

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

In the Matter of the Protest of )  
[Redacted], ) DOCKET NO. 25804  
Petitioners. )  
DECISION  
\_\_\_\_\_ )

[Redacted] and [Redacted] (Petitioners) protested the Notice of Deficiency Determination dated May 17, 2013, asserting income tax and interest for taxable years 2011 and 2012 in the total amount of \$12,421. 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 2010, 2011, and 2012. 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’ 2010, 2011, and 2012 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 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 for the period [Redacted] was in [Redacted]. The Bureau determined [Redacted] abode was in the United States while he was in [Redacted]and, therefore, he was not considered to have a tax home in [Redacted]. The Bureau corrected Petitioners’ 2011 and 2012 Idaho income tax returns and sent them a Notice of Deficiency determination.

Petitioners protested the Bureau's determination, stating the Bureau's determination is erroneous. Petitioners stated the Bureau found [Redacted] established a tax home, bona fide residence, and place of abode in [Redacted] up to July 18, 2011, and reestablished his bona fide residence and tax home in [Redacted] upon returning to [Redacted] on September 7, 2012. Petitioners stated the Bureau erred in its determination that [Redacted] did not establish a bona fide residence in [Redacted] and that he had an abode in the United States. Petitioners stated the Bureau also concluded, incorrectly, that [Redacted] did not meet the physical presence requirement of 330 days for taxable year 2011, by one day.

Petitioners stated the Bureau erred in its conclusion that [Redacted] did not have a tax home in [Redacted]. Petitioners argued that being employed on a foreign military base qualifies as a tax home, and the abode exception is only for those individuals commuting to work outside the United States, but returning to their home in the United States on their time off. Petitioners stated the abode has no application to [Redacted] situation, since he lived in [Redacted] and only vacationed in [Redacted], Idaho. Petitioners also argued the physical presence test is calculated on whatever 12-month period is most advantageous for the taxpayer, not a calendar year.

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 November 14, 2013. During, and subsequent to, the hearing, Petitioners provided the following information.

[Redacted] was employed by [Redacted]. In 2009, [Redacted] was contracted to the [Redacted] for work in [Redacted]. [Redacted] moved to the [Redacted] and began claiming the foreign earned income exclusion on his 2010 income tax return. In 2011, [Redacted] accepted a

contract as a trainer for the [Redacted] in [Redacted]. [Redacted] contract was to train the [Redacted] in [Redacted]. [Redacted] contract was a renewable contract based upon his performance. [Redacted] was promoted at least twice while in [Redacted] and he did have the option of renewing his contract. [Redacted] remained in [Redacted] until September 6, 2012, when he returned to the [Redacted]. Petitioners stated that since [Redacted] contract was longer than one year, his employment in [Redacted] is considered permanent and, as a result, his tax home was in [Redacted].

While in [Redacted] [Redacted] lived at [Redacted]. He worked 10 hour shifts, 5½ days/week. Everything was done at [Redacted]. Petitioners stated that generally once a week [Redacted] would go to [Redacted] in downtown [Redacted] It was called their “morale run.” It was usually on a Friday and several of them would go together in four to six vehicles to get money from ATMs, purchase items from the exchange, use the U.S. postal facility, and shop the local bazaars. Petitioners stated [Redacted] would travel as far as [Redacted], on the east side of [Redacted]. Petitioners stated that when [Redacted] was going to travel anywhere, he had to inform the local command where he was going, his travel routes, and when he would return. Petitioners stated [Redacted] was not [Redacted] [Redacted] until the last few months he was in [Redacted]. The [Redacted] and [Redacted] occurred due to heightened threat possibilities, causing his travel to be restricted to [Redacted].

Petitioners stated [Redacted] would go into downtown [Redacted] to purchase airline tickets for personal leave or to pick up or drop off fellow employees at the [Redacted]. Other trips into [Redacted] were for medical needs to see a specialist at a [Redacted] clinic that accepted the company’s health insurance. The [Redacted] could only be used for emergencies or

on a space available basis. All transportation to [Redacted] was through contracted [Redacted] drivers and interpreters.

[Redacted] only vacation while he was in [Redacted] was a trip back home to [Redacted]. [Redacted] was in Idaho from December 28, 2011 to January 8, 2012. Petitioners stated they had to pay for [Redacted] to fly back to [Redacted].

While in [Redacted], [Redacted] housing and meals were provided by either his employer or the [Redacted]. Petitioners stated that occasionally [Redacted] and others would get food locally or have an [Redacted] vendor cater cookouts and other company events. Petitioners stated [Redacted] also was invited to eat with the [Redacted] they trained at their headquarters or dining facility (outside the [Redacted]) about once a week.

Petitioners stated [Redacted] was provided a room that was furnished with a bed and a desk. [Redacted] purchased additional bedding, a TV, a DVD player, a small stereo, a hot water pot, and a personal computer. Petitioners stated [Redacted] had to purchase all his personal items, entertainment, snacks, coffee, and personal clothing. [Redacted] also had to provide most of his work clothing; although the company reimbursed part of the cost.

Petitioners stated [Redacted] association with the [Redacted] locals was limited to those he worked with and trained. [Redacted] did not have much social interaction outside of his training responsibilities. Petitioners stated [Redacted] working relationships were different than those of the [Redacted]. As a contractor, [Redacted] had a comparatively stable presence with his [Redacted] counterpart than the [Redacted] individuals who would come and go. Petitioners stated [Redacted] relationship with his [Redacted] counterpart, [Redacted], got to the point that they exchanged gifts, which was not common.

Petitioners stated [Redacted] could only live on the [Redacted] and his family (wife) was not allowed in country. Petitioners stated [Redacted] attended Church services while in [Redacted], which were usually held Sunday evening on the [Redacted]. Petitioners stated [Redacted] work day was very regimented because of the [Redacted]. Petitioners stated that [Redacted] employer, [Redacted], did not guarantee or promise [Redacted] employment after his [Redacted] contract ended. Nevertheless, [Redacted] was contracted again to the [Redacted] after [Redacted].

## **LAW AND ANALYSIS**

Internal Revenue Code (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’s examination of the [Redacted] Idaho income tax returns encompassed taxable years 2010, 2011, and 2012, looking specifically at the foreign income exclusion the [Redacted] claimed each year. The Bureau determined the foreign income exclusion claimed for taxable year 2010 was valid for the time [Redacted] was in the [Redacted], but the foreign income exclusions claimed for taxable years 2011 and 2012, when [Redacted] was in [Redacted], were not. The Bureau determined [Redacted] did not have a tax home in [Redacted] because his abode was in the United States rather than [Redacted]; therefore, [Redacted] was not a qualified individual for the foreign income exclusion. The Bureau disallowed the deduction in total on the [Redacted] 2011 return and prorated the deduction for the number of days [Redacted] was in

[Redacted] on the [Redacted] 2012 return. The Bureau did not adjust the [Redacted] 2010 return because it felt [Redacted] abode was in the [Redacted] rather than the United States. The Bureau's proration for taxable year 2012 was based on the premise [Redacted] again established an abode in the [Redacted] when he returned to the [Redacted] from [Redacted].

The Bureau's determination was based upon the facts that while [Redacted] was in [Redacted] he lived in employer provided housing on a [Redacted], he did not socialize with the locals, he was not allowed to freely roam about the country, and he retained significant U.S. ties such as a home, driver's license, bank accounts, vehicles, mailing address, and family. The Bureau determined [Redacted] familial, economic, and personal ties to the United States were far stronger than his ties to [Redacted].

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 while in [Redacted], he automatically met the tax home test, and the abode qualifier to the tax home is irrelevant. Nevertheless, Petitioners stated that even for the abode test, only the relevant period can be reviewed, i.e. the 330 days, and abode is determined by where the taxpayer slept, ate, showered, relaxed, watched TV, etc. In [Redacted] case it was in [Redacted]. Petitioners cited the examples in the Treasury Regulations for the relevant period in the determination of a tax home/abode. However, Petitioners did agree that the place of abode is an abode in a real and substantial sense.

Petitioners argued that the Bureau allowed a tax home for [Redacted] in the [Redacted] for 2010 and 2012. Petitioners argued [Redacted] abode could have remained in the [Redacted] since he maintained a [Redacted] (Department of Defense) driver's license and he rented an apartment. Petitioners stated [Redacted] did nothing to bring his tax home back to the U.S. prior

to going to [Redacted]. Petitioners did state that [Redacted] did not keep the same apartment when he left the [Redacted] for [Redacted], and when [Redacted] returned to the [Redacted] he had to find another apartment.

IRC section 911(d)(1) states that a qualified individual must have his tax home in a foreign country. IRC section 911(d)(3) defines the term tax home by referencing IRC section 162(a)(2) which states an individual's tax home is "the vicinity of the taxpayer's principal place of employment and not where his or her personal residence is located." Mitchell v. Commissioner, 74 T.C. 578, 581 (1980); Rev. Rul. 75-432, 1975-2 C.B. 60. However, if an individual has no regular or principal place of business, the individual's tax home is his or her place of abode in a real and substantial sense. Treasury Regulation section 1.911-2(b).

The general rule of section 911(d)(1) tax home is also subject to an exception. IRC section 911(d)(3) states, "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." Therefore, even though an individual's tax home is in a foreign country, by definition of IRC section 162(a)(2), if that individual does not have an abode in the foreign country and his abode is in the United States, the individual is not considered to have a tax home in the foreign country.

"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 have examined and contrasted a taxpayer's domestic ties with his or her ties to the foreign country in which he or she claims a tax home in order to determine

whether his or her 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 his or her abode remained in the United States, especially when his or her ties to the foreign country were transitory or limited during that period. Harrington v. Commissioner, 93 T.C. at 308.

Petitioners stated that because [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 of those tests 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 this case, [Redacted] incurred little to no housing costs, little to no meals expenses, no local transportation costs, and only partial clothing expenses. Petitioners stated [Redacted] did have to pay for his transportation costs home for vacation purposes and he purchased other creature comfort items, but apparently all other costs were paid for or provided by his employer or the [Redacted].

In contrast, when [Redacted] was living and working in the [Redacted], [Redacted] lived with him where they rented an apartment or flat, traveled around the country, knew the language,

and attended cultural events and plays. [Redacted] was able to drive in the [Redacted], although he maintained his Idaho driver's license, and he used a [Redacted]affiliated bank in the [Redacted] for currency exchange and to pay his rent and utilities. Petitioners even licensed and registered two vehicles in the [Redacted]. None of this was done, or even possible, in [Redacted].

In comparing the time [Redacted] was in the [Redacted] to that in [Redacted], it is clear [Redacted] had familial, economic, and personal ties to make the [Redacted] his abode. On the other hand, while in [Redacted], [Redacted] familial, economic, and personal ties were severely limited or missing altogether. Because [Redacted] [Redacted]ties were limited and transitory, the Tax Commission finds [Redacted] did not have an abode in [Redacted]. Therefore, the remaining question is, was [Redacted] abode in the United States while he was in [Redacted]?

In June 2011, [Redacted] agreed to, and signed, a contract to work in [Redacted]. He did this while he was living and working in the [Redacted]. On June 24, 2011, [Redacted] moved back to the United States into the home he maintained in Idaho to prepare for his assignment in [Redacted]. Petitioners stated [Redacted] shipped all his household goods from the [Redacted] to [Redacted]. [Redacted] returned to [Redacted] and stayed until July 7, 2011, when he left for [Redacted], Virginia, to begin his [Redacted] contract. Petitioners stated [Redacted] also attended a funeral in [Redacted] during that time. [Redacted] only tie to the [Redacted] during this time was a [Redacted] driver's license that permitted him to drive in the [Redacted]. [Redacted] left the UK previously to resume her nursing career in Idaho. From the time [Redacted] left the [Redacted] to his departure to [Redacted], [Redacted] had strong familial, economic, and personal ties in the United States and virtually no ties anywhere else. When [Redacted] left for [Redacted], his strong familial, economic, and personal ties remained in the

United States. [Redacted] did not acquire or establish those same ties while he was in [Redacted]. Therefore, [Redacted] abode was in the United States during the period he worked in [Redacted]and, as a result, he did not have a tax home in [Redacted]. [Redacted] was not a qualified individual for the foreign earned income exclusion.

The Bureau disallowed the full amount of the foreign earned exclusion claimed on Petitioners' 2011 income tax return. However, during taxable year 2011, [Redacted] was living and working in the [Redacted] for part of the year. [Redacted] left the [Redacted] and returned to [Redacted] on June 24, 2011. Since [Redacted] was a qualified individual in 2010, it follows that he would have been a qualified individual for the portion of taxable year 2011 that he was in the [Redacted]. Therefore, the Tax Commission modifies the foreign earned income exclusion adjustment to allow for the foreign earned income exclusion for the time [Redacted] was in the [Redacted].

### **CONCLUSION**

Because [Redacted] abode remained in the United States (Idaho) while he was in [Redacted], [Redacted] is not considered to have a tax home in a foreign country. As a result, [Redacted] was not a qualified individual for the foreign earned income exclusion.

The Bureau added interest to Petitioners' Idaho tax liability. The Tax Commission reviewed that addition and found it applicable and in accordance with Idaho Code section 63-3045.

THEREFORE, the Notice of Deficiency Determination dated May 17, 2013, and directed to [Redacted] and [Redacted] is AFFIRMED as MODIFIED by this decision.

IT IS ORDERED that Petitioners pay the following tax and interest:

<u>YEAR</u>	<u>TAX</u>	<u>INTEREST</u>	<u>TOTAL</u>
2011	\$3,969	\$326	\$4,295
2012	4,809	217	<u>5,026</u>
		TOTAL DUE	<u>\$9,321</u>

DEMAND for immediate payment of the foregoing amount is hereby made and given.

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

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

IDAHO STATE TAX COMMISSION

\_\_\_\_\_  
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.  
  
\_\_\_\_\_