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How Long Must One Stay in the USVI to be Considered a "Resident" to Qualify for the 90% Residency Tax Credit?

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How Long Must One Stay in the USVI to be Considered a "Resident" to Qualify for the 90% Residency Tax Credit?

Cover Page Footnote

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HOW LONG MUST ONE STAY IN THE USVI TO BE CONSIDERED A "RESIDENT" TO QUALIFY FOR THE 90% RESIDENCY TAX CREDIT?

BECKETT G. CANTLEY*

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I. INTRODUCTION

Residents of the United States Virgin Islands (USVI) generally¹ file their tax returns with the USVI tax authorities rather than the Internal Revenue Service (IRS).² Such residents also generally³ make

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1. I.R.C. § 932(a)(1)(A) (2003). A taxpayer:
 - is a citizen or resident of the United States (other than a bona fide resident of the Virgin Islands at the close of the taxable year), and [who] has income derived from sources within the Virgin Islands, or effectively connected with the conduct of a trade or business within such possession, for the taxable year....
2. Rev. Rul. 60-291, 1960-2 C.B. 407 (1960). This rule states the following:
 - For taxable years for which income tax returns are due on or after July 22, 1954, citizens of the United States who are inhabitants of the Virgin Islands, as defined in section 28(a) of the Revised Organic Act of the

all tax payments to the USVI taxing authorities.⁴ The U.S. Naval Services Appropriation Act states that the income tax laws in force in the United States are likewise in force in the USVI.⁵ As the law developed under the mirror system, the provisions of the Internal Revenue Code are applicable to the Virgin Islands so long as the specific section to be applied is not “manifestly inapplicable or incompatible with

Virgin Islands, are required to satisfy their income tax obligations to the United States under the applicable taxing statutes of the United States by filing their returns with the taxing authority of the Virgin Islands....

(emphasis added). See also OFFICE OF GOVERNOR, U.S. VIRGIN ISLANDS, *Tax Structure of U.S. Virgin Islands*, 93 TAX NOTES INT'L 171-18, Sept. 3, 1993, available at LEXSTAT 93 TNI 171-18 (discussing the USVI tax consequences for individuals, corporations, and charities).

3. The Revised Organic Act of the Virgin Islands, 48 U.S.C. § 1642 (2000) states the following:

The proceeds of customers duties, the proceeds of the United States income tax, the proceeds of any taxes levied by the Congress on the inhabitants of the Virgin Islands, and the proceeds of all quarantine, passport, immigration, and naturalization fees collected in the Virgin Islands, (less the cost of collecting all such duties, taxes and fees...), shall be covered into the treasury of the Virgin Islands, and shall be available for expenditure as the Legislature of the Virgin Islands may provide: *Provided*, That the term “inhabitants of the Virgin Islands” as used in this section shall include persons whose permanent residence is in the Virgin Islands, and such persons shall satisfy their income tax obligations under applicable taxing statutes of the United States by paying their tax on income derived from all sources both within and outside the Virgin Islands into the treasury of the Virgin Islands....

See also Rev. Rul. 60-291, *supra* note 2, at 1. This rule provides the following:

For taxable years for which income tax returns are due on or after July 22, 1954, citizens of the United States who are inhabitants of the Virgin Islands, as defined in section 28(a) of the Revised Organic Act of the Virgin Islands, are required to satisfy their income tax obligations to the United States under the applicable taxing statutes of the United States by...*paying into the treasury of the Virgin Islands their tax on income derived from all sources, both within and without the Virgin Islands.*

(emphasis added.)

4. The contact information for the Bureau of Internal Revenue (BIR) for St. Thomas and St. John is:

Virgin Islands Bureau of Internal Revenue
Lockhart Gardens No. 1A
St. Thomas, Virgin Islands 00802
(809) 774-5865
(809) 776-4037 (Fax)

The contact information for St. Croix is:

Virgin Islands Bureau of Internal Revenue
No. 1DA Estate Diamond
Christiansted
St. Croix, Virgin Islands 00820
(809) 773-1040
(809) 773-1006 (Fax)

5. 48 U.S.C. § 1397 (2000). See also Marjorie Rawls Roberts, *U.S. Virgin Islands Enacts Expanded Tax Incentives for Business Owned by Long-Term Residents*, 2001 WORLDWIDE TAX DAILY 113-13, June 11, 2001, available at LEXSTAT 2001 WTD 113-13.

a separate territorial income tax.”⁶ Moreover, under the “equality principle,” discussed in *Johnson v. Quinn*,⁷ “the tax to be paid [to the Virgin Islands] ordinarily is measured by the amount of income tax the taxpayer would be required to pay to the United States of America if the taxpayer were residing in the continental United States.”⁸

For example, a USVI corporation would file Form 1120 with the Virgin Islands Bureau of Internal Revenue (BIR) and not with the U.S. Internal Revenue Service. If the corporation was engaged in business only in the USVI, it would not have any additional income tax filing requirements. If a USVI corporation is engaged in business in the United States, it files a Form 1120F, not Form 1120, with the IRS. As for individuals, a U.S. citizen who is a bona fide resident of the USVI files a single Form 1040 with the BIR reporting his or her worldwide income and does not file a Form 1040 with the IRS.⁹

Residents of the USVI can be eligible for as much as a 90% tax credit¹⁰ on their personal income or investment income from ownership in certain business entities¹¹ by taking advantage of the Economic Development Commission (EDC)¹² program¹³ for investment in the

6. *Chicago Bridge and Iron Co. v. Wheatley*, 430 F.2d 973, 976 (2d Cir. 1970).

7. 821 F.2d 212, 214 (3d Cir. 1987).

8. *Id.* at 214. (quoting *Chicago Bridge*, 430 F.2d at 975-76).

9. See *Roberts*, *supra* note 5.

10. *Id.* at 4.

According to the Economic Development Program, a beneficiary receives a 90 percent reduction in its income tax liability on income from the business for which benefits are granted (although the benefits can be reduced upon renewal). The reduction results in an effective tax rate of approximately 4 percent on income from approved operations. If the beneficiary's owners are residents of the U.S. Virgin Islands, the owners also receive the reduction on their dividends or distributions.

11. Marjorie Rawls Roberts, *Legislative Changes Expand, Clarify U.S. Virgin Islands Tax Incentives*, 2000 WORLDWIDE TAX DAILY 204-6, October 16, 2000, available at LEXSTAT 2000 WTD 204-6.

On February 12, 1998, the USVI finally enacted legislation permitting the establishment of limited liability companies, the registration of foreign limited liability companies, and the establishment of limited liability partnerships. The legislation which went into effect June 1, 1998, provided that under the [then] Industrial Development Program, “corporation” shall include a limited liability company and “partnership” shall include a limited liability partnership if the limited liability company or limited liability partnership otherwise meets all of the requirements for industrial development benefits [now economic development commissions].

See also Act No. 6204, § 6(a), Sess. L. 1998; 29 V.I.C. § 703(i).

12. Marjorie Rawls Roberts, *U.S. Virgin Islands Promulgates New Law on Investment Incentives*, 2001 WORLDWIDE TAX DAILY 67-6, April 3, 2001, available at LEXSTAT 2001 WTD 67-6 (stating that the Industrial Development Program changed to the Economic Development Commission). Furthermore:

Act No. 6390 adds a new chapter to the territory's economic development statute, establishing an economic development authority (EDA). It is an umbrella organization that integrates and unifies the

USVI.¹⁴ Under the law of the Virgin Islands, the Governor is given limited review discretion over program participants.¹⁵ The Legislature explicitly states that its intent is that the Governor use this power only to determine whether a business will “promote the public interest by economic development in the Virgin Islands.”¹⁶

functions of the Government Development Bank, the EDC, the Industrial Park Development Corporation, and the Small Business Development Agency under one executive board.

13. The USVI Exempt Companies Act of 1986 authorized a new provision to I.R.C. §934(b) which became operative on Feb. 24, 1987 with the signing of the Tax Implementation Agreement (TIA) between the United States and the Virgin Islands. Under the initial agreement qualified foreign owned companies could elect for a 20-year local exemption from all taxes except for a \$1,000 annual franchise tax. To qualify the company had to pass certain tests:

1. No U.S. person (or USVI person) could own (within the meaning of I.R.C. § 958) 10% or more of the total voting power or value of its stock;
2. The company could not have U.S. source income, nor income effectively connected with the conduct of a trade or business within the U.S.;
3. The company could not carry on a USVI trade or business; and
4. The company must disclose certain information to the IRS about its activities (but paid no taxes).

While the requirements for inclusion of benefits under the economic development program have changed since its initial inception, it has become broader and now includes a broader base of business which can apply for the tax benefits and also initiated new tax incentive programs specifically designed for small business. See I.R.C. § 934(b) (2003).

14. 29 V.I. CODE ANN. § 708 (2002).

15. *Id.*

16. *Id.* See also *Virgo Corp. v. Paiewonsky*, 5 V.I. 417 (D. St. Croix 1966), *rev'd on other grounds* (holding that the Legislature intended the Governor to use his discretion only to determine if the business will promote the public interest by economic development in the Virgin Islands). See also *Corp. v. Paiewonsky*, 6 V.I. 256 (D. St. Croix 1968) (holding that if an industry is of economic benefit to the Virgin Islands, then the individuals or companies which make up that industry must of necessity benefit the Virgin Islands' economy. Grants under the industrial incentive program are closely articulated with the purposes of the program in advancing the economic development of the Virgin Islands and are not intended as mere gratuities or bounties).

These credits have been in existence for almost fifty years¹⁷ and are filled with historical precedent.¹⁸ These credits are also safely guarded by many members of the U.S. Congressional Black Caucus.¹⁹ In response to the Organisation for Economic Cooperation and Development's (OECD) blacklist of tax havens on which the United States Virgin Islands were included, the U.S. Congressional Black Caucus stated that including the U.S. Virgin Islands on the list "will undermine the ability of developing nations and one of our own territories to strengthen and diversify their economies and reduce poverty."²⁰

One of the most perplexing questions surrounding the acquisitions of these tax credits is how many days during the tax year must a person "reside" in the USVI in order to complete the "residency" requirement? It is clear that a person must reside in the USVI on the last day of the tax year to be considered a "resident."²¹ However, unlike the United

17. Rev. Rul. 60-291, *supra* note 2 :

The Revised Organic Act of the Virgin Islands was approved on July 22, 1954, and its provisions became generally operative as of such date. See section 34 of that Act, 48 U.S.C. Supp. V 1541. However, insofar as it is pertinent here, section 7651(5)(B) of the Internal Revenue Code of 1954 provides, "For the purposes of this title [Title 26], section 28(a) of the Revised Organic Act of the Virgin Islands shall be effective as if such section had been enacted subsequent to the enactment of this title." It is clear, therefore, that section 28(a) of the Act was not revoked by the enactment of the 1954 Code.

Accordingly, although section 6151 of the Code requires, in general, that payments of Federal tax be made to the principal internal revenue officer for the internal revenue district in which the return is required to be filed and section 6091 of the Code requires, in general, that returns be filed in the district in which is located the residence or principal place of business of the taxpayer, by reason of section 28(a) of the Act inhabitants of the Virgin Islands are required to file their income tax returns due on or after July 22, 1954, with and pay their tax from all sources to the taxing authorities of the Virgin Islands.

18. The USVI government was organized under the Revised Organic Act of 1954 in which the United States Congress stated the Virgin Islands is an unincorporated U.S. territory. When the USVI was determined to be an unincorporated U.S. territory many of the current deductions available to certain corporations were instigated. Furthermore, the Virgin Islands tax authority is composed of the Internal Revenue Code of 1986 (hereinafter IRC) and the Naval Appropriation Act, which established the principle that the IRC applies in the Virgin Islands under a "mirror system" where "the Virgin Islands" is substituted for "the United States" whenever necessary to give the I.R.C. the proper effect in the Virgin Islands.

19. U.S. CONGRESSIONAL BLACK CAUCUS, *US Congressional Black Caucus letter on the OECD blacklist, available at* http://www.thepanamanews.com/pn/v_07/issue_06/business_02.html, which was a letter in response to the OECD's blacklist of tax havens. The United States Virgin Islands was included in the list and the U.S. Congressional Black Caucus stated that the U.S. Virgin Islands' inclusion in the list, "will undermine the ability of developing nations and one of our own territories to strengthen and diversify their economies and reduce poverty." *Id.*

20. *Id.*

21. I.R.C. § 932(c) (2003). The code, summarized into more readable language, states the

States, there does not appear to be a 183-day residency requirement²²

following:

A citizen or resident of the United States (other than a bona fide Virgin Islands resident) who derives income from the Virgin Islands or an individual who files a joint return with a citizen or resident of the United States who derives income from the Virgin Islands is not liable to the Virgin Islands for any tax determined under the Virgin Islands mirror code. The tax liability of such individuals to the Virgin Islands is a fraction of the individual's U.S. tax liability, based on the ratio of adjusted gross income derived from Virgin Islands sources to worldwide adjusted gross income. Such an individual files identical returns with the United States and the Virgin Islands. The Virgin Islands' portion of the individual's tax liability (if paid) is credited against his total U.S. tax liability. Taxes paid to the Virgin Islands by the individual, other than the Virgin Islands portion of his U.S. tax liability, are treated for U.S. tax purposes in the same manner as state and local taxes.

Individuals who qualify as bona fide Virgin Islands residents *as of the last day of the tax year* (or individuals who file a joint return with such bona fide residents—see the special rule for joint returns, below, however) pay tax to the Virgin Islands under the mirror system on their worldwide income. They have no final tax liability for such year to the United States, as long as they report all income from all sources and identify the source of each item of income on the return filed with the Virgin Islands. Any taxes withheld and deposited in the United States from payments to such individuals, and any estimated tax payments properly made by such individuals to the United States, are covered into the Virgin Islands Treasury and are to be credited against their Virgin Islands tax liability. Residents of the Virgin Islands who derive gross income from sources outside the Virgin Islands report all items of such income on their Virgin Islands return. Information contained on these returns is compiled by the Virgin Islands Bureau of Internal Revenue and transmitted to the IRS in order to facilitate enforcement assistance.

(emphasis added).

22. 1987-2 C.B. 947 (1960) which provides:

The Tax Reform Act of 1984 added section 7701(b) to the Code to provide a definition of the term "resident alien". Under section 7701(b)(1), an alien individual is considered to be a resident of the United States if he satisfies either of two tests: the green card test or the substantial presence test. As provided in section 7701(b)(1)(A)(i) and (b)(6), an alien individual is considered to be a resident under the green card test if he is a lawful permanent resident of the United States at any time during the calendar year. Under the substantial presence test provided in section 7701(b)(3), an alien individual is treated as a resident if (1) he is physically present in the United States for 183 days or more during the current year, or (2) the sum of the days the alien is physically present in the United States during the current year, plus one-third the number of days the alien is physically present in the United States during the second preceding calendar year, plus one sixth the number of days the alien is physically present in the United States during the second preceding year equals or exceeds 183 days. Section 7701(b)(3) also provides that an individual shall not be considered to meet the substantial presence test if the individual is present in the United States for fewer than 183 days in the current year, has a tax home in a foreign country, and maintains a closer connection to that foreign country than the United States.

Id. For Example, B, an alien individual, is a resident of foreign country X under X's internal

to be considered a resident of the USVI.²³ The purpose of this article is to determine the best answer to the question "How many days must a resident live in the USVI in order to be a 'resident' for purposes of taking advantage of the USVI tax credit?"

II. TAX CONSEQUENCES OF BEING A USVI RESIDENT

A. *The 90% Tax Credit*

Under the Economic Development Commission's program, a beneficiary company receives a 90% reduction in its income tax liability²⁴ on income from the business for which benefits are granted.²⁵

law. Country X is a party to an income tax convention with the United States. B is also a resident of the United States under United States law. B is considered to be a resident of country X under the articles of the convention. The convention does not specifically deal with characterization of foreign corporations as controlled foreign corporations or the taxability of United States shareholders on inclusions of subpart F income, but it provides, in an "other Income" article similar to Article 21 of the 1982 draft of the United States Model Income Tax Convention (U.S. Model), that items of income of a resident of country X that are not specifically dealt with in the articles of the convention shall be taxable only in country X. B owns 80% of the one class of stock of foreign corporation R. The remaining 20% is owned by C, a United States citizen who is unrelated to B. In 1985, corporation R's only income is interest that is foreign personal holding company income under §1.954-2. Because the United States-X income tax convention does not deal with characterization of foreign corporations as controlled foreign corporations, United States internal income tax law applies. Therefore, B and C are United States shareholders within the meaning of §1.951-1(g), corporation R is a controlled foreign corporation within the meaning of §1.957-1, and corporation R's income is included in C's income as subpart F income under §1.951-1. B may avoid current taxation on his share of the subpart F inclusion by filing as a nonresident (*i.e.*, by following the procedure in §301.7701(b)-7(b)). If B files as a nonresident, then his share of the subpart F income will not be subject to tax in the United States because the "other Income" article of the convention reserves to the state of residence the exclusive right to tax income other than those items specifically covered in the convention.

23. Marjorie Rawls Roberts, *Legislative Changes Expand, Clarify U.S. Virgin Islands Tax Incentives*, 2000 WORLDWIDE TAX DAILY 204-6, Oct. 16, 2000, available at LEXSTAT 2000 WTD 204-6.

Before amendment by Act No. 6269 "resident of the United States Virgin Islands" was defined to mean any United States citizen currently domiciled in the USVI for one year or more, or the holder of an alien registration receipt card (United States Department of Justice Form No. 1-151) domiciled in the USVI for one year or more. The statute provided that demonstration of the required residency period could be shown by 'using the date of issuance information from a W-2 form, a voter registration card, a permanent resident card, or a United States Virgin Islands driver's license.

24. For example, Coca-Cola opens a bottling subsidiary in the USVI and has \$100,000,000 in gross sales in 1999 and before tax profits of \$10,000,000. Under the USVI economic development program, the regular U.S. income tax rate of 35% will be applied to the profits, but 90% of the tax payment is exempt, making the actual tax paid to the USVI treasury \$350,000. That is an effective tax rate of 3.5%.

25. 29 V.I.C. § 708(a) gives a detailed list of the business that the USVI wishes to attract. The statute provides:

Invest at least \$100,000, exclusive of inventory, in an approved

The reduction results in an effective tax rate of approximately 4% on income.²⁶ If the owners of a beneficiary business are USVI residents, the owners also receive a reduction on certain dividends²⁷ or distributions²⁸ from the beneficiary business.

industry or business that the Commission has determined to advance the economic well-being of the Virgin Islands and its people. The approved industries or businesses and their established categories shall be: Category I – Rum Production, Milk/Dairy Production, Watch and Jewelry Manufacturing and Assembly; Category II – Product Assembly, Manufacturing (other than Jewelry and Watch Manufacturing and Assembly), Agriculture/Food Processing, Mari culture/Food Processing, Marine Industry, Raw Materials Processing, Hotels/Guesthouses, Transportation and Telecommunications; Category IIA – Service Businesses, not limited to but including, Investment Managers and Advisors, Research and Development, Business and Management Consultants, Software Developers, E-Commerce Businesses, Call Centers, High Tech Businesses, International Public Relations Firms, International Trading and Distribution, and any other businesses serving clients located outside the Virgin Islands. Category III – Utilities, Health Care Facilities, Recreation Facilities, and such other industries or businesses as may be deemed appropriate by the Commission. However, any application that qualifies in two categories, under the provisions of this subsection, shall be considered in the highest payment fee and term category for the purposes of this chapter and an applicant may apply in more than one approved industry or business. Such industry or business shall not, except as provided in section 715 of this chapter, be the same or substantially the same enterprise as one previously granted industrial development benefits under the same or substantially the same ownership, disguised, in whatever manner, for the purpose of qualifying for benefits under this chapter. The fair market value of all equipment leased for a term of at least five years shall be included in determining compliance with the investment requirement. In determining the amount of the investment undertaken by the applicant for purposes of this subsection, the assessed value of land and previously existing buildings (as assessed for tax purposes) used in the industry or business shall be included only to the extent that it does not exceed twenty (20%) percent of the investment undertaken; however, this provision shall not apply to an industry or business of a nature in which investment in land and alteration and/or improvement thereof represents its primary investment factor. The minimum investment required by this section may be reduced, if the Commission finds that the proposed industry or business will provide sufficient employment to justify the lower investment.

26. For further amplification, see *example supra* note 22.

27. 29 V.I.C. 713b(e) (2002). The statute provides that:

The provisions of this subsection shall apply only to shareholders, members, partners, grantors, beneficiaries, or other owners who are bona fide residents of the Virgin Islands pursuant to section 932(c) of the Internal Revenue Code of 1986, as amended. Such shareholders, members, partners, grantors, beneficiaries, or other owners shall be entitled to a ninety percent (90%) reduction on income taxes payable with respect to income derived from the dividends or distributions paid to them by the beneficiary and which dividends or distributions are attributable to income derived from the business or industry for which the certificate is granted and income from investments described in section 713d(c)(2).

28. *Id.*

In general, residency is determined under section 932(c) of the Internal Revenue Code of 1986,²⁹ which means that a person must be a bona fide resident as of the end of his or her tax year.³⁰ Beneficiaries also may receive an exemption from the USVI property tax (.75% of the property's fair market value),³¹ an exemption from USVI gross receipts tax (otherwise imposed at 4% on the gross receipts of a business with no deductions),³² and exemptions from excise taxes on building materials³³ and raw materials.³⁴

B. The Real Estate Exemption

Real property taxes³⁵ are generally comparably lower in the USVI than in the United States.³⁶ A tax rate of \$1.25 per hundred dollars is applied against 60% of "actual value."³⁷ The real property tax may be reduced by establishing a homestead exemption.³⁸ If the owner occupies at least a portion of the property full time, the first \$15,000 of assessed value is not taxable.³⁹ For veterans and widow/widowers of veterans, the exemption is \$25,000.⁴⁰ Persons sixty years old and over having

29. I.R.C. § 932(c) (2003).

30. *Id.*

31. 29 V.I.C. § 713a (2002).

32. *Id.* at § 713a(a)(2). "All banks as defined by the word 'bank' in Title 19, chapter 1, section 1 of the Virgin Islands Code shall be exempt from the payment of all gross receipts taxes imposed by the Government of the Virgin Islands." 33 V.I.C. § 43(d). *See also* Marjorie Rawls Roberts, *Tax Statute Benefits Knowledge-Based Businesses, Establishes Research and Technology Park*, 28 TAX NOTES INT'L 451, 452, Nov. 4, 2002, available at LEXSEE 28 Tax Notes Int'l 451.

33. *Id.* at 713a(a)(3).

34. 33 V.I.C. § 43(d) (2003).

35. OFFICE OF GOVERNOR, *supra* note 2 (stating the Lieutenant Governor's office is responsible for the administration of the real property tax). *See also* 33 V.I.C. § 2301 (2002).

36. 2-34 FLORIDA REAL ESTATE TRANSACTIONS § 34.01:

All real and personal property in the state, unless immune or expressly exempted, ... is subject to taxation [see § 192.011, Fla. Stat.]. Real property, for purposes of taxation, includes land and all buildings, fixtures, and other improvements [§ 192.001(12), Fla. Stat.]. An ad valorem tax is a tax based on the assessed value of property.

Id. Compare 33 V.I.C. § 2301 (2002), which provides that property taxes are assessed, levied and collected a tax of one and one quarter percent (1.25%) of sixty percent (60%) of such assessed value of all real property in the Virgin Islands.

37. OFFICE OF GOVERNOR, *supra* note 2.

38. The Homestead Act, 33 V.I. CODE ANN. § 2305 (2002).

39. *Id.*

40. 33 V.I.C. § 2305(b) (2002):

Provided, however, that homestead exemptions for veterans and for widows of veterans shall be an exemption from real property taxes in an amount not to exceed the then applicable rate of such taxes multiplied by valuation not to exceed \$25,000 on property on which the owner has his homestead exemption constituted. If the property on which the homestead is constituted is assessed up to \$25,000, the entire property shall be exempted from the payment of real property taxes. If the property on

maximum income of \$10,500 per year are granted an exemption of up to \$30,000 assessed value.⁴¹ The maximum exemption in any situation is \$20,000 (or \$250 in tax).⁴²

C. The Economic Development Commission (EDC) System

Under the federal umbrella, the USVI legislature enacted the EDC program.⁴³ The EDC program establishes the types of businesses that the USVI is seeking to attract with tax benefits and the requirements for obtaining those benefits.⁴⁴ There are four categories of industries or business that the EDC seeks to attract to the USVI. The categories are:

which the homestead is constituted is assessed for more than \$25,000 the homestead exemption of \$25,000 shall be deducted from the total assessment of property, and shall not be taxable. Provided, further, that the entire homestead property of a veteran who has military service connected disability due to war or peacetime service entitling him to compensation for permanent and total disability due to: (a) the loss or loss of use of both lower extremities such as to preclude locomotion without the aid of braces, crutches, canes, or a wheelchair, or (b) disability which includes blindness in both eyes, having only light perception, plus loss or loss of use of one lower extremity, as determined by a Veterans' Administration disability board, shall be exempted from the payment of all real property taxes. For the purposes of this section "veteran" means a person who served in the active military, naval or air service of the United States, and who was discharged or released therefrom under conditions other than dishonorable.

41. 33 V.I.C. § 2305(b) (2002):

Provided that homestead exemption for persons 60 years of age or over whose annual gross income from all sources does not exceed \$10,500 shall be an exemption from real property taxes in an amount not exceeding the then applicable rate of such taxes multiplied by valuation not to exceed \$30,000 on property on which the owner has his homestead constituted. If the property on which the homestead is constituted is assessed up to \$30,000 the entire property shall be exempted from the payment of real property taxes. If the property on which the homestead is constituted is assessed for more than \$30,000 the homestead exemption of \$30,000 shall be deducted from the total assessment of property, and shall not be taxable....

42. *Id.*

43. Roberts, *supra* note 5 (explaining the change from the Industrial Development Program to the Economic Development Commission). See also Marjorie Rawls Roberts, *U.S. Virgin Islands Expands Tax Benefits Under Economic Development Program*, 2002 WORLDWIDE TAX DAILY 197-1, Oct. 8, 2002 available at LEXSTAT 2002 WTD 197-1 (explaining that the Economic Development Commissioner receives lengthy, detailed tax benefits applications from business, holds public hearings, and approves or denies the applications).

44. 29 V.I.C. § 708(a) (2002). For the pertinent text of the statute refer to note 26. See also 29 V.I.C. § 708(f). The statute requires that the beneficiary must employ at least 10 USVI residents full-time (working at least 32 hours a week). 29 V.I.C. 710(a) further requires that regardless of the number of employees, at least 80% of all employees must be residents of the USVI.

Category I: Rum production, milk/dairy production, and watch and jewelry manufacturing and assembly,⁴⁵

Category II: Product assembly, manufacturing (other than jewelry and watch manufacturing and assembly), agriculture/food processing, mari culture/food processing, marine industry, raw material processing, hotels/guesthouses, transportation, and telecommunications;

Category IIA: Service business not limited to but including, investment managers and advisers, re-search and development, business and management consultants, software developers, e-commerce business, call centers, high-tech business, international public relations firms, international trading and distribution, and any other business serving clients outside the Virgin Islands; and

Category III: Utilities, health care facilities, recreation facilities, and such other industries or businesses as may be deemed appropriate by the commission.⁴⁶

The above provided list differs from the originally enacted list. The USVI recently enacted legislation to make significant changes to the list.⁴⁷

Under the EDC program, a beneficiary business must make a minimum capital contribution of \$100,000,⁴⁸ exclusive of inventory⁴⁹ and provide full-time⁵⁰ employment for at least ten USVI residents.⁵¹ A

45. See Marjorie Rawls Roberts, *U.S. Congress and USVI Enact Incentives to Attract Jewelry Manufacturers*, 2000 WORLDWIDE TAX DAILY 59-5, Mar. 27, 2000, for further analysis of the laws pertaining to manufacturers of jewelry and watches.

46. Roberts, *supra* note 5.

47. See *id.*

48. See *id.*

49. 29 V.I.C. § 708(a) (2002).

50. See 29 V.I.C. § 708-726 (2002) for the EDC Rules and Regulations. Specifically, 29 V.I.C. § 708(f) states that not only must an EDC beneficiary employ at least 10 USVI residents but they must be employed for at least 32 hours a week. See also 29 V.I.C. § 710(a) for the requirement that regardless of the number of employees one has, at least 80% of all employees must be residents of the USVI.

51. 29 V.I.C. § 708(f) (2002). The code does allow for employment of fewer than ten USVI residents if the employer can satisfactorily demonstrate to the Commission that "the employment of this number of persons in his particular enterprise would not be feasible or practical, and upon further finding by the Commission that the desirability of the proposed enterprise outweighs the fact that it is not labor intensive."

beneficiary business must also agree to purchase all goods⁵² and services⁵³ available⁵⁴ in the USVI from USVI suppliers⁵⁵ that have valid business licenses⁵⁶ and are in full payment of their taxes.⁵⁷

Benefits are available for ten years for the islands of St. John, St. Thomas, and the Christiansted District (eastern side of St. Croix), and for fifteen years for the Frederiksted District (western side of St. Croix).⁵⁸ Benefits can be extended for ten years⁵⁹ if the applicant is in

52. 11A V.I. CODE ANN. § 2-105 (2002):

- (1) "Goods" means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (article 8) and things in action. "Goods" also includes the unborn young of animals and growing crops and other identified things attached to realty as described in the section on goods to be severed from realty (§ 2-107).
- (2) Goods must be both existing and identified before any interest in them can pass. Goods which are not both existing and identified are 'future' goods. A purported present sale of future goods or of any interest therein operates as a contract to sell.

11(A) V.I. Code Ann. § 2-105 (2002) Uniform Laws Comments:

The *definition of goods* is based on the concept of movability and the term "chattels personal" is not used. It is not intended to deal with things which are not fairly identifiable as movables before the contract is performed.

Growing crops are included within the *definition of goods* since they are frequently intended for sale. The concept of "industrial" growing crops has been abandoned, for under modern practices fruit, perennial hay, nursery stock and the like must be brought within the scope of this Article. The young of animals are also included expressly in this definition since they, too, are frequently intended for sale and may be contracted for before birth. The period of gestation of domestic animals is such that the provisions of the section on identification can apply as in the case of crops to be planted. The reason of this definition also leads to the inclusion of a wool crop or the like as "goods" subject to identification under this Article.

The exclusion of "money in which the price is to be paid" from the *definition of goods* does not mean that foreign currency which is included in the definition of money may not be the subject matter of a sales transaction. Goods is intended to cover the sale of money when money is being treated as a commodity but not to include it when money is the medium of payment.

(emphasis added).

53. GILBERT'S LAW DICTIONARY 131 (Pocket size ed. 1997) defines "service" as: "To perform a job; to render labor for the benefit of another."

54. Roberts, *supra* note 5.

55. See 29 V.I.C. § 708(h) (2002).

56. *Id.* The "valid business license" test is met where a firm or corporation that is a resident of the USVI or incorporated under the laws of the USVI, has been licensed to conduct business in the USVI for at least a year.

57. *Id.*

58. 29 V.I.C. § 714(a) (2002).

59. Under prior law, a beneficiary upon proper application and review could obtain extensions to its benefits from the IDC in five-year increments. Eligible beneficiaries can now receive ten year and subsequent extensions in five-year increments. See 29 V.I.C. § 713a (b)

full compliance⁶⁰ with all requirements of the EDC and submits a completed⁶¹ extension application.⁶² The EDC has the authority⁶³ to reduce⁶⁴ the beneficiary business' benefits⁶⁵ under the EDC program upon a filing for an extension.⁶⁶

In order to obtain EDC benefits, a beneficiary business must file a long application⁶⁷ and a public hearing⁶⁸ must be held to discuss the application.⁶⁹ After the hearing, the EDC holds an executive session⁷⁰ to discuss the potential granting of EDC benefits. If the application is

(2002).

60. Full compliance means a firm or company that has met all the requirements needed to become a licensed business under the EDC and that the business continues to meet the requirements throughout the time they are licensed to conduct business in the USVI. *See* 29 V.I.C. § 708 (2002).

61. 29 V.I.C. § 714 (2002). The statute outlines requirements to obtain an extension under the EDC program. The application process generally consists of reviewing the company's business activities while a company was licensed as an EDC. *See also* 29 V.I.C. § 713(a) (2002); 29 V.I.C. § 715 (2002).

62. *See* 29 V.I.C. § 713(a) (2002); 29 V.I.C. § 714 (2002); 29 V.I.C. § 715.

63. The EDC has the authority to reduce the benefits it grants upon an extension, but not upon the initial grant. *See Roberts, supra* note 5.

64. *Id.*

65. The benefits would be the same that are granted under the EDC program to a licensed business; beneficiary businesses receive a 90% reduction of their tax liability on income from the business. Furthermore, they would receive a tax exemption from property tax; 29 V.I.C. § 713a(a)(1), an exemption from USVI gross receipts tax; 29 V.I.C. § 713a(a)(2), a reduction in customs duties on certain items; 29 V.I.C. § 713c, an exemptions from excise taxes on building materials; 20 V.I.C. § 713a(a)(3), and raw material; 33 V.I.C. § 43d.

66. 29 V.I.C. § 713a(b) (2002). Benefits can be extended for 10 years if the applicant is in full compliance with all requirements of the EDC and submits a completed extension application.

67. 29 V.I.C. § 717(a) (2002). The application process consists of a long application and a public hearing. After the hearing, the EDC holds an executive session in which benefits are discussed. The approved applications are then reviewed by the Governor who makes the final determination of all tax benefits.

68. 29 V.I.C. § 1007(a) (2002). The statute states that there "may or may not" be a public hearing. The "may or may not" requirement of this statute pertains to renewal of a company's economic benefits. A public hearing must be held whenever a company initially obtains the economic benefits granted by the EDC. 29 V.I.C. § 717(a) (2002).

69. 29 V.I.C. § 717(a) (2002).

70. *Roberts, supra* note 5. The author explains that: "[T]he board is to include three people who head cabinet-level executive departments or are on the governor's executive staff...In addition, the board includes three private citizens appointed by the governor, one each from St. Croix, St. John, and St. Thomas."

approved by the EDC, then the USVI governor⁷¹ must review the approved application and approve any tax benefits.⁷²

III. GENERAL RULES APPLICABLE TO USVI RESIDENTS

U.S. citizens who are non-resident to the USVI are generally not liable to the USVI for tax even where such non-residents are party to a joint U.S. federal income tax return with a USVI resident.⁷³ However, where a U.S. citizen who is a non-resident of the USVI chooses to file a joint income tax return with a USVI resident, the non-resident may elect to file the return in the USVI under certain circumstances.⁷⁴

U.S. citizens who are non-resident to the USVI are only liable to the USVI for tax on income that the USVI non-resident derives from the USVI.⁷⁵ In such cases, the USVI non-resident would make a determination as to what fraction of the USVI non-resident's worldwide income represents USVI income and would file identical returns with the United States and the USVI.⁷⁶ Any taxes paid to the USVI would be credited against the USVI non-resident's total U.S. tax liability⁷⁷ in the same manner as state and local taxes.⁷⁸

71. 18 V.I.C. § 41 (2002). There are two election districts within the USVI, the district of St. Croix and the district of St. Thomas-St. John. Each district has a separate Board of Elections consisting of seven members who are elected by the electors in each district to terms of four years; provided that the St. Thomas-St. John Board shall include at least two members who are residents of St. John. No more than four members of the same political party shall be members of each board. See 3 V.I.C. § 1 (2002). The Governor and Lieutenant Governor are elected on the same ticket by popular vote for four-year terms. The Governor receives a salary of \$80,000 per annum, payable in equal bi-weekly installments. The Governor may appoint such personal assistants and provide from the funds appropriated to his office such compensation for the same as he deems appropriate. See also <http://www.cia.gov/cia/publications/factbook/geos/vq.html#Govt> for more information on the USVI and the electoral system.

72. 29 V.I.C. § 717(a) (2002).

73. See I.R.C. § 932(c) (2003).

74. I.R.C. § 932(d) (2003). "Special rule for joint returns. In the case of a joint return, this section shall be applied on the basis of the residence of the spouse who has the greater adjusted gross income (determined without regard to community property laws) for the taxable year."

75. OFFICE OF GOVERNOR, *supra* note 2.

The V.I. tax liability for all other U.S. citizens or residents with V.I. income is computed as a fraction of the taxpayer's total tax liability, based on the ratio of adjusted gross income derived from V.I. sources to worldwide adjusted gross income. Such individuals must file signed identical returns with the United States and the Virgin Islands...using IRS Form 8689 to figure out what portion of their income tax must be paid to the Virgin Islands.

76. *Id.*

77. I.R.C. § 932(b) (2003).

78. *Id.*

USVI residents⁷⁹ pay tax to the USVI on their worldwide income.⁸⁰ In general,⁸¹ USVI residents do not have to file federal income tax returns with the IRS.⁸² The USVI resident's USVI income tax return must identify the source of each item of income on the return.⁸³ The USVI Treasury must credit any taxes withheld and deposited in the United States against the USVI resident's USVI tax liability.⁸⁴ The USVI Treasury must also credit any estimated taxes paid in the United States against the USVI resident's USVI tax liability.⁸⁵ Residents of the Virgin Islands who derive gross income from sources outside the Virgin Islands report all items of such income on their USVI income tax return.⁸⁶ The information reported on these USVI income tax returns is compiled by the Virgin Islands Bureau of Internal Revenue and transmitted to the IRS in order to facilitate enforcement assistance.⁸⁷

There are special rules for joint return filers where one filer is a USVI resident and one is a USVI non-resident.⁸⁸ Where only one spouse qualifies as a resident of the USVI, the resident status of both spouses is determined by reference to the status of the spouse with the greater amount of adjusted gross income⁸⁹ for the tax year in question.⁹⁰

79. 29 V.I.C. § 703 (2002).

80. I.R.C. § 932(c) (2003). Individuals who qualify as bona fide Virgin Islands residents as of the last day of the tax year (or individuals who file a joint return with such bona fide residents--however, see the special rule for joint returns below) pay tax to the Virgin Islands under the mirror system on their worldwide income.

81. Individuals who qualify as bona fide Virgin Island residents (see explanation, *supra* note 81) have no final tax liability for such year to the United States as long as they report all income from all sources and identify the source of each item of income on the return filed with the USVI. Any taxes withheld and deposited in the United States from payments to such individuals, and any estimated tax payments properly made by such individuals to the United States, are covered into the Virgin Islands Treasury and are to be credited against their USVI tax liability. Residents of the USVI who derive gross income from sources outside the USVI report all items of such income on their USVI return. Information contained on these returns is compiled by the VI BIR and transmitted to the IRS in order to facilitate enforcement assistance. *Special rule for joint returns:* In the case of a joint return where only one spouse qualifies as a resident of the USVI, the resident status of both spouses is determined by reference to the status of the spouse with the greater amount of adjusted gross income (determined without regard to community property laws) for the tax year in question. *Authority to impose nondiscriminatory local income taxes:* In addition to taxes imposed under the mirror system, the USVI has the authority to enact nondiscriminatory local income taxes (which for U.S. purposes would be treated as deductible state or local income taxes). See I.R.C. § 932 (2003).

82. OFFICE OF GOVERNOR, *supra* note 2. "A Virgin Island resident files a Form 1040 with the Virgin Islands and pays taxes on their world-wide income to the Virgin Islands."

83. 26 C.F.R. 1.871-2(b) (2002) (emphasis added).

84. I.R.C. § 901 (2003).

85. 33 V.I.C. § 1181(d)(3) (2002).

86. OFFICE OF GOVERNOR, *supra* note 2.

87. *Id.*

88. I.R.C. § 932(d) (2003).

89. *Id.* In the case of a joint return where only one spouse qualifies as a resident of the USVI, the resident status of both spouses is determined by reference to the status of the spouse with the greater amount of adjusted gross income (determined without regard to

IV. WHAT DOES IT TAKE TO BECOME A USVI "RESIDENT"?

The USVI statutorily requires that all persons claiming residency in the USVI be a resident of the USVI on the last day of the tax year (end of year test).⁹¹ By itself, this does not provide enough information to determine who is and who is not a resident of the USVI. Simply being present in the USVI on the last date of the year is not sufficient to acquire residency. In order to acquire residency, a person must be domiciled in the USVI on the last day of the tax year and either; (1) meet the U.S. "facts and circum-stances" test (described below), or (2) meet one of the other USVI statutory prescriptions for residency (also discussed below).

A. *How the U.S. "Facts and Circumstances" Test Applies to the USVI*

The U.S. Treasury Regulations provide that whether a person is a resident of the U.S. is determined by the "facts and circumstances" test. The facts and circumstances test provides that:

An alien actually present in the United States who is not a mere transient or sojourner is a resident of the United States for purposes of the income tax. Whether he is a transient is determined by *his intentions with regard to the length and nature of his stay*. A mere floating intention, indefinite as to time, to return to another country is not sufficient to constitute him a transient. *If he lives in the United States and has no definite intention as to his stay, he is a resident*. One who comes to the United States for a definite purpose which in its nature may be promptly accomplished is a transient; but, if his purpose is of such a nature that an extended stay may be necessary for its accomplishment, and to that end the alien makes his home temporarily in the United States, he becomes a resident, though it may be his intention at all times to return to his domicile abroad when the purpose for which he came has been consummated or abandoned. An alien whose stay in the United States is limited to a definite period by the immigration laws is not a resident of the United States within the meaning of this section, in the absence of exceptional circumstances.⁹²

community property laws) for the tax year in question.

90. *Id.*

91. I.R.C. § 932(c)(1)(A) (2003).

92. 26 C.F.R. 1.871-2 (2002). *See also* Preece v. Commissioner, 95 T.C. 594 (Dec. 5, 1990),

The first element of the “facts and circumstances” test is an actual physical presence in the United States for some time period although the time period may be indefinite.⁹³ Second, the “facts and circumstances” test requires an intention to stay in the United States.⁹⁴ Even if the intention is nothing more than a “floating intention”⁹⁵ or the person intends to later leave the United States,⁹⁶ if the person resides in the U.S., the courts will look at the nature of the person’s business in the States⁹⁷ and how long they intend to stay⁹⁸ in order to determine whether the person should be considered a resident of the United States.

The “facts and circumstances” test sets forth one universal test for the courts to use in order to determine whether the person is a resident. There are no differing time periods for different classes of people or professions.⁹⁹ In general, this “facts and circumstances” test will apply equally to the USVI as it does to the United States.¹⁰⁰ As discussed below, the USVI also has carved out exceptions to the “facts and circumstances” test by statute¹⁰¹ and case law.¹⁰² However, in the absence of such exceptions, the “facts and circumstances” test should apply to determine USVI residency.

There are many facts and circumstances which could assist an individual in proving he or she is a resident of the USVI, such as: (1) registering to vote in the USVI; (2) obtaining a driver’s license in the USVI; (3) leasing or purchasing a permanent home in the USVI; (4)

for a judicial interpretation of the facts and circumstances test.

93. 26 C.F.R. 1.871-2(b) (2002).

One who comes to the United States for a definite purpose which in its nature may be promptly accomplished is a transient; but, if his purpose is of such a nature that an extended stay may be necessary for its accomplishment, and to that end the alien makes his home temporarily in the United States, he becomes a resident, though it may be his intention at all times to return to his domicile abroad when the purpose for which he came has been consummated or abandoned.

94. *Id.* “Whether he is a transient is determined by his intentions with regard to the length and nature of his stay.”

95. *Id.* “A mere floating intention, indefinite as to time, to return to another country is not sufficient to constitute him a transient. If he lives in the United States and has no definite intention as to his stay, he is a resident.”

96. *Id.*

97. *Id.*

98. *Id.*

99. 26 C.F.R. 1.871-2(b) (2002).

100. See OFFICE OF GOVERNOR, *supra* note 2 for a discussion of the V.I. tax consequences for individuals, corporations, and charities. Thus, these “facts and circumstances” rules will also apply to the USVI under the “mirror system.”

101. See 27 V.I.C. § 94 (2001) dealing with statutory requirements of registered nurses; 27 V.I.C. § 65 (2001) regarding licensing requirements for dentists; and 27 V.I.C. § 283 (2001) regarding general requirements for licensing.

102. See *Gumbs v. Gumbs*, 14 V.I. 550 (1978); *Williams v. Williams*, 8 V.I. 244 (D. St. Croix 1971).

joining a church, synagogue, or other religious organization in the USVI; (5) joining a social club in the USVI; and (6) obtaining USVI estate planning documentation. This non-exclusive common sense list of facts and circumstances would tend to show whether the person intends to make his or her permanent residency in the USVI. As such, if enough of these type of items have been accomplished prior to the last day of the tax year, then it would appear that both the “facts and circumstances” test and the “year end” statutory requirement have been met for personal residency, regardless of the amount of time the person has actually lived on the island.

B. Exceptions to the “Facts and Circumstances” Test

1. Employees: One-Year Test

The test used to determine residency for employees in the USVI is called the “one-year physical presence test.”¹⁰³ This test is found under section 703 of the economic development statute¹⁰⁴ and provides that to determine residency for employment purposes, a USVI resident is a person who has resided in the USVI for at least one year.¹⁰⁵ This test was subsequently broadened¹⁰⁶ and currently includes any person who attended school in the USVI for at least six years¹⁰⁷ or who graduated from high school in the USVI and is registered to vote in the USVI.¹⁰⁸ In addition, a graduate of the University of the Virgin Islands is also a resident of the USVI as long as they are registered to vote.¹⁰⁹

103. *Id.*

104. 29 V.I.C. §703 (2002).

According to the laws of the Virgin Islands, a resident of the Virgin Islands is defined as follows:

- (1) any United States citizen currently domiciled in the Virgin Islands for one (1) year or more;
- (2) a person who has attended a school in the Virgin Islands for at least six (6) years or is a high school or University of the Virgin Islands graduate and who is registered to vote in the Virgin Islands; or
- (3) the holder of an alien registration receipt card (United States Department of Justice Form No. 1-151) domiciled in the Virgin Islands for one (1) year or more. A person shall demonstrate that he has been a resident for one (1) year or more for the purposes of this chapter using the date of issuance information from a W-2 form, a voter registration card, a permanent resident card, or a Virgin Islands driver's license

105. *Id.*

106. Roberts, *supra* note 5. See also 29 I.R.C. § 703 (2003).

107. 29 V.I.C. § 703(e)(2) (2002).

108. *Id.*

109. *Id.*

2. Professional Licenses

Some of the professional licensure statutes only discuss residency with regard to a particular profession. For example, a residency requirement for a public notary¹¹⁰ requires a person to:

[B]e a citizen of the United States, at least 21 years of age and a resident of the Virgin Islands for at least 5 years preceding his appointment; provided, however, that notaries ex officio and members of the Virgin Islands Bar commissioned in accordance with the provisions of section 771 of this title shall not be required to comply with the five year residency requirement imposed by this section.¹¹¹

However for certain medical professionals the residency requirement is drastically reduced.¹¹² For example, for registered nurses¹¹³ the statute has been interpreted to mean:

Where Legislature provided a *six-months'* residency requirement for persons seeking entrance to certain medical and related professions, but not for dentists and nurses, requiring a six-months' residency of dentists

110. 3 V.I.C. § 771(a) (2002) (covering specific provisions regarding notaries public).

111. 3 V.I.C. § 772 (2002) (emphasis added).

- (1) be a citizen of the United States at least 21 years of age and a resident of the Virgin Islands for at least 5 years preceding his appointment; Provided, however, That notaries ex officio and members of the Virgin Islands Bar commissioned in accordance with the provisions of section 771 of this title shall not be required to comply with the five year residency requirement imposed by this section;
- (2) be a graduate of an accredited high school or have passed the high school equivalency test;
- (3) continue to reside within the Virgin Islands during the term of his office; and
- (4) shall not have been convicted of any crime either within or without the Virgin Islands.

Id. Every applicant for a notary appointment shall be investigated by the Office of the Lieutenant Governor with respect to his character so that prior to the issuance of a commission, the Lieutenant Governor is satisfied with the applicant's good character and integrity for the office. Removal from the Virgin Islands shall vacate his office and be the equivalent of a resignation.

112. See 27 V.I.C. § 94 (2001) dealing with statutory requirements of registered nurses; 27 V.I.C. § 65 (2001) regarding licensing requirements for dentists; and 27 V.I.C. § 283 (2001) regarding general requirements for licensing.

113. 27 V.I.C. § 94 (2002) (stating the statutory requirements related to registered nurses).

and nurses was a matter for legislation and could not be accomplished by administrative regulation.¹¹⁴

Thus, the USVI appears to have a more relaxed requirement for certain needed professions (six months in the above example).

3. Divorce

The USVI statutes only require that a person be a resident in the USVI for six weeks in order to either bring a divorce proceeding within the USVI or for a person to be subject to a divorce proceeding in the USVI.¹¹⁵ This six week standard for divorce cases is strongly supported by USVI case law.¹¹⁶ These cases generally hold that the person's six-week residency in the USVI should be continuous and uninterrupted¹¹⁷ and with the intent to stay in the USVI.¹¹⁸

C. Facts and Circumstances Applied to EDC Program Participants

While it may be possible for a person to establish personal residency under the "facts and circumstances" test without respect to the time the person has spent in the USVI (as discussed above), it would be much more difficult for that person to benefit from an EDC program unless the person has spent a reasonable amount of time as both (1) a resident in the USVI and (2) a participant in the EDC program. It is likely that the USVI would enforce a more relaxed residency requirement for participation in the EDC program than they would for general workers under the "one year" program. Like the above statutes regarding medical professionals, the EDC program is intended to provide an incentive to potential residents who can benefit the USVI.¹¹⁹ Medical professionals bring a skill lacking in the USVI. EDC program participants bring investment, jobs, and a boon to the local economy. In

114. 27 V.I.CODE ANN. § 94 (2002) (emphasis added).

115. 16 V.I.C. § 106 (2002) (internal citations omitted). *See also* Fombrum v. Fombrum, 21 V.I. 300, 302 (1985) (stating that domicile, in and of itself, while sufficient to satisfy constitutional prerequisites, is not sufficient to grant a Virgin Islands court jurisdiction in a divorce action; the statutory requirement of six-weeks residency must still be met, and residency exists independent of domicile, although residency can be submitted in support of a claim of domicile).

116. *See Gumbs & Williams, supra* note 102.

117. *Fombrum, supra* note 115.

118. *Id.*

119. *Roberts, supra* note 5:

One of the perceived benefits of the Industrial Development Program is to reverse brain drain by creating jobs in the territory, so the definition of resident of the Virgin Islands was expanded, effective October 31, 1998, to include 'a person who has attended a school in the Virgin Islands for at least six (6) years of who is a high school graduate and who is registered to vote in the Virgin Islands'.

addition, like the medical profession, the EDC program (as discussed above) is only offered to businesses who are engaged in one of four ¹²⁰ categories.¹²¹ The businesses listed above demonstrate that the USVI wants to attract certain types of companies¹²² to the USVI and thus, in order to attract those businesses, they generally have less stringent residency requirements in order for EDC program participants to benefit from their investment.

The six-week residency requirements found in the divorce statute¹²³ are a practical standard not only for a business wanting to move to the USVI, but for the USVI government as well. The shortened time frame would be an added incentive for a business to move to the USVI. Furthermore, the requirements for residency, continuity, and uninterrupted residency coupled with the intent to stay, are not so onerous that they would substantially impede a person or business from claiming residency in the USVI. In addition, the requirements also protect the interest of the USVI because a person or business is required to take assertive actions that prove they intend to stay and be domiciled in the USVI. Moreover, the person or business must also be physically present in the USVI, and while the physical presence of the person may not always be uninterrupted (see discussion below), so long as the intention to stay in the USVI is evidenced by assertive action,¹²⁴ the six-week time frame should not be destroyed.

A lack of continuity and uninterrupted residency does not absolutely preclude a person from claiming domicile under the “facts and circumstances” test. In *Mitchell v. United States*¹²⁵ the court stated: “[t]hat domicile once acquired is not lost simply due to absence from the place of domicile (when the *intent to return remains*).”¹²⁶ The rule in *Mitchell* would appear to help further define the “facts and circumstances” test. Therefore, so long as a person takes logical steps to demonstrate an intention to stay and claim domicile in the USVI,¹²⁷ then he or she should not be required to be physically present the entire

120. 29 V.I.C. § 708(a) (2002). The categories are listed in Part II. B. of the text and at note 26.

121. Roberts, *supra* note 5.

122. *Id.* The USVI wants to “advance the economic well-being of the United States Virgin Islands.”

123. 16 V.I.CODE ANN. § 106 (1988).

124. *Berger v. Berger*, 3 V.I. 477 (3d Cir. 1954) (holding that although the plaintiff in divorce action left his domicile in New York on the advice of a physician and came to live in Virgin Islands, securing employment there, becoming a member of local library and taking out a permanent driver's license, were evidence sufficient for finding that the plaintiff had established domicile in USVI and such conclusion was not rebutted by absence of plaintiff from the Islands on pleasure or business trips or by payment of Federal income taxes in State of former domicile for the year prior to change of domicile.)

125. 88 U.S. 350 (1875).

126. *Id.* (emphasis added).

127. For a good example, see the *Berger* case, *supra* note 124.

six weeks in an uninterrupted fashion.¹²⁸ For example, the resident's business may require her to be out of the USVI to serve customers such that she is not able to be in the USVI uninterrupted for six weeks, even though she will be in the USVI for at least six weeks total during the year. It should be noted though that persons seeking domicile have the burden of proving that they intend to claim domicile in the USVI.¹²⁹ Furthermore, persons seeking residency have to be ready to show evidence that indicates that they intend to make the USVI their domicile.¹³⁰ The intent to remain domiciled in the USVI requires that they show evidence that they intend to remain in the USVI and establish a home there. However, a person is not required to show an intention to remain in the USVI until death. Rather, a person need only show an intention to make a home in a place until some reason makes it desirable or necessary to leave.¹³¹ By contrast, a person's intent to move to another place outside the USVI can terminate any residency claim that a person has made.¹³² Finally, if a person is claiming solely through the divorce statute and not through the "facts and circumstances" test (i.e., the person is involved in a divorce proceeding in the USVI), then the case law would indicate the person would need to be in the USVI for the entire six weeks in an uninterrupted fashion to take advantage of the divorce statute.¹³³

D. Summary

Generally, a combination of the "facts and circumstances" test¹³⁴ and the "end of year" tests¹³⁵ will determine whether an individual can claim

128. See *Williams v. Williams*, 8 V.I. 244 (D. St. Croix 1971) (holding that a person need not intend to remain in a place until death to acquire domicile there sufficient to vest a court with divorce jurisdiction; it is only necessary to intend to make a home in a place until some reason not incident to the divorce makes it desirable or necessary to leave). See also the *Berger* case, *supra* note 124 (stating that absence of plaintiff from Islands on pleasure or business trips was not enough to rebut presumption of Virgin Islands residency requirements).

129. See *Williams*, *supra* note 102.

130. See *Korn v. Korn*, 398 F.2d 689 (3d Cir. 1968).

131. See *Williams*, *supra* note 102 at 328.

132. *Sachs v. Sachs*, 4 V.I. 102 (3d Cir. 1957) (holding complaint was properly dismissed for lack of jurisdiction where evidence showed that plaintiff, who had resided in the Islands six months before commencing action, intended to return to Massachusetts).

133. The courts have generally upheld the continuous and uninterrupted requirement. See *Fombrum*, *supra* note 115 (granting defendant's motion to dismiss commencement of the divorce action because she had not resided continuously and uninterruptedly for six weeks in the USVI and therefore did not fulfill the residency requirement). See also *Gumbs*, *supra* note. 102 (dismissing a petition for divorce on the grounds that the petitioner had not maintained continuous and uninterrupted residency in the USVI for the six-week time requirement).

134. 26 C.F.R. § 1.871-2 (2002). See also *Preece v. Commissioner*, 95 T.C. 594 (1990) discussed in note 92.

135. I.R.C. § 932(c)(1)(A) (2003).

residency in the USVI.¹³⁶ However, the USVI has separately carved out by statute a general one-year presence test¹³⁷ for employees in the USVI,¹³⁸ and the Virgin Islands Code has several professions that do not even require the one-year presence test.¹³⁹ With respect to individuals wishing to claim benefits as participants in EDC programs, it is likely that the USVI will require more of a personal time commitment to the USVI. Perhaps a six-week commitment would be the proper time commitment, given it is the time commitment required to take advantage of the USVI divorce laws. As such, the residency requirements of the USVI might be summarized as follows:

- (1) If the person is a W-2 employee, then the person must be domiciled in the USVI for one year before becoming a resident.
- (2) If the person's profession is covered by a particular USVI statute, then that person's time commitment for residency would likely be contained in the USVI statute, generally, six months.
- (3) If the person is not covered by (1) or (2) and is currently (this tax year) not seeking to receive benefits from an EDC program, then the "facts and circumstances" test applies together with the "year end" test. However, no specific amount of time on the USVI is likely to be required.
- (4) If the person is currently seeking (this tax year) benefits from an EDC program, then the time commitment to the USVI must be more substantial than in (3). Perhaps the six-week test contained in the divorce statute is the proper test, although "facts and circumstances" may dictate that the six-weeks period need not be uninterrupted.

V. WHAT IS THE CONGRESSIONAL OUTLOOK ON THE CREDIT?

The most significant legislation to pass affecting the United States Virgin Islands tax credit was the passage of the Foreign Sales Corporation (FSC) Repeal and Extraterritorial Income Exclusion Act of

136. 48 U.S.C. § 1397 (2000).

137. Roberts, *supra* note 5.

138. 16 V.I.C. § 106 (2002).

139. *Id.*

2000. This act effectively repealed the foreign sale corporation program beginning on December 31, 2001.¹⁴⁰ The new legislation approved by Bill Clinton was in response to the World Trade Organization's (WTO) contention that the FSC regime was a prohibited export subsidy.¹⁴¹

The FSC Repeal and Extraterritorial Income Exclusion Act of 2000 was detrimental to the USVI because FSCs constituted the largest part of the USVI financial services industry.¹⁴² The USVI Lieutenant Governor, Gerard Luz James II, stated, "[T]he financial impact of such a ruling would be detrimental to the Virgin Islands economy, which is already experiencing an extremely large deficient."¹⁴³ In response to the FSC Repeal and Extraterritorial Income Exclusion Act the USVI legislature approved a bill that would replace its foreign sales corporations at year-end and has created a new form of entities called the V.I. foreign sales corporations (VIFSCs).¹⁴⁴

140. William L. Blum, *U.S. Virgin Islands Legislature Approves New Tax Exemption Program*, 24 TAX NOTES INT'L 1306, Dec. 10, 2001. "The U.S. Virgin Islands — the first jurisdiction to enact local FSC legislation when the program was created in 1984, and where more than 4,000 FSCs have been created over the years...." See also Marjorie Rawls Roberts, *WTO's FSC Ruling Could Prove Detrimental to the USVI's Economy*, 2000 WORLDWIDE TAX DAILY 66-2, Mar. 31, 2000:

The Virgin Islands was the first of the major FSC jurisdictions to enact legislation to encourage U.S. exporters to establish their FSCs in the territory, and it has had the most FSCs of any jurisdiction consistently since 1984. The Virgin Islands provides for one-day incorporation of FSCs, and its statute exempts FSCs from all income taxes and all local taxes. FSCs are required to pay an annual franchise tax ranging from US \$400 to \$25,000, based on foreign trading gross receipts, as well as an annual US \$100 license fee.

141. Jose Oyola, *News Analysis: A Fresh Look at FSC Beneficiaries*, 23 TAX NOTES INT'L 71, July 2, 2001. See also Marjorie Rawls Roberts, *U.S. Virgin Islands Listed as 'Harmful' Tax Haven by OECD*, 2000 WORLDWIDE TAX DAILY 131-1 June 29, 2000. In the report the OECD states that the USVI was included on the list of harmful tax havens because of U.S. federal legislation on I.R.C. § 934(b)(3) (2003) that allows the establishment of tax-benefited "exempt companies" in the USVI.

142. *Id.* The FSCs in the services sector mainly consisted of exempt insurers, exempt companies, investment advisors, and consulting firms.

143. Roberts, *supra* note 141. The article also stated that the USVI hosted the majority of the FSCs worldwide.

144. 13 V.I.C. § 772 (2002); 13 V.I.C. § 780 (2002). See also Blum, *supra* note 140.

The new VIFSCs would offer substantial tax savings¹⁴⁵ to companies that keep their FSC status. Furthermore, VIFSCs would be exempt from all USVI income taxes,¹⁴⁶ gross receipts, taxes on export sales,¹⁴⁷ and excise taxes.¹⁴⁸ Furthermore, VIFSCs would be exempt from certain withholding taxes¹⁴⁹ and they would only be required to pay an annual license fee of \$100 and an annual franchise tax of \$300, regardless of their sales volume.¹⁵⁰ Prior FSCs may elect to become a VIFSC by amending their articles of incorporation.¹⁵¹ For new companies that do not already have FSC status in the USVI, they would be permitted under the USVI redomiciliation laws¹⁵² that would permit

145. See Roberts, *supra* note 141. See also Albertina M. Fernandez, *Week in Review*, 20 TAX NOTES INT'L 1609, April 10, 2000 (Release Date: April 05, 2000), which provides:

Marjorie Rawls Roberts reports that the U.S. Virgin Islands hosts the majority of FSCs worldwide, with approximately 3,900 active FSCs. This is no coincidence, since the USVI has consistently wooed FSCs to its shores by enacting legislation to encourage U.S. exporters to establish the entities within its territory. For example, the author reports, "The USVI offers a contract signed by the lieutenant governor that guarantees FSC tax exemptions for a 30-year period from the date the contract is issued." Needless to say, government officials have expressed concern regarding the possible elimination of FSC legislation.

146. 13 V.I.C. § 774 (2002).

147. *Id.*

148. 13 V.I.C. § 775 (2002).

149. 13 V.I.C. § 778 (2002).

150. Roberts, *supra* note 141.

The Virgin Islands was the first of the major FSC jurisdictions to enact legislation to encourage U.S. exporters to establish their FSCs in the territory, and it has had the most FSCs of any jurisdiction consistently since 1984. The Virgin Islands provides for one-day incorporation of FSCs, and its statute exempts FSCs from all income taxes and all local taxes. FSCs are required to pay an annual franchise tax ranging from US \$400 to \$25,000, based on foreign trading gross receipts, as well as an annual US \$100 license fee.

151. 13 V.I.C. § 772(b) (2002).

A corporation that is in good standing as of the effective date of this section, and which, as of the day prior to such effective date, was a foreign sales corporation, as defined in section 770 of this chapter as in effect as of that day may elect to be treated as a VIFSC if, prior to, or within twelve months of such effective date, it amends its articles of incorporation to conform with section 431(a)(1) of this title, as amended, or otherwise files a document with the Lieutenant Governor evidencing its intent to be treated as a VIFSC. Such election, if timely filed after such effective date, will be deemed to be effective as of such effective date."

(emphasis added.)

152. 13 V.I.C. § 471 (2002) (dealing with redomiciliation). See also William L. Blum, *Business Opportunities, Corporations, Taxes, Tax Incentives, and Tax Planning in the U.S. Virgin Islands*, available at <http://www.USVI.net/USVI/taxes.html>, stating:

The USVI permits both the inbound and outbound redomiciliation of companies and it is the only jurisdiction under the U.S. flag to allow for both of these options. An inbound redomiciliation is when a company formed outside the USVI wants to move to the USVI and be treated as if it had been formed there. When the company moves into the USVI it can

a company with a FSC in another jurisdiction to move their subsidiary to the USVI, where they could elect VIFSC status. Companies that did not have FSC status prior to the inception of the VIFSC program could, "also be formed as VIFSCs as soon as the bill becomes law."¹⁵³ A company could also obtain VIFSC status by merger.¹⁵⁴

VI. THE CONGRESSIONAL BLACK CAUCUS: DEFENDERS OF THE CREDIT

The Congressional Black Caucus is one of the biggest supporters of the USVI tax credit and has defended the Virgin Islands recently against attacks by the Organization for Economic Co-Operation and

also elect to be treated as an exempt company if it otherwise qualifies. An outbound redomiciliation, by which a USVI corporation moves its domicile to another jurisdiction, is allowed, provided that the laws of the jurisdiction to which the company wishes to move permits it. The company must first prepare and file whatever documents are required by the other jurisdiction; then an affidavit is filed with the USVI as evidence that the company has continued its existence elsewhere. Then the government issues a certificate of discontinuance. A corporation which has removed its domicile from the USVI is not liable for future franchise or other taxes but it does not avoid liabilities incurred prior to its redomiciliation.

See also Marjorie Rawls Roberts, *Tax Havens: Amendments to U.S. Virgin Islands Exempt Company Act Examined*, 7 TAX NOTES INT'L 723, Sept. 20, 1993:

On August 17, 1993, U.S. Virgin Islands Governor Alexander A. Farrelly signed into law Act No. 5880, the Exempt Company Amendments Act of 1993. The act makes significant changes to the U.S. Virgin Islands' exempt company legislation. It also adds a provision permitting the transfer of domicile on non-United States and non-Virgin Islands corporations into and out of the Virgin Islands...

Section 3 of Act No. 5880 contains provisions that permit foreign corporations to relocate to the Virgin Islands on both a permanent and a standby basis without reincorporating. The corporate *redomiciliation* provisions are almost identical to those existing under Delaware law. Under section 4(b) of Act No. 5880, a permanent relocation costs \$500; the annual franchise tax would be \$1,000 if exempt company status were elected. If a corporation does not elect or is not eligible for exempt company status, then the relocation fee is a minimum of \$175 and the regular annual franchise tax rates apply after relocation. A standby relocation, which is only available to corporations not incorporated in one of the states of the United States or the District of Columbia, costs \$1,100 initially and \$1,000 per year thereafter, whether or not the company actually relocates.

Id. at 724-725 (emphasis added).

153. See William L. Blum, *U.S. Virgin Islands Legislature Approves New Exemption Program*, 24 TAX NOTES INT'L 1306, December 24, 2001 (discussing the new VIFSC program). For companies that did not have FSC status prior to the inception of the VIFSC program they could, "also be formed as VIFSCs as soon as the bill becomes law."

154. 13 V.I.C. § 431 (2002).

Development (OECD)¹⁵⁵ and the WTO.¹⁵⁶ In a letter to then U.S. Treasury Secretary Paul O'Neill,¹⁵⁷ the Congressional Black Caucus stated:

As you surely know, the Organization for Economic Cooperation and Development (OECD), of which the United States is a member, has initiated a process designed to eliminate so-called "harmful tax competition." Within one year, if these "harmful practices" are not eliminated, sanctions are to be issued. The practices in question are said to be the facilitation of foreign owned entities to do business in these locations, no or nominal tax on relevant income of these entities, lack of information exchange, and lack of transparency.

This initiative threatens to undermine the fragile economies of some of our closest neighbors and allies, as well as the US Virgin Islands. These countries are already grappling with reduced tariffs and declining preferences for their industrial and agricultural products.

Wealthy OECD nations should not have the right to re-write the rules of international commerce on taxation simply because they are upset that investors and entrepreneurs are seeking higher after-tax returns.

The Congressional Black Caucus further stated: "We also fell [sic] that this 'harmful tax competition' project is not in America's national interests. In the case of the Virgin Islands, they were put on the list largely because of federal enabling legislation that was a requirement imposed by the Department of the Treasury."

This sentiment was echoed by USVI legislature when it noted that Federal and not USVI legislation has resulted in the USVI being

155. Marjorie Rawls Roberts, *U.S. Virgin Islands Listed as 'Harmful' Tax Haven by OECD*, 2000 WORLDWIDE TAX DAILY 131-1, June 29, 2000 (discussing the Virgin Islands placement on the OECD list as a 'harmful' tax haven).

156. Roberts, *supra* note 141.

157. THE CONGRESSIONAL BLACK CONGRESS, *supra* note 19. This letter was signed by Del. Donna Christian-Christensen, Rep. Maxine Waters, Rep. James Clyburn, Rep. Eva Clayton, Rep. John Conyers, Rep. Stephanie Tubbs Jones, Rep. William Clay, Rep. Earl Hilliard, Rep. John Lewis, Rep. William Jefferson, Rep. Alcee Hastings, Rep. Charles Rangel, Rep. Barbara Lee, Rep. Major Owens, Rep. Corrine Brown, Rep. Gregory Meeks, Rep. Sanford Bishop, Rep. Sheila Jackson-Lee, Del. Eleanor Holmes Norton, Rep. Bobby Rush, Rep. Carrie Meek, Rep. Danny K. Davis, Rep. Robert Scott, Rep. Eddie Bernice Johnson, Rep. Melvin Watt, and Rep. Edolphus Towns.

included on the OECD list. Thus, the USVI cannot unilaterally pledge to cooperate with the OECD to remove its name from the list. Furthermore, the United States is one of twenty-nine members of the OECD.¹⁵⁸ Therefore, the U.S. government's pledge to fully cooperate in preparing sanctions for tax havens that fail to reform does not make sense for the USVI because the United States enacted the legislation that effectively put the U.S. Virgin Islands on the list in the first place.

The Congressional Black Caucus openly criticized the OECD report.¹⁵⁹ U.S. House of Representatives Ways and Means Committee Chair William M. Thomas, R-California, introduced the American Competitiveness and Corporate Accountability Act of 2002 that repealed the FSC Repeal and Extraterritorial Income Exclusion Act of 2000. The American Competitiveness and Corporate Accountability Act was not enacted in 2002, but it has been raised again for the new Congressional session in 2003.¹⁶⁰ However, whether the Act will have any more success getting passed is something only time will tell.¹⁶¹ Therefore this is a continuing issue of importance for the USVI that will need continued watch this Congressional session.

VII. CONCLUSION

Residents of the USVI generally file and make all payments of their taxes to the USVI tax authorities as opposed to the IRS.¹⁶² There are several benefits to having USVI residency. For example, taxpayers of the USVI can be eligible for as much as a 90% tax credit¹⁶³ on their

158. OECD, *OECD Reports on Harmful Tax Jurisdiction*, 2000 WORLDWIDE TAX DAILY 124-11, June 26, 2000. The original members of the OECD are: Austria, Belgium, Canada, Denmark, France, Germany, Greece, Iceland, Ireland, Italy, Luxembourg, the Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, the United Kingdom, and the United States. Newer members are: Japan, Finland, Mexico, the Czech Republic, Hungary, Poland, and Korea.

159. THE CONGRESSIONAL BLACK CONGRESS, *supra* note 19 stating:

What we have been facing is a successful international media campaign, developed by the OECD, aimed at painting a picture of money laundering and unsound regulatory practices. However, the anti-money laundering regulations of many of these countries have been successfully enhanced through the assistance of international funding agencies and the commitment of their own national resources.

160. *Id.* Rose Proskauer, *Impact of the Sarbanes-Oxley Act and Current Legislative and Regulatory Proposals on Employee Benefits and Executive Compensation*, 10 *The Metropolitan Corporate Counsel* 12 (December 2002).

161. Natalia Radziejewska, *Taxwriters Introduce Bipartisan ETI Act Repeal Bill*, 30 *TAX NOTES INT'L* 239, Apr. 21, 2003. "U.S. House of Representatives Ways and Means Committee members Philip M. Crane, R-Illinois, and Charles B. Rangel, D-New York, on 11 April introduced a bipartisan bill that would repeal the FSC Repeal and Extraterritorial Income Exclusion Act (ETI Act) and provide U.S. domestic manufacturers a corporate tax rate reduction."

162. I.R.C. § 932(a)(1)(A) (2003).

163. *See Revised Organic Act Of The Virgin Islands*, 48 U.S.C. § 1642 (2002).

personal income or investment income from ownership in certain business entities by taking advantage of the EDC program for investment in the USVI.¹⁶⁴ However, it is clear that a person must reside in the USVI on the last day of the tax year (“end of year” test) to benefit from the USVI’s favorable tax system.¹⁶⁵ But unlike the United States, there does not appear to be a one-hundred-eighty-three-day residency requirement to meet the USVI residency requirement.¹⁶⁶ Instead, it appears that in order to determine one’s residency in the USVI there is a combination of the “facts and circumstances” test¹⁶⁷ and the “end of year” test.¹⁶⁸ If a person wishes to take advantage of the EDC program, it is likely that the USVI will require more of a personal time commitment to the USVI for the individual to claim the EDC program benefits. Perhaps a six-week commitment would be the proper time commitment, given it is the time commitment required to take advantage of the USVI divorce laws. If this six-week test is the proper test, then the residency requirements of the USVI might be summarized as follows in the next paragraph.

The clearest test is where the person is a W-2 employee. In such cases, the person must be domiciled on the USVI for one year before becoming a resident. Secondly, if the person’s profession is covered by a particular USVI statute, then that person’s time commitment for residency would likely be contained in the USVI statute, generally, six months. Thirdly, where the person is neither a W-2 employee nor is covered by one of the professional statutes, and is not seeking to receive benefits in the current tax year from an EDC program, the “facts and circumstances” test applies together with the “year end” test. No specific amount of time on the USVI is likely to be required. Lastly, where the person is seeking benefits from an EDC program, the time commitment to the USVI must be more substantial than where the person is not seeking EDC benefits in the current tax year. In this last instance, perhaps the six-week test contained in the divorce statute is the proper test, although “facts and circumstances” may dictate that the six-week period need not be uninterrupted.

164. See Roberts, *supra* note 5.

165. See I.R.C. § 932 (2003).

166. See 1987-2 C.B. 946 (1960).

167. 26 C.F.R. § 1.871-2. See also Preece v. Commissioner, 95 T.C. 594 (1990) discussed in note 92.

168. I.R.C. § 932(c)(1)(A) (2003).

