

**BEFORE THE TAX COMMISSION OF THE STATE OF IDAHO**

|                                 |   |                  |
|---------------------------------|---|------------------|
| In the Matter of the Protest of | ) |                  |
|                                 | ) | DOCKET NO. 25670 |
| [Redacted],                     | ) |                  |
|                                 | ) |                  |
| Petitioners.                    | ) | DECISION         |
| _____                           | ) |                  |

[Redacted] and [Redacted] (Petitioners) protested the Notice of Deficiency Determination dated March 19, 2013, asserting income tax and interest for taxable years 2009 through 2011, in the total amount of \$24,039. Petitioners disagreed that [Redacted] was not a qualified individual for the purposes of the foreign earned income exclusion. The Tax Commission, having reviewed the file, hereby issues its decision.

**BACKGROUND**

Petitioners timely filed their Idaho individual income tax returns for taxable years 2009, 2010, and 2011. Petitioners excluded foreign earned income on each of those returns. As part of the Income Tax Audit Bureau’s (Bureau) project to determine the validity of the foreign earned income exclusion, Petitioners’ 2009, 2010, and 2011 Idaho individual income tax returns were selected for examination. The Bureau notified Petitioners of its intent to examine their returns and requested specific information from Petitioners to support the foreign earned income exclusion. Petitioners provided the information the Bureau requested. The Bureau reviewed the documentation and information Petitioners provided, and determined [Redacted] did not meet the requirements of a qualified individual; in that he did not have a tax home in the foreign country because his abode remained in the United States while he was in the foreign country. The Bureau corrected Petitioners’ 2009, 2010, and 2011 Idaho income tax returns and sent them a Notice of Deficiency determination.

Petitioners protested the Bureau's determination, stating the Bureau's determination is incorrect based upon the facts and circumstances, and the applicable law. Petitioners stated Internal Revenue Code (IRC) section 911(d)(3) defines tax home for the purposes of the foreign income exclusion the same as it does in IRC section 162(a)(2) and that the Bureau improperly applied that definition. Petitioners stated [Redacted] had been employed in a foreign country for more than fourteen years, which clearly makes his assignment permanent, rather than temporary, per the statute. Petitioners stated that while the Bureau placed emphasis on Petitioners owning a home in Idaho where [Redacted] lived, Treasury Regulation 1.911-2(b) states that, "Maintenance of a dwelling in the United States by an individual whether or not that dwelling is used by the individual's spouse and dependents, does not necessarily mean that the individual's abode is in the United States." Petitioners stated the cases cited by the Bureau do not follow the fact pattern of [Redacted] time in the foreign country. Petitioners stated it is clear the Bureau misinterpreted the facts and the law in its determination.

The Bureau acknowledged Petitioners' protest and referred the matter for administrative review. The Tax Commission reviewed the matter and sent Petitioners a letter discussing the methods available for redetermining a protested Notice of Deficiency Determination. Petitioners requested a hearing, which was held on October 1, 2013. During the hearing, Petitioners provided the following information.

[Redacted] was a [Redacted] contractor in [Redacted] for taxable years 2009, 2010, and part of 2011. [Redacted] lost part of its government contract in 2011, and [Redacted] was laid off. Fortunately, for [Redacted] he was able to contract with [Redacted] for the same job so he continued working in [Redacted].

[Redacted] stated his contracts did not allow him to live on the military base. [Redacted] current living accommodation is an apartment that is shared with one other individual, an American that is also assigned by his employer to the apartment. [Redacted] stated the building he lives in is what the government calls “forced protection.” This means that the inhabitants are at most a 50/50 mix of expats from other countries and locals. The government believes this ratio helps detour attacks on contractors in the country. Other than the mix of locals in the building, the only other protection is armed guards at the entrance to the building who, in the event of an emergency, would just make a phone call.

[Redacted] stated his apartment came with the most basic of furnishings. It has private bedrooms and bathrooms for each resident, with remaining areas shared. [Redacted] purchased a small refrigerator and microwave to keep his food separate from that of his roommate; co-mingled food had a way of disappearing. [Redacted] also purchased a desk for his computer, which is his main means of communication with his wife.

[Redacted] works varied shifts on the [Redacted], both day and night. His commute to the [Redacted] is two hours one way. [Redacted] has a company car available that is shared with the other employees of the company. Although the vehicle is provided, its maintenance is done by and paid for by, the contractors. When the company car is not available, which it is most of the time because of its use to commute to the [Redacted], [Redacted] uses public transportation and cabs to move about in the city.

[Redacted] works 80-90 hours/week, with one day off during the week. [Redacted] spends his off duty time doing laundry, shopping for his personal needs, and cooking his meals for the upcoming work week. [Redacted] stated he provides for all his meals, even on the [Redacted]. If he does not take his meal to work with him, he has to purchase it on the

[Redacted]. [Redacted] stated his working conditions are dictated by [Redacted] Labor Laws, however, his employer usually works him longer. When at work on the [Redacted] is not allowed to leave during his shift.

[Redacted] contract does not provide for his wife to be in country. If his wife were to accompany him, [Redacted] would have to pay her transportation costs and their lodging expenses, both of which are paid by his employer for him. [Redacted] contract is known as a hardship contract.

[Redacted] gets three weeks of vacation every year. He spends all his vacation time at home in Idaho. [Redacted] employer pays for one flight back to the States per year. [Redacted] takes his vacation time all at one time because of the airfare costs, the best utilization of his time at home, and the scheduling has to be 16 months in advance.

Petitioners stated English was the language of business in [Redacted], so [Redacted] did not need to be fluent in [Redacted]. [Redacted] knows his neighbors in his apartment compound. [Redacted] has a bank account in [Redacted] that he uses to shop for food, clothing, and other personal needs. [Redacted] is paid in dollars and he uses the [Redacted] bank to convert the dollars into [Redacted] currency. There are other currency exchanges available, but the bank is the cheapest. [Redacted] lives on a budget; everything in [Redacted] is very expensive.

Cultural assimilation is limited due to time constraints. Nevertheless, [Redacted] does associate with the locals, most of which are members of the [Redacted] with whom he works. [Redacted] does have a personal [Redacted] friend that he meets with on a regular basis for tea. This individual is a retired member of the [Redacted] and he likes to practice his English with [Redacted]. Because [Redacted] does not have a lot of time to socialize with the locals, his usual interaction is while shopping, banking, and eating out.

[Redacted] can spend his free time however he wants and is as free to move about the country as any of the locals. [Redacted] does not participate in recreational activities because most all his free time is spent taking care of his personal needs; cooking, cleaning, and washing clothes in preparation for the upcoming work week. Petitioners stated [Redacted] has more freedom in [Redacted] than the U.S. military personnel stationed there.

[Redacted] job involves training the [Redacted], and at every meeting he engages in their social custom of having tea. Tea is always a part of [Redacted]social meetings or other gatherings. Petitioners stated the older [Redacted] are very friendly and are appreciative of everything the foreign contractors do. In contrast, the younger generation, which is not that dissimilar to the youth in the United States, is indifferent to the foreign contractors. Another social aspect Petitioners related was how [Redacted] became familiar with the [Redacted] treatment and respect of [Redacted].

Petitioners argued that their case is distinguishable from the cases cited by the Bureau. The majority of the cases cited involved individuals working blocks of time outside the United States, typically 28-30 days on and an equal number of days off. Petitioners stated those individuals did not and could not meet the physical presence test of IRC section 911, therefore they could not have a tax home at their place of employment because of their abode being in the United States. In contrast, [Redacted] spent more than 330 days per year in [Redacted] and only 48 days total in the United States during 2010 and 2011. Petitioners argued that even though [Redacted] employer provided housing for him in [Redacted], he made his small apartment comfortable and very livable. Petitioners stated [Redacted] abode was in [Redacted]. He did all the things one would normally do in a place where one planned to stay indefinitely. He knew his neighbors and associated with them, he learned the language to the extent necessary to live in

[Redacted], he has [Redacted] friends and acquaintances, and he routinely purchased groceries, personal care items, and household goods from the local community. Petitioners stated [Redacted] lifestyle and circumstances were vastly different than the individuals in the cases cited by the Bureau. Petitioners believe [Redacted] abode was in [Redacted] and, therefore, he was a qualifying individual for the foreign earned income exclusion.

## **LAW AND ANALYSIS**

IRC section 911 provides for the exclusion from taxable income an amount of income earned from sources within a foreign country or countries which constitutes earned income attributable to services performed by a qualified individual. IRC section 911(d)(1) defines a qualified individual as,

### **(1) Qualified individual.**

The term “qualified individual” means an individual whose tax home is in a foreign country and who is-

(A) a citizen of the United States and establishes to the satisfaction of the Secretary that he has been a bona fide resident of a foreign country or countries for an uninterrupted period which includes an entire taxable year, or

(B) a citizen or resident of the United States and who, during any period of 12 consecutive months, is present in a foreign country or countries during at least 330 full days in such period.

IRC section 911(d)(3) defines the term “tax home” for purposes of IRC section 911 as,

### **(3) Tax home.**

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

Treasury Regulation 1.911-2(b) further clarifies tax home for purposes of IRC section 911.

(b) Tax home. For purposes of paragraph (a)(i) of this section, the term “tax home” has the same meaning which it has for purposes of section 162(a)(2) (relating to travel expenses away from home). Thus, under section 911, an individual’s tax home is considered to be located at his regular or principal (if more than one regular) place of business or, if the individual has no regular or principal place of business because of the nature of the business, then at his regular place of abode in a real and substantial sense. An individual shall not, however, be considered to have a tax home in a foreign country for any period for which the individual’s abode is in the United States. Temporary presence of the individual in the United States does not necessarily mean that the individual’s abode is in the United States during that time. Maintenance of a dwelling in the United States by an individual, whether or not that dwelling is used by the individual’s spouse and dependents, does not necessarily mean that the individual’s abode is in the United States. (Underlining added.)

To be allowed the foreign income exclusion, the taxpayer must have a tax home in the foreign country and he must either be outside the United States for a period of 330 days in a consecutive 12 month period or be a bona fide resident of the foreign country. As a qualifier to the tax home requirement, the taxpayer is not considered to have a tax home in the foreign country if his abode is in the United States during the period he is in the foreign country.

The Bureau determined [Redacted] had an abode in the United States (Idaho); therefore, [Redacted] did not have a tax home in a foreign country and [Redacted] was not a qualified individual eligible for the foreign earned income exclusion. The Bureau’s determination was based upon responses [Redacted] made on a questionnaire the Bureau asked Petitioners to complete. On the questionnaire, [Redacted] stated his housing was provided by his employer, he did not rent out his Idaho home, his family was in Idaho, he registered vehicles in Idaho, his banking was done with U.S. banks, he only socialized with other Americans while in [Redacted], he maintained an Idaho driver’s license, and he spoke very little [Redacted]. From this, the Bureau determined [Redacted] familial, economic, and personal ties to the United States were far stronger than his ties to [Redacted], which meant [Redacted] abode was in the United States.

Petitioners argued Treasury Regulation section 1.911-2 defines the relevant period for determining tax home and the 330 day test. Petitioners argued that since [Redacted] met the physical presence test in [Redacted], he automatically met the tax home test, and the abode qualifier to the tax home is irrelevant. Petitioners stated that even if the abode test is relevant, only the relevant period can be reviewed, i.e. the 330 days, and abode is determined by where the taxpayer slept, ate, showered, and relaxed. In [Redacted] case this was in [Redacted]. Petitioners cited the examples in the Treasury Regulations for the relevant period in the determination of a tax home/abode.

“Abode” is not defined in IRC section 911 or the regulations thereunder. However, the courts have examined the issue and determined in the context of IRC section 911 that abode is directly associated with a taxpayer’s ties, i.e. familial, economic, and personal. See Harrington v. Commissioner, 93 T.C. 307-308, (1989); Daly v. Commissioner, T.C. Memo. 2013-147, 2013; Struck v. Commissioner, T.C. Memo. 2007-42, 2007; Eram v. Commissioner, T.C. Memo. 2014-60, 2014. The courts’ methodology is to examine and contrast a taxpayer’s domestic ties with his or her ties to the foreign country in which the taxpayer claims a tax home in order to determine whether the taxpayer’s abode was in the United States during a particular period. Eram v. Commissioner, Id. Even though a taxpayer may have some limited ties to a foreign country during a particular period, if the taxpayer’s ties to the United States remain strong, the courts have held that the taxpayer’s abode remained in the United States, especially when the taxpayer’s ties to the foreign country were transitory or limited during that period. Harrington v. Commissioner, 93 T.C. at 308.

Petitioners stated that since [Redacted] met the physical presence test for being in a foreign country, the abode requirement is irrelevant. However, as discussed in

Harrington v. Commissioner, Id. the requirement that the taxpayer not have an abode in the United States is a requirement separate and apart from the requirement that the taxpayer also meet the physical presence test or the bona fide resident test. A taxpayer can meet either the physical presence test or the bona fide resident test and still fail the tax home test. See IRC section 911(d)(1). Ultimately, the focus is on [Redacted] contact with the culture and society of the foreign country in which he worked. Jones v. Commissioner, 927 F2d. 849, (1991).

In addition to the familial, economic, and personal ties, and the cultural and social contacts within the foreign country, the Jones court made reference to the additional living expenses incurred by the taxpayer. In the present case, [Redacted] incurred no housing costs, but he did pay for all his other living expenses. [Redacted] did take advantage of his employer paying for one plane ticket per year taking all his vacation time all at once so as not to incur any additional costs. Petitioners stated [Redacted] lived on a budget while in [Redacted] because everything was very expensive.

In determining where [Redacted] had the stronger ties for the determination of his abode and hence, his tax home, the Tax Commission considered all the facts and circumstances surrounding the relevant periods. [Redacted] did have familial, economic, and personal ties in the United States during the relevant period. He also had economic and personal ties in [Redacted] during the relevant period. [Redacted] did not have familial ties in [Redacted] during the relevant period, however, in this case it appears to be a choice of the Petitioners rather than a condition of working in [Redacted]. See Harrington v. Commissioner, 93 T.C. 297, (1989) and Daly v. Commissioner, T.C. Memo 2013-147. Furthermore, as stated in Treasury Regulation section 1.911-2(b), the maintenance of a dwelling in the United States that is used by a spouse does not necessarily mean an individual's abode is in the United States. Likewise, a spouse who

chooses to remain in the United States is not necessarily indicative of an individual's abode. Jones v. Commissioner, 927 F2d. 849, 855 (1991).

In some sense of the word, [Redacted] had "strong" ties in the United States (his wife and a house); however, the preponderance of the evidence shows that [Redacted] had significant ties to [Redacted] and that his dwelling place in [Redacted] was more than just a place to sleep. [Redacted] cultivated friendships, he mingled with the locals in their environment, and he continues to be employed in [Redacted]. Considering all the facts and circumstances, the Tax Commission finds that [Redacted] abode was in [Redacted] for the relevant periods. Therefore, [Redacted] tax home was in [Redacted].

### CONCLUSION

Seeing that [Redacted] is a citizen of the United States, that he was physically present in a foreign country for a full 330 days during the relevant periods for the taxable years 2009, 2010, and 2011, and that his tax home was in a foreign country, [Redacted] was a qualified individual for the purposes of the foreign earned income exclusion.

THEREFORE, the Notice of Deficiency Determination dated March 19, 2013, and directed to [Redacted] and [Redacted] is CANCELLED.

An explanation of the Petitioners' right to appeal this decision is enclosed.

DATED this \_\_\_\_\_ day of \_\_\_\_\_ 2014.

IDAHO STATE TAX COMMISSION

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COMMISSIONER

**CERTIFICATE OF SERVICE**

I hereby certify that on this \_\_\_\_\_ day of \_\_\_\_\_ 2014, a copy of the within and foregoing DECISION was served by sending the same by United States mail, postage prepaid, in an envelope addressed to:

[Redacted]

Receipt No.

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