

What Does Foreign (Non-US) Versus US Mean?

It All Depends on What You are Referring to!

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The goal of this article is to provide a comprehensive checklist of information for the US person to consider prior to accepting an assignment outside/ inside the US. This article is not designed to teach you the technical competence required to perform self compliance; however it will certainly arm you with the knowledge to determine if your US tax preparer knows all that they should know to provide you with technically competent professional services.

Foreign- the Foreign Earned Income Exclusion (FEIE), Foreign Tax Credit (FTC) and Substantial Presence Test (SPT):

Under IRC Sec 911- Citizens or Residents of the United States Living Abroad- the FEIE, Sec. 901- Foreign Tax Credit and Sec. 7701(b) Definition of Resident Alien and Non Resident Alien- the concept of 'foreign' plays a crucial role in determining whether income, income taxes or physical presence qualify for respective exclusions, credits or residency. In all cases the concept of 'foreign' takes on a different definition.

IRC Sec 911/ §1.911-2(g)-(h)- Citizens or Residents of the United States Living Abroad- the FEIE:

To meet the Bonfide Resident Test (BFR), Physical Presence Test (PPT) or Tax Home Test (THT) you must live or be present in a 'foreign country'.

A 'foreign country' is defined as any territory under the sovereignty of a government other than the United States. 'Foreign country' does not include ships or aircraft traveling in or above international waters. Nor does it include offshore installations which are located outside the territorial waters of any individual nation.

Additionally the term 'foreign country' includes the country's airspace and territorial waters, in addition to the seabed and subsoil of those submarine areas adjacent to the country's territorial waters over which it has exclusive rights under international law to explore and exploit the natural resources.

The term 'foreign country' does not include therefore Antarctica or US possessions such as Puerto Rico, Guam, the Commonwealth of the Northern Mariana Islands, the US Virgin Islands and Johnston Island.

Sub-notes- there is a possession exclusion available to individuals who are BFR of American Samoa for the entire tax year. See Form 4563- Exclusion of Income for Bona Fide Residents of American Samoa. Puerto Rico and US Virgin Islands- may not claim the FEIE however residents of Puerto Rico generally are not subject to US tax on Puerto Rican source income.

IRC Sec. 901- Foreign Tax Credit/ §1.901-2(g)(2):

Under US domestic law IRC Sec. 901 and also included in most federally negotiated international income tax treaties, there is a provision to avoid "double taxation". The provision is reportable on IRS Form- 1116- as the "Foreign Tax Credit" (FTC). The FTC is a dollar for dollar reduction of US tax in respect of non excluded foreign tax on non excluded foreign income.

In this instance 'foreign' tax and income are defined as a foreign country or a US possession. A foreign country includes any foreign state and its political subdivisions. A foreign city or province qualify. A US

possession includes Puerto Rico, Guam, the Northern Mariana Islands and American Samoa.
IRC Sec. 7701(b)(1)(A)(2) Definition of Resident Alien and Non Resident Alien:

Under IRC Sec 7701(b) All individuals with enough US presence meeting the Substantial Presence Test (SPT)- comprising the addition of the actual days of US presence in the current year with a fractional two year look back rule- are US resident aliens.

You meet the SPT if you have at least 31 days of US presence in the current year and where the following sums to 183 days or greater: 100 % of the physical days of US presence in the current year + 1/3 of the days of US presence in the preceding year + 1/6 of the days of US presence in the second preceding year.

Under IRC Sec §301.7701(b)-1(c)(2)(ii) The term US includes all 50 states and the District of Columbia (DC), the territorial waters of the US and the seabed and subsoil of those submarine areas that are adjacent to US territorial waters and over which the USD has exclusive rights under international law to explore and exploit natural resources. The term does not include US possessions and territories or US airspace.

Additionally to add a twist in limited circumstances an individual's physical days of US presence may be excluded (be considered 'foreign'?) for purposes of determining the SPT, in cases where they were:

a) exempt individuals IRC Sec 7701(b)(5): (i)/ §301.7701(b)-3. a student in the US on a F, J, M or Q visa, a trainee or a teacher in the US on a J or Q visa, (ii) a professional athlete, or (iii) IRC Sec. 7701(b)(3)(D) an individual with a medical condition, or

b) others IRC Sec 7701(b)(7)/ §301.7701(b)-3.: (i) regular commuters to work in the US from Canada or Mexico, (ii) when in transit in the US between other points for less than 24 hours, (iii) days in the US as a crew member of a foreign vessel and (iv) all employees of international organizations or foreign governments.

c) IRC Sec 7701(b)(3)(B)/ §301.7701(b)-2- In such cases as a US resident alien having less than 183 days in the current year but is in excess of the requirements using the fractional two year look back rule, these individuals will be able to file IRS Form 8840- Closer Connection Exception Statement for Aliens- claiming a "tax home" and "closer connection" to a foreign country and remain US non resident aliens.

d) Relief under a US-XX income tax treaty article covering residency, generally referred to as the "treaty tiebreaker" article.

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