the hardships inherent in the objective approach generally taken by the code. An alien who has closer connections to a foreign country and who is not present in the United States for over half of the current calendar year will not be considered a resident for tax purposes. The goal behind this section is to avoid unfair tax consequences. The "closer connection" mechanism is ambiguous, and may be difficult to implement. *See infra* notes 110-12.

104. Without some fairly objective means to ensure that an alien's contacts with the United States were sufficiently meaningful to impose taxation, I.R.C. § 7701(b) (P-H 1984) would fail to carry out Congress's will and would become so rigid and mechanistic that it would fail as an equitable taxation device. It would be a strange result if one alien working continuously in the United States from January 10 through September 10 were taxed on the same period as another alien who left his home on January 10 but returned to close the deal on his home on September 10 and left the country the next day. I.R.C. § 7701(b)(2)(C)(i)(ii) (P-H 1984) helps avoid such results.

is the mainstay of section 7701(b). It is an objective standard based on the length of an alien's stay in the United States. The strength of the test lies in its simplicity. An alien present in the United States for at least 31 days in the current calendar year, who has been present in the United States in the current year and the preceding two years for 183 days, when multiplied by the applicable multiplier, establishes residence under the substantial presence test.[105] The applicable multiplier simply multiplies the number of days in the current year by one, the number of days in the first preceding year by one-third, and the number of days in the second preceding year by one-sixth.[106] Thus, an alien with an average presence in the United States of 122 days or more will be a resident of the United States.[107] Of course an alien who spends 183 or more days in the United States in the current year will be a resident for that year.

The substantial presence test serves as an objective gap filler for the Code. Aliens who spend a significant amount of time in the United States will be taxed on the basis of mere presence. The section eliminates the problems imposed by the Regulation's subjective inquiries[108] and presumptive mechanisms used to determine intent.[109] Unfortunately, the objective numerical approach used in the statute has potential for unjust results.

Section 7701(b) accounts for these rough edges by identifying a number of situations that are exempt from taxation under the substantial presence test. By far the most significant of these is the exception for aliens who are present in the United States for less than half of the current year who can prove a "closer connection" to a foreign country.[110] Section 7701(b) uses the tax home concept borrowed from the Code sections dealing with deductions for traveling expenses[111] to determine whether an alien has a closer connection to a foreign country.[112]

In addition to the foreign tax home exception, the Code makes

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105. I.R.C. § 7701(b)(3)(A)(i), § 7701(b)(3)(A)(ii) (P-H 1984).

106. I.R.C. § 7701(b)(3)(A)(ii) (P-H 1984).

107. H.R. REP. NO. 432, 98th Cong., 2d Sess. 1523, 1524, *reprinted in* 1984 U.S. CODE CONG. & AD. NEWS 468, 469.

108. *See, e.g.*, Treas. Reg. § 1.871-2(b) (1957).

109. *See, e.g.*, Rev. Rul. 69-611, 1969-2 C.B. 150.

110. I.R.C. § 7701(b)(3)(B) (P-H 1984).

111. The definition of tax home used in I.R.C. § 7701(b) (P-H 1984) is found in I.R.C. § 911(d)(3) (West 1984). It reads as follows:

> The term 'tax home' means, with respect to any individual, such individual's home for purposes of section 162(a)(2) (relating to traveling expenses while away from home). An individual shall not be treated as having a tax home in a foreign country for any period for which his abode is within the United States.

Id.

112. I.R.C. § 7701(b)(3)(B)(ii) (P-H 1984). The Code withdraws this exception in cases in which the alien has a change in his residence status pending or has taken steps to change it. *See* I.R.C. § 7701(b)(3)(C)(i-ii) (P-H (1984).

four transactional exceptions. These exceptions are more narrow and their purpose is more specific. First, the statute exempts from an alien's presence in the United States any time spent because the alien's ability to leave the country was made impracticable by medical necessity.[113] The Code also exempts three classes of aliens from treatment under the substantial presence test. Foreign government related aliens,[114] teachers or trainees,[115] and students[116] each have a provision in the statute exempting them from normal treatment under the substantial presence test. Congress, however, gives less reign to teachers, trainees, and students than to foreign government related aliens. The statute places restrictions on teachers, trainees and students which limit the total amount of time these aliens can avail themselves of the exception, and which prohibit stringing the exceptions together.[117] Thus, under section 7701(b), a student may not study physics and thereby attain exempt status from the current year and substantial presence tests, and remain in the United States to teach physics expecting the same legislative grace.[118]

4. Defining Presence in The United States.—Because of the objective approach taken by the section, the single most important underlying concept is that of presence. With the exception of Mexican and Canadian commuters,[119] and those aliens just "passing through,"[120] the statute posits that an alien is "present" in the United States whenever physically present within United States' borders.[121] Thus, with these two rather narrow exceptions listed above, any presence in the United States at any time of day constitutes legal presence in the United States for the day.

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113. It is noteworthy that I.R.C. § 7701(b)(3)(D)(ii) (P-H 1984) exempts aliens who are forced to stay in the United States on account of a medical condition, but not aliens who come to the United States for medical treatment.

114. *See* I.R.C. § 7701(b)(4)(A)(i) (P-H 1984).

115. I.R.C. § 7701(b)(4)(C)(ii) (P-H 1984).

116. I.R.C. § 7701(b)(4)(D)(iii) (P-H 1984).

117. I.R.C. § 7701(b)(4)(E)(P-H 1984) places these limits on students, teachers, and trainees only. It appears Congress felt that were such limitations placed on foreign government related individuals, it would do little to further diplomatic ties with foreign diplomats. Evidently, Congressional support for exchanging educational and technical information with other countries is not as strong as its commitment to international diplomacy.

118. *Id.*

119. Under I.R.C. § 7701(b)(6)(B) (P-H 1984) an alien who regularly commutes to employment from a place of residence in Canada or Mexico will not be considered present in the United States for purposes of the statute on any day he so commutes. In a statute whose major focus is an increase in objectivity and predictability, it is unfortunate that the terms "regularly" and "to employment" go undefined. These will be likely sources of future litigation.

120. I.R.C. § 7701(b)(6)(C) (P-H 1984) exempts from "presence" within the United States any time less than twenty four hours spent in the United States when the alien is en route between two points outside the United States.

121. I.R.C. § 7701(b)(6)(A) (P-H 1984).

V. Policy and Suggestions

A. Policy

The Code's new section successfully eradicates the uncertainty confronting an alien taxpayer attempting to determine his residence status.[122] No longer does visa status establish a rebuttable presumption.[123] Once a person is admitted to the United States for lawful permanent residence, he is a resident alien as a matter of law.[124] In many instances the section merely turns the concepts underlying the presumptions into black letter law.[125] There are, however, two fundamental differences between the approach taken by the section and that taken by the Regulations and Rulings. First, the subjective inquiry into the alien's intent is totally eliminated under the code approach. While subjective criteria are used in the Code,[126] at no time is the focus of the Code's subjective inquiry the potential taxpayer's intent. Second, the Code allows mere presence to constitute sufficient connection with the United States to justify taxation.[127]

These two distinguishing features alone are sufficient to significantly increase the number of aliens taxed as resident aliens in the United States.[128] Moreover, section 7701(b) will probably include a large number of aliens in the resident category without their prior knowledge. Because the alien's intent and expectations are irrelevant unless voiced to declare intent to establish permanent residence, the common sense notions that may have served in the past to alert aliens to possible tax consequences of their connections with the United States are removed. These distinctions are illustrated in a number of the section's provisions.

The heart of section 7701(b) lies in the substantial presence test.[129] Like the section as a whole, the substantial presence test is two-pronged. It creates automatic resident status for aliens whose presence in the United States for one year exceeds 183 days.[130] The

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122. *See* H.R. REP. NO. 432, 98th Cong., 2d Sess. 1523, *reprinted in* 1984 U.S. CODE CONG. & AD. NEWS 468.

123. *Compare* Treas. Reg. § 1.871-2(b) (1957) (residence determined by the alien's *intentions* concerning the length and nature of his stay), *with* I.R.C. § 7701(b)(1)(A)(iii) (P-H 1984) (residence determined by the alien's length and nature of stay).

124. I.R.C. § 7701(b)(1)(A)(i) (P-H 1984) calls for the imposition of resident status on all aliens lawfully admitted for permanent residence, but fails to define lawful permanent resident for two full pages. *See* I.R.C. § 7701(b)(5) (P-H 1984).

125. *Compare* Rev. Rul. 69-611, 1969-2 C.B. 150 (one year residence presumption) *with* I.R.C. § 7701(b)(1)(A)(ii) (P-H 1984) (substantial presence test). *See also supra* note 123.

126. *See, e.g.*, I.R.C. § 7701(b)(3)(B) (P-H 1984) (closer connection test).

127. I.R.C. § 7701(b)(1)(A)(ii) (P-H 1984).

128. TAX NOTES, *supra* note 35, at 1320.

129. I.R.C. § 7701(b)(3)(A)(i-ii) (P.H. 1984).

130. The notion that an alien present in the United States for more than half of the

substantial presence test also establishes resident status for aliens present in the United States for less than half a year but who maintain regular and prolonged presence[131] in the United States.

Unfortunately, the test is one of the few areas of the section that may be overly subjective. An alien present in the United States for less than half of the current year who can establish a closer connection to a foreign country will not be a resident, even if he would otherwise qualify for resident status under the substantial presence test.[132] This exception raises two difficult questions for the alien taxpayer. First, what is a "closer connection?" Though there is evidence that the term has been in use for over twenty years,[133] its meaning remains subject to dispute. Second, how appropriate is the tax home[134] concept in an international context?

B. Ambiguity Surrounding the Closer Connection Test

There appears to be no prior statutory provision using the term "closer connection."[135] Though the concept is not new, it is not couched in the same objective, easy to administer language that marks the rest of the statute.[136] The closer connection concept has an analog in the Treasury Department Model Income Tax Treaty of May 17, 1977.[137] The Treaty uses the language, "his or her personal and economic relations are closer (center of vital interests)."[138] This language, however, has been severely criticized as "highly uncertain in [its] application, involving factual determinations in each case which may be extremely difficult to make and very controversial."[139]

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current year should be a resident is a direct manifestation of congressional intent. *See* H.R. REP. NO. 432, 98th Cong., 2d Sess. 1523-24, *reprinted in* 1984 U.S. CODE CONG. & AD. NEWS 468-69.

131. Substantial presence is determined by a legislative presumption that if the alien's length of stay in the United States in the first year preceding the current year, multiplied by one-third, and the length of stay in the second preceding year, multiplied by one-sixth, when added to the alien's total presence in the current year equals or exceeds 183 days, then residence is established for that current year. There is no underlying logic or reason behind the calculus used here. Absent outright knowledge of the law, the alien taxpayer will be afforded no warning of the impending tax implications of his continued presence in the United States. Though ignorance of the law is no excuse, and the burden of knowing the law properly rests with the taxpayeyr, it would be well to make the ramifications of I.R.C. § 7701(b) (P-H 1984) known to the alien public at large, particularly those aliens with extensive contacts with the United States.

132. I.R.C. § 7701(b)(3)(B) (P-H 1984).

133. TAX NOTES, *supra* note 35, at 1322.

134. There is less than unanimous accord on the issue of the exact definition of "tax home." *See infra* note 140 and accompanying text.

135. This finding is supported by the Committee. *See* TAX NOTES, *supra* note 35, at 1322.

136. This in no way implies that mere ease of administration is indicative of good legislation. In this case, however, given the purpose of the statute, the ambiguity created by the closer connection concept seems ill fit to the task of clarifying the state of the law in this area.

137. Art. IV(2)(a).

138. *Id.*

139. U.S. Treasury Department, Technical Explanation of the 1969 United States-

The goal of preventing unfair taxation when an alien has spent less than half of the current year in the United States is praiseworthy. But the manner chosen by Congress to reach this goal is likely to cause much uncertainty and consequent litigation. Since this is precisely the problem the section was created to remedy, such an approach is ill-advised.

The tax home[140] concept is used in the closer connection to a foreign country exception to the substantial presence test.[141] The use of this concept will serve as the fountainhead of three potential sources of uncertainty. First, the tax home, as defined by the Internal Revenue Service[142] is either the taxpayer's principal place of business,[143] or if the taxpayer has no regular place of business, then his tax home is his place of abode.[144] In isolation, these definitions foster ambiguity. Specifically, the terms "principal place of business"[145] and "regular place of abode"[146] are susceptible to a number of different and conflicting interpretations. In relation to the closer connection test, the confusion surrounding the terms could be a fruitful source of litigation.

The uncertainty created by this definition is compounded by the fact that the courts are not in complete agreement with the Internal Revenue Service's definition of tax home. Some courts have held an individual's tax home is his residence.[147] Other courts have followed the guidance of the Internal Revenue Service and have held that an individual's tax home is his principal place of business. Thus, given the uncertainties surrounding the tax home concept in its domestic use, it is unlikely that the concept will be of any greater clarity or aid in the international sphere.

VI. Conclusion

An alternative was presented to Congress prior to the enactment of section 7701(b). Congress, however, failed to make use of the advantages offered by the proposal. The Committee on United States Activities of Foreign Taxpayers (Committee) advocated a place of accommodation test to be used in combination with the Code's ex-

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Netherlands Estate Tax Treaty, 1976-1, C.B. 477, 479.

140. "Tax home" is defined in I.R.C. § 911(d)(3) (West 1984).

141. I.R.C. § 7701(b)(3)(B)(ii) (P-H 1984).

142. *See* Rev. Rul. 60-189, 1960-11 C.B. 60 (tax home at principal place of business); *but see* Rev. Rul. 71-247, 1971-1 C.B. 54 (tax home at place of abode).

143. Rev. Rul. 60-189, 1960-1 C.B. 60.

144. Rev. Rul. 71-247, 1971-1 C.B. 54.

145. *See, e.g.*, Commissioner of Internal Revenue v. Flowers, 326 U.S. 465 (1946). "The meaning of the word 'home' . . . with reference to a taxpayer residing in one city and working in another has engendered much difficulty and litigation." *Id.* at 471.

146. *See* TAX NOTES, *supra* note 35, at 1321.

147. *See, e.g.*, Rosenspan v. United States, 438 F.2d 905 (2d Cir. 1971), *cert. denied*, 404 U.S. 864 (1971).

isting substantial presence test.[148] Under the proposal, an alien would achieve resident status if he stayed in the United States over 183 days and had a place of accommodation generally available in the United States.[149] Place of accommodation is defined in the proposal as "any fixed place used principally to accommodate individuals overnight."[150] "Generally available" is defined as the "exclusive right to occupy the place of accomodation, and to exclude others from occupying such place for a continuous period which exceeds twelve months taking into account any periods of renewal that are exercised."[151]

The test proposed by the Committee has three advantages over the Code's closer connection to a foreign country approach. First, it is less ambiguous, and more easily understood than the present test. Use of the Committee's proposal would obviate the uncertain law surrounding the tax home and closer connection standards while still providing objective criteria other than mere presence on which to base residence status. Second, by establishing a set of necessary contacts with the United States the Committee's proposal offers aliens a kind of common sense notice of potential tax implications. Thus, the Committee's proposal is more fair to aliens. In addition, the Committee's proposal coincides with Congress' intention that people who stay in the United States for over 183 days should be taxed as residents.[152] Finally, the proposal, which could be used in conjunction with both the current year and the substantial presence tests,[153] would be far easier to administer and enforce because it focuses on contacts with the United States rather than with a foreign country.

Were Congress to adopt the Committee's proposal, the present section 7701(b) would be more fair, more precise and easier to administer. These are the exact goals that Congress intended to achieve. The Committee's proposal should therefore be adopted.

Rolf E. Kroll

148. *See* TAX NOTES, *supra* note 35, at 1320-21.

149. *Id.* at 1320.

150. *Id.* at 1321.

151. *Id.* This control concept encompasses situation in which the place of accommodation is controlled by a person with whom the alien regularly shares such accommodation. The Committee uses presumptions in this regard in the case of an alien's spouse or child. *Id.*

152. H.R. REP. NO. 432, 98th Cong., 2d Sess. 1523-24, *reprinted in* 1984 U.S. CODE CONG. & AD. NEWS 468-69.

153. Though the Committee does not advocate the use of the place of accommodation test in conjunction with the current year provision of I.R.C. § 7701(b) (P-H 1984), it offers the same benefit to the current year test that it does to the substantial presence test. By requiring something other than mere presence to establish residence, the place of accommodation test would be a positive addition to the current year test found in I.R.C. § 7701(b)(3) (P-H 1984).