

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

In the Matter of the Protest of	)	
	)	DOCKET NO. 25708
[Redacted],	)	
	)	
Petitioners.	)	DECISION
_____	)	

[Redacted] (Petitioners) protested the Notice of Deficiency Determination dated March 22, 2013, asserting additional income tax and interest for taxable years 2009 through 2011 in the total amount of \$25,205. Petitioners disagreed that Mr. [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 Mr. [Redacted] did not meet the requirements of a qualified individual. The Bureau determined Mr. [Redacted] 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 individual income tax returns and sent them a Notice of Deficiency Determination.

Petitioners protested the Bureau's determination stating that Mr. [Redacted] tax home, as well as his place of abode, was in [Redacted]. Petitioners also stated Mr. [Redacted] was physically present in [Redacted] for at least 330 days so he did meet the requirements of Internal Revenue Code (IRC) section 911 for the foreign earned income exclusion. Petitioners stated many of the factors considered in determining the location of Mr. [Redacted] abode were not applicable in regards to his employment in [Redacted]. Because Mr. [Redacted] was employed in an active war zone, he could not have his family with him, he did not need a foreign driver's license, voting was not allowed, he could not have relationships outside of work, and his housing was only allowed on site. Petitioners stated if Mr. [Redacted] had not been in a war zone he could have done all of those things and more. Petitioners stated Mr. [Redacted] intent was to work in [Redacted] for an indefinite time and his abode was in [Redacted] to the extent it was possible.

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 before the Tax Commission which was held on June 26, 2015, wherein they provided the following information.

Mr. [Redacted] is a long time resident of the state of Idaho, living in Boise. Mr. [Redacted] was employed with the [Redacted] for 27 years prior to going to [Redacted]. Mr. [Redacted] first went to [Redacted] on January 1, 2005. He continued his employment in [Redacted] until 2012, at which time he went to [Redacted]. Petitioners stated Mr. [Redacted] has worked for the [Redacted] [Redacted] for over eleven years.

Petitioners stated Mr. [Redacted] went to [Redacted] as a trainer and ultimately became responsible for all training [Redacted]. Mr. [Redacted] managed all the training centers and facilities. Petitioners stated because of Mr. [Redacted] job duties he was able to go anywhere [Redacted] where there were training centers and also for recruiting. Petitioners stated Mr. [Redacted] was responsible for his own safety and security when traveling within [Redacted]. Petitioners stated Mr. [Redacted] did carry weapons while in [Redacted]. Petitioners stated Mr. [Redacted] status in [Redacted] was the equivalent to a colonel in the military.

Mr. [Redacted] housing in [Redacted] was containerized housing provided by the [Redacted] through his employer. Essentially his housing was a 12X22 foot aluminum trailer inside the U.S. Embassy compound. Petitioners stated Mr. [Redacted] unit was furnished with a twin-size bed and a bureau. He added BSU posters, pictures from home, a lamp, dishes, pots, a microwave, and a refrigerator. Mr. [Redacted] also had a Christmas tree and decorations during the holidays. Petitioners stated that even though Mr. [Redacted] meals were provided as part of his contract, he did purchase grocery items to keep in his living quarters. Because Mr. [Redacted] lived near the U.S. Embassy, he did live in a secured area, the security around the Embassy. Petitioners stated very few contractors lived on the Embassy grounds.

As previously noted, Petitioners stated Mr. [Redacted] meals were provided by his employer. However, Petitioners stated Mr. [Redacted] frequently ate lunch and dinner on the local economy with a colleague. Mr. [Redacted] paid for these meals and likened them to business meals. Petitioners stated Mr. [Redacted] would also have meals with his [Redacted] counterparts in the [Redacted].

Petitioners stated Mr. [Redacted] social interaction with the [Redacted] involved loading up trucks with clothing, toys, etc. and delivering the goods to a central neighborhood. Petitioners

stated Mr. [Redacted] social calendar was very full and he was usually involved in all the activities that embassy personnel did locally. Petitioners stated Mr. [Redacted] attended soccer games, was invited to numerous social events, dinners, and [Redacted] homes. Mr. [Redacted] also observed [Redacted] and participated in 4<sup>th</sup> of July celebrations at the Embassy.

Petitioners stated Mr. [Redacted] work days were usually long so he did not have a lot of time for recreation. In his free time, Mr. [Redacted] would workout, do personal chores, socialize with other contractors, and skype with his wife and grandchildren. Petitioners stated Friday was Mr. [Redacted] day off. Friday morning was spent on activities with the Embassy and the balance of the day doing the things previously mentioned. Mr. [Redacted] also went to a movie theater in [Redacted] and visited the [Redacted] zoo. Petitioners stated Mr. [Redacted] even attended birthday parties for some of the [Redacted] children.

Petitioners stated Mr. [Redacted] professional contacts in [Redacted] turned into strong personal relationships. These relationships were with both Americans and [Redacted] on his training staff and with his [Redacted] counterparts working with the [Redacted]. Petitioners stated Mr. [Redacted] helped a few [Redacted] individuals get their VISAs so they could leave the country. Petitioners stated Mr. [Redacted] is still friends with those individuals to this day.

Petitioners stated Mr. [Redacted] had no need of medical services while in [Redacted]. Petitioners stated, if needed, Mr. [Redacted] could go the Embassy clinic; however, it was usually overrun with patients. Petitioners stated Mr. [Redacted] would buy over-the-counter medication in the local community whenever he needed to.

Petitioners stated Mr. [Redacted] spent most of his vacation time with his wife, either in Idaho or other parts of the United States. On one occasion, Mr. [Redacted] took his family to

[Redacted]. Petitioners stated Mr. [Redacted] employment contract provided for two flights anywhere per contract year, provided the cost was the same as a flight to the United States.

Petitioners stated when Mr. [Redacted] went to [Redacted] he was looking to make a difference in that country. Because of his sense of duty and service to others, Mr. [Redacted] fully intended to be in [Redacted] for the long-term. Petitioners stated Mr. [Redacted] was committed to what he was doing, regardless of the country, because it was what he believed in.

In addition to asking that the audit adjustment be reversed, Petitioners asked that they be awarded attorney fees.

## **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.)

The Bureau determined Mr. [Redacted] had an abode in Idaho (the United States); therefore, Mr. [Redacted] did not have a tax home in a foreign country and Mr. [Redacted] was not a qualified individual eligible for the foreign earned income exclusion.

Petitioners argued Mr. [Redacted] abode was not in the United States because he met the 330 day physical presence test and that his abode was where he regularly lived; where he ate, slept, showered, relaxed, etc., which was in [Redacted]. Petitioners argued there is no case law where an individual met the physical presence test and was denied the foreign earned income exclusion.

The test for a qualified individual is a two part test, 1) the individual's tax home is in a foreign country and, 2) the individual either meets the required number of days outside the United States or he is a bona fide resident of the foreign country. (IRC section 911(d)(1)). As

part of the test for the individual's tax home, the individual's abode cannot be in the United States.

Petitioners' implied that because Mr. [Redacted] met the physical presence test, the abode requirement is irrelevant because Mr. [Redacted] abode is where he lived, slept, ate, showered, relaxed, etc. However, that implication is not supported by statute or case law. In Harrington v. Commissioner, 93 T.C. 297 (1989) the court discussed the requirement that a taxpayer not have an abode in the United States as a condition to the tax home test and that it was a test separate and apart from the physical presence test or the bona fide resident test. Consequently, a taxpayer can meet either the physical presence test or the bona fide resident test and still fail the tax home test. *See* also IRC section 911(d)(1).

Abode has been held to have a domestic rather than a vocational meaning; a place where the taxpayer has strong familial, economic, and personal ties. *See* Harrington v. Commissioner, 93 T.C. 297 (1989); Doyle v. Commissioner, 57 T.C.M. (CCH) 1439 (1989); Lemay v. Commissioner, 53 T.C.M. (CCH) 862 (1987), *affd.* 837 F.2d 681 (5<sup>th</sup> Cir. 1988); and Bujol v. Commissioner, T.C.M. (CCH) 762 (1987), *affd.* without published opinion 842 F.2d 328 (5<sup>th</sup> Cir. 1988). To determine whether a taxpayer's abode was in the United States during a particular period, 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. Eram v. Commissioner, T.C. Memo. 2014-60, 2014. 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.

In determining where Mr. [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. Mr. [Redacted] spent a significant amount of time in [Redacted] beginning in 2005 and ending in 2012. During the time Mr. [Redacted] was in [Redacted], Mrs. [Redacted] and Petitioners' children lived in Idaho. Since Mr. [Redacted] was in a war zone and his employment contract did not allow his family to accompany him overseas, Mr. [Redacted] did a balancing act between fulfilling his sense of duty and service and being with his family.

Mr. [Redacted] did contribute to the local economy while in [Redacted]. Even though Mr. [Redacted] meals were provided as part of his employment contract, Mr. [Redacted] frequently had meals outside of his contract on the local economy. Petitioners stated Mr. [Redacted] paid for these meals and also paid for snacks and his general living expenses. Petitioners also stated Mr. [Redacted] would help load up trucks with clothing, toys, and various other items and deliver them to various neighborhoods in [Redacted]. Presumably, since Mr. [Redacted] was participating in loading and delivering the goods, he likely contributed to the cause for purchasing the goods.

Mr. [Redacted] had personal contacts and relationships with numerous individuals in [Redacted]. His professional contacts turned into personal relationships and he had a strong relationship with his training staff. Mr. [Redacted] attended various social functions, sporting events, and entertainment venues. He was invited to dinners and to the homes of his [Redacted] counterparts. Petitioners stated Mr. [Redacted] was also instrumental in providing ways for some of his [Redacted] friends and colleagues to get out of [Redacted] for their own safety.

Looking at the facts and circumstances it is clear Mr. [Redacted] had ties to both the United States and to [Redacted]. The Tax Commission, as the trier of the facts, must determine where Mr. [Redacted] had the stronger ties during the relevant period. From the facts presented and the testimony given, the Tax Commission finds that although Mr. [Redacted] family was in the United States his desire, commitment, and sense of duty to his belief that he could make a difference in [Redacted], made his ties to [Redacted] more than limited and transitory. And because of Mr. [Redacted] community involvement and interaction with the [Redacted] people, the Tax Commission finds Mr. [Redacted] abode was in [Redacted] for the relevant period. Therefore, Mr. [Redacted] tax home was in [Redacted].

Petitioners asked for attorney's fees pursuant to Idaho Code section 12-117(1) on the basis that there are no court cases where an individual who meets the physical presence test that was denied the foreign earned income exclusion. Petitioners also stated that the Bureau's position had no basis in fact or law to deny the foreign earned income exclusion.

Idaho Code section 12-117(1) states in part,

[I]n any proceeding involving as adverse parties a state agency or a political subdivision and a person, the state agency, political subdivision or the court hearing the proceeding, including on appeal, shall award the prevailing party reasonable attorney's fees, witness fees and other reasonable expenses, if it finds that the nonprevailing party acted without a reasonable basis in fact or law.

Idaho Code section 63-3045 states in pertinent part,

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any tax payable under this act or the liability at law or in equity of any person in respect to any tax provided in this act or collecting any such liability, the state tax commission or its duly authorized deputy is authorized—

- (a) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

IRC section 911 states that certain requirements must be met before a taxpayer can claim an exclusion from income of their foreign earned income. Not meeting one of those requirements was the basis of the Bureau's determination that Petitioners had a tax deficiency. The law states that a taxpayer's tax home is not treated as being in a foreign country if the taxpayer has an abode in the United States during the period. The Bureau examined Mr. [Redacted] tax home and abode, and from the information Petitioners provided, the Bureau determined Mr. [Redacted] had an abode in the United States during the time he was employed in [Redacted].

Since Petitioners claimed the foreign earned income exclusion, it is within the Tax Commission's purview to review and examine the validity of the deduction claimed. The information Petitioners provided during the audit phase led the Bureau to believe Mr. [Redacted] abode was in the United States while he was employed in [Redacted]. While ultimately the Tax Commission found in Petitioners' favor, the Bureau did not have an unreasonable position in fact or law. Therefore, Petitioners' request for attorney's fees is denied.

### **CONCLUSION**

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

THEREFORE, the Notice of Deficiency Determination dated March 22, 2013, and directed to [Redacted] is CANCELLED.

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

DATED this \_\_\_\_\_ day of \_\_\_\_\_ 2015.

IDAHO STATE TAX COMMISSION

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COMMISSIONER

**CERTIFICATE OF SERVICE**

I hereby certify that on this \_\_\_\_\_ day of \_\_\_\_\_ 2015, 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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