

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

In the Matter of the Protest of	)	
	)	DOCKET NO. 25722
[Redacted],	)	
	)	
Petitioners.	)	DECISION
_____	)	

[Redacted] and [Redacted] (Petitioners) protested the Notice of Deficiency Determination dated March 22, 2013, asserting income tax and interest for taxable years 2009 through 2011, in the total amount of \$9,698. 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 stated the information the Bureau requested is irrelevant to whether [Redacted] was a qualified individual because [Redacted] met the physical presence test.

The Bureau reviewed the information available and Petitioners’ statements, and determined that [Redacted] abode was in the United States. Therefore, [Redacted] tax home was not considered to be in [Redacted] and, as a result, he did not meet the requirements of a

qualified individual. 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 erroneous. Petitioners stated the Bureau has confused itself by reading irrelevant tax cases relating to the bona fide residence test of taxpayers working on [Redacted]. Petitioners stated that in the cases cited by the Bureau, the Tax Court found that the taxpayers did not have a tax home in the foreign countries because they maintained their home (abode) in the United States. Consequently, these individuals were not eligible for the foreign earned income exclusion under the bona fide residence test. Petitioners further stated that had any of the individuals in the cited cases met the physical presence test they would have been entitled to the foreign earned income exclusion.

Petitioners stated further, the Bureau's attempt to make any connection with the individuals in the cited cases with [Redacted] is misguided. Petitioners stated [Redacted] clearly had his place of abode in [Redacted] and clearly satisfied the bright line physical presence test. Petitioners stated at no time, for any period, did [Redacted] claim to be a bona fide resident of [Redacted].

Petitioners stated that even though the Bureau's questionnaire was not relevant to [Redacted] status in [Redacted], they provided the following information as proof to clearly show [Redacted] tax home was in a foreign country.

[Redacted] was a civilian living at [Redacted] in the [Redacted].

[Redacted] housing was abandoned [Redacted] buildings taken over by the [Redacted].

The [Redacted] provided food and fuel for generators.

[Redacted] family did not relocate to [Redacted] because of the [Redacted] and it would have been a violation of his employment contract.

[Redacted] received his mail at an APO address located in [Redacted].

[Redacted] VISA did not require him to leave [Redacted].  
[Redacted] job was training [Redacted] with the help of a language assistant.  
[Redacted] did not leave his home base except for [Redacted] and all his relationships were work related.  
[Redacted] had an [Redacted] cell phone.

Petitioners cited IRS Memorandum AM 2009-003 and its discussion of civilian contractors working in combat zones. Specifically, Petitioners focused in on the statement, “As a general matter, in light of the foregoing, it is difficult for civilian contractors, and other civilian employees, who are not employees of the United States or an agency thereof, working in foreign country combat zones to meet the bona fide residence test under IRC section 911.” Petitioners inferred from this statement, that had [Redacted] intended to disallow the physical presence test as well to civilian contractors, it would have named the physical presence test in the statement also.

Petitioners stated that individuals who live and work overseas for extended periods of time clearly maintain a tax home in a foreign country despite still owning a home in the U.S. or maintaining a U.S. bank account. Petitioners do not believe [Redacted] is asking taxpayers to give up their citizenship, move bank accounts and family homes, and break all U.S. ties in order to qualify for the foreign earned income exclusion. Petitioners believe the test is designed to look at where the taxpayer spent the most time during the year and where the taxpayer worked.

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 telephone conference in which it was determined the Tax Commission would prepare questions for [Redacted] to respond to. The Tax Commission prepared and sent Petitioners a list of questions, which was forwarded on to [Redacted] since he was back in [Redacted]. A few

weeks later, the Tax Commission received [Redacted] responses to the questions. However, rather than responding to the specific questions, [Redacted] provided a narrative of his time living overseas as an [Redacted] working for [Redacted].

[Redacted] stated he spent the majority of his time as an [Redacted]. He was assigned to an [Redacted] team as their [Redacted]. [Redacted] [Redacted] in the various districts they were assigned to. [Redacted] duties were to [Redacted] in the principles of [Redacted]; to break the cycle of corruption and teach them the principles of human rights. This was done through classroom training, but mostly through going on missions with the [Redacted] throughout the towns they were assigned. [Redacted] stated he provided his passport and [Redacted] took care of his VISA. [Redacted] also provided him with a [Redacted] as stipulated in its contract with the Department of State.

From 2009 through 2010, [Redacted] was stationed at a place called [Redacted]. [Redacted] stated he spent a year there assigned to the [Redacted] [Redacted] (Company). [Redacted] stated his Company was the first to occupy [Redacted]. They occupied an abandoned [Redacted]. [Redacted] stated the buildings were not habitable at first, so his first mission was to make it livable by cleaning out all the trash and debris, dirt, scorpions and spiders. They also needed to make it defensible against attacks. [Redacted] stated that even when they were making [Redacted] a safer place, he still needed to start making relationships with the [Redacted]. [Redacted] stated he would help with the [Redacted] during the day and meet with his [Redacted] at night to go out with them and watch their interaction with the citizens.

[Redacted] stated the accommodations were pretty meager by American standards. His room consisted of a bunk bed, a gorilla box, and his laptop. [Redacted] stated they had no power or running water to begin with. A soldier in his unit was able to get power from their generators

to each of the rooms so they did have power. However, running water was never available inside the building. Bottled water was brought in by the [Redacted] and there was an old hand-pump well where they could get water to wash clothes or to take a sponge bath. The same soldier who got the power on also came up with a way to warm the water in a large bladder for a make-shift shower. [Redacted] stated this worked well until the winter months came.

[Redacted] stated the [Redacted] provided MREs (Meals Ready to Eat) along with the bottled water. [Redacted] stated the MREs were okay for a while, but got to be intolerable for every meal. [Redacted] stated the [Redacted] had a small market or bazaar close to them in the town of [Redacted]. He stated he would go there to buy local food; always their bread and sometimes the [Redacted] version of french fries. [Redacted] stated going to the bazaar gave him the opportunity to have something else to eat and to meet the [Redacted]. By meeting the [Redacted] they opened up their homes and he often dined with them.

[Redacted] stated a lot of the [Redacted] lived with them on [Redacted]. Some were security, some were [Redacted], and some were the [Redacted] that he and others were [Redacted]. The [Redacted] that lived within and around the base had no better living conditions than the Americans and sometime worse, i.e. tents. Having the [Redacted] live on the base built relationships and trust between the Americans and the [Redacted]; it was also more convenient for [Redacted] purposes.

[Redacted] stated winter brought on a whole different set of conditions to deal with; however, it was a more peaceful time since the conditions brought about a decrease in [Redacted] activities. The winter season also taught them more about the [Redacted]; who were really not equipped to deal with winter, but were still able to survive.

[Redacted] stated he engaged in sporting events with the [Redacted]. He said they were better at throwing snowballs, but were not as skilled when it came to playing softball.

[Redacted] stated it was difficult spending holidays away from his wife and kids. Nevertheless, he made the most of it by getting together with the people who had become family to him.

[Redacted] stated that towards the end of his year at [Redacted] the living conditions improved. The [Redacted] brought in a shower trailer and they started getting real food; albeit frozen food. This was also about the time the [Redacted] completed their tour and headed back to the States. [Redacted] stated it was a sad time because all the friends he had made were leaving and, in addition to the [Redacted] unit leaving, he was reassigned to another district where he had to start anew with the [Redacted] and another [Redacted] unit. [Redacted] stated he is still in contact with the friends he made at [Redacted]. He stated they talk frequently on the phone and often exchange Christmas cards.

[Redacted] stated his life in [Redacted] makes him appreciate being an American. He stated he went to [Redacted] to make a difference, have some excitement, and make money. What he came away with was invaluable friendships.

### **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 a 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 Petitioners' Idaho income tax returns encompassed taxable years 2009, 2010, and 2011, looking specifically at the foreign earned income exclusion Petitioners claimed each year. 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 earned income exclusion. The Bureau disallowed the foreign earned income exclusion Petitioners claimed for each taxable year.

The Bureau's determination was based upon the facts that [Redacted] retained significant U.S. ties such as a home, a driver's license, an Idaho resident fish and game license, and family. The Bureau determined, based upon the information available, [Redacted] familial, economic, and personal ties to the United States were stronger than his ties to [Redacted].

Petitioners argued that [Redacted] met the physical presence test while in [Redacted] and that the Bureau was requesting information that applied to the bona fide resident test. Petitioners stated [Redacted] place of abode was clearly in [Redacted] because he met the bright-line physical presence test. Since [Redacted] met the bright-line physical presence test, Petitioners argued the information the Bureau requested was irrelevant; [Redacted] was not a bona fide resident of [Redacted].

The information the Bureau asked of Petitioners was for the determination of [Redacted] abode.

The question of whether a citizen of the United States is a bona fide resident of a foreign country is different from the question of abode, and, although it involves to some extent the same facts as those relative to determining abode, it requires a different factual determination. While the tax home inquiry focuses on the taxpayer's ties to the United States in order to determine abode, the bona fide residence inquiry focuses on the taxpayer's ties to the country of which he claims to be a resident. Additionally, the taxpayer must present "strong proof" that he

was a bona fide resident of a foreign country, whereas he need only establish that his tax home was in a foreign country by a preponderance of evidence. Schoneberger v. Commissioner, 74 T.C. 1016, 1024 (1980). Therefore, a conclusion that petitioner's tax home was not within the United States in 1988 or 1989 is not determinative of whether petitioner was a bona fide resident of Syria.

Lansdown v. C.I.R., T.C. Memo. 1994-452, 1994.

As discussed in Harrington v. Commissioner, 93 T.C. 307-308, (1989), 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 or the bona fide resident tests and still fail the tax home test.

The general rule of IRC section 911(d)(1), that taxpayer's tax home be in a foreign country, is subject to an overriding 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 has his abode 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 examine and contrast 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.

The decisions the Tax Court relies heavily upon in the determination of a taxpayer's abode are Bujol v. Commissioner, T.C. Memo. 1987-230, affd. without published opinion 842 F.2d 328 (5th Cir. 1988), and LeMay v. Commissioner, T.C. Memo. 1987-256, affd. 837 F.2d 681 (5th Cir. 1988). In those cases, the taxpayers were employed on off-shore drilling rigs located in territorial waters of a foreign country. The taxpayers worked a shift of 28 days on the rig followed by 28 days of off-duty, wherein both taxpayers went home to their families in the United States. The taxpayers were required to live on premises and had little contact with the local people. The court concluded that both Bujol's and LeMay's abode was at a location where they had strong economic, family, and personal ties, which was within the United States.

Citing the Bujol and LeMay cases, the court in Welsh v. C.I.R., T.C. Memo. 1988-512, 1988, found that,

Although petitioner was not employed on an offshore drilling rig, the nature of his employment allowed only transitory contacts with Saudi Arabia. See Brobst v. Commissioner, T.C. Memo. 1988-456. He lived at a bachelor camp provided by Aramco. He traveled between the camp and the work site, and he occasionally traveled in Saudi Arabia to shop or to eat. He obtained a Saudi Arabian driver's license; however, he did not relinquish his Kansas driver's license. Thus, petitioner had minimal contact with Saudi Arabian society. Further, he always returned to Kansas at the end of his 56-day work period in order to visit his wife and children. It was not practicable or possible for petitioner to establish an abode in Saudi Arabia. Therefore, we find that petitioner's abode remained in the United States during the years in issue. Sec. 911(d)(1).

In the case at hand, [Redacted] did not work shifts; his contracts were typically for one year with annual leave accruing at either 4% of his base salary or 30 calendar days per contract

year. [Redacted] vacationed in the United States, as well as in [Redacted] and the [Redacted] during the years in question. [Redacted] time spent in the United States averaged 11 to 12 days for the 2009 and 2010 periods and 15 days for the 2011 period. From the information provided, it is clear [Redacted] did not return to the United States on a regular and consistent basis, as did the taxpayers in Bujol, LeMay, and Welsh.

Looking at the three factors for the determination of abode (familial, economic, and personal) it is evident that at least one of the three weighs heavily on either the United States or the foreign country; those being familial and economic. However, even those two factors touch the borders of the other country. Therefore, the deciding factor in determining [Redacted] abode is his personal ties during the periods in question.

[Redacted] stated he worked closely and lived with the Afghan police. He stated that in addition to going out on missions with the [Redacted], the [Redacted] lived in and around the refurbished buildings where he lived. In addition to working closely with the [Redacted], [Redacted] socialized with the [Redacted], he played sports with them, and he dined in [Redacted] homes. By going out on [Redacted] with the [Redacted], [Redacted] was a visible member of the [Redacted] community. [Redacted] also contributed to the local economy by purchasing food and goods at the local bazaar.

Even though [Redacted] maintained his Idaho driver's license and purchased Idaho fish and game licenses for the years in question, it appears [Redacted] had more personal ties to [Redacted]. Furthermore, when [Redacted] took his vacations, he did not spend all his time in the United States. In addition to the United States, [Redacted] spent time in [Redacted] and the [Redacted] and, in a prior tax year, in Mexico. The facts of this case show that for the purpose of IRC section 911 tax home, [Redacted] abode was not in the United States.

**CONCLUSION**

Since [Redacted] tax home was in [Redacted] and he met the physical presence test, [Redacted] was a qualified individual for purposes of the foreign earned income exclusion.

THEREFORE, the Notice of Deficiency Determination dated March 22, 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 \_\_\_\_\_ 2015.

IDAHO STATE TAX COMMISSION

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