

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

In the Matter of the Protest of	)	
	)	DOCKET NO. 25621
<b>[Redacted]</b>	)	
	)	
Petitioners.	)	DECISION
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**[Redacted]** (Petitioners) protested the Notice of Deficiency Determination issued by the Income Tax Audit Bureau (Bureau) of the Idaho State Tax Commission asserting additional income tax and interest for taxable years 2009, 2010, and 2011 in the total amount of \$20,673. Petitioners disagreed that Mr. **[Redacted]** did not meet the requirements of a qualified individual for the foreign earned income exclusion. The Tax Commission having reviewed the file hereby issues its decision.

**BACKGROUND**

Petitioners timely filed Idaho resident individual income tax returns for taxable years 2009, 2010, and 2011. On each return, Petitioners claimed an exclusion from gross income for foreign earned income. The Bureau selected Petitioners' returns to verify the foreign earned income exclusion claimed. The Bureau requested information from Petitioners, reviewed it, and determined Mr. **[Redacted]** was not a qualified individual as defined in Internal Revenue Code section 911(d). The Bureau determined Mr. **[Redacted]** tax home was not in a foreign country because his abode remained in the United States. The Bureau corrected Petitioners' Idaho individual income tax returns and sent them a Notice of Deficiency Determination.

Petitioners protested the Bureau's determination. Petitioners stated the starting point for Idaho's tax computation is federal adjusted gross income and since the Idaho Code does not have a provision to add back the federal foreign earned income exclusion (citing Tax Commission Decision on Docket No. 19972), the Tax Commission cannot add back the foreign earned

income exclusion claimed. Petitioners stated further that there is a body of federal court cases that support the contention a U.S. citizen assigned to work in Saudi Arabia can be a bona fide resident even though they do not fully assimilate into Saudi society. Petitioners cited Ditman v. CIR, 56-1 USTC 9186 and Larsen v. Commissioner, 23 TC 599 as two examples of the case law in support of bona fide residency in Saudi Arabia. Petitioners asked that their returns be accepted as filed.

The Bureau acknowledged Petitioners' protest and referred the matter for administrative review. The Tax Commission reviewed Petitioners' case and sent their representative, a letter discussing the methods available for redetermining a protested Notice of Deficiency Determination. Petitioners' representative did not respond, so a follow-up letter was sent to Petitioners. Petitioners contacted the Tax Commission through their representative and requested that a telephone hearing be held to present their position and any other additional information required by the Tax Commission. A telephone hearing was held on December 15, 2015, wherein Petitioners provided the following additional information.

Mr. [Redacted] began working overseas for his employer, [Redacted], in 2009. Mr. [Redacted] contract was for 36 months, but since [Redacted] had an on-going contract in the Kingdom of Saudi Arabia, Mr. [Redacted] believed he could have renewed his contract when its term expired. However, due to issues back in Idaho, Mr. [Redacted] did not renew his contract. Since his return to Idaho, Mr. [Redacted] has worked other short-term projects that have taken him overseas. Mr. [Redacted] desire is to work overseas and is currently seeking opportunities to work overseas.

Mr. [Redacted] Saudi Arabia contract was offered as unaccompanied, meaning [Redacted] would not pay to have his family move to Saudi Arabia. Mr. [Redacted]

stated there were security concerns and women are not welcome in Saudi Arabia.

While in Saudi Arabia, Mr. [Redacted] lived in a walled compound with security guards. He initially shared a four room flat with three other individuals. Later, he moved into a separate apartment of his own that had a kitchen and utility room. Mr. [Redacted] furnished his apartment with art, chairs, a TV, a computer, speakers, and cooking utensils and appliances. Mr. [Redacted] employer paid for his housing and utilities while he was in Saudi Arabia. Mr. [Redacted] paid for all his other living expenses.

Mr. [Redacted] provided for all his meals which he generally cooked himself. Mr. [Redacted] stated he occasionally went out to eat with his co-workers after work. Mr. [Redacted] stated he did not dine out in the local community very often.

Mr. [Redacted] contract was to lead the [Redacted] restoration of the desert from the damage of the first gulf war. Mr. [Redacted] stated he had no physical restrictions on where he could go in the Kingdom, but there were some locations he was advised to stay away from. Mr. [Redacted] stated he could freely move around the country and he did. Mr. [Redacted] stated when necessary he traveled to other locations to work on other projects [Redacted] had. Mr. [Redacted] stated his employer had four SUVs available for use at any time, either for work or personal. Mr. [Redacted] stated he acquired a Saudi driver's license, and he was issued a multiple entry/exit visa so he could come and go into the Kingdom as he pleased. Mr. [Redacted] stated he was granted an access pass from the Presidency of Meteorology and the Environment that allowed him access to remote desert locations.

Mr. [Redacted] stated he involved himself with the Saudi community within the limitations imposed by the conservative Muslim society. However, he fully participated with the expat community in the compound where he lived. Because of the Muslim society, Mr. [Redacted]

contact with the local Saudis was limited to those he worked with, security, and on occasion the police, and then only the men. Mr. [Redacted] stated he did observe Ramadan, but most of his integration was done within the walled compound with the other expats from around the world.

Mr. [Redacted] stated he did not have many opportunities to meet the local Saudi community. Those he did have contact with were individuals he worked with or belong to the security detail. Mr. [Redacted] stated it was only the single males in Saudi Arabia that were receptive to hanging out with expats.

Mr. [Redacted] stated his recreational opportunities occurred one day per week. His work schedule was a 6-day work week which left one day to all the other activities necessary to live comfortably. Mr. [Redacted] stated he lived near the Gulf of Arabia which enabled him to go sailing, swimming, and fishing. Mr. [Redacted] stated he also went camping in the desert with other expats and visited ancient villages and souks. When Mr. [Redacted] took a vacation or holiday he would come back to Idaho, but on occasion he would visit the neighboring countries in the Middle East. He stated, he and some of the other expats took trips to Lebanon and Bahrain for recreation and site seeing. Mr. [Redacted] said he also did a lot of 4-wheeling in the company vehicles.

Mr. [Redacted] stated he did not have much need for any medical attention while he was in Saudi Arabia. He stated the entire medical profession was non-Saudis; all the doctors and nurses were of foreign nationalities.

Mr. [Redacted] stated he had a Saudi work permit which was difficult to get. He stated it was similar to “green cards” in the United States and only a certain number were issued to companies working in Saudi Arabia. Mr. [Redacted] stated he also had letters from the police to show that he was not in the country illegally.

Mr. [Redacted] stated that while in Saudi Arabia he had little contact with his family and friends in the U.S. Mr. [Redacted] stated he stayed in contact via e-mail. He stated he rarely used Skype due to the poor internet connections. Mr. [Redacted] stated there was not a lot of communication between him and his family.

## **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 earned 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 looked specifically at the foreign earned income exclusion Petitioners claimed each year. The Bureau determined Mr. [Redacted] did not have a tax home in Saudi Arabia because his abode was in the United States; therefore, Mr. [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 Mr. [Redacted] retained significant U.S. ties such as a home, a driver's license, banking, and family in the United States. The Bureau determined, based upon the information available, Mr. [Redacted] familial, economic, and personal ties to the United States were stronger than his ties to Saudi Arabia.

Petitioners argued that Mr. [Redacted] situation was very similar to the cases of Ditman and Larsen, supra, in that Mr. [Redacted] did not speak Arabic, he did not enter into the social life of the community nor did he become assimilated into the foreign environment, he did not pay

income taxes to Saudi Arabia, nor did he apply for citizenship, but he did work in Saudi Arabia for a period extending longer than one year. Petitioners stated that since the federal courts have time and again accepted a bona fide resident claim with similar facts and circumstances as that of Mr. [Redacted], the Tax Commission should accept Petitioners' claim and reverse the Notice of Deficiency Determination.

Petitioners' argument is based upon court decisions prior to the amendment of IRC section 116; the predecessor of IRC section 911. The Foreign Earned Income Act of 1978, Public Law No. 95-615, added the requirement that a taxpayer's tax home be in a foreign country. In addition to the tax home requirement, a taxpayer's abode could not be in the United States while in the foreign country. The Bureau disallowed Petitioners' foreign earned income exclusion on the basis that Mr. [Redacted] tax home was not in a foreign country because his abode was in the United States. The Bureau did not examine whether Mr. [Redacted] was a bona fide resident of Saudi Arabia.

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.

Lansdown v. CIR, T.C. Memo 1994-452, (1994).

Mr. [Redacted] ties to the United States included a home, wife and child, an Idaho driver's license, vehicles registered in Idaho, Idaho bank accounts, he was registered to vote in Idaho and voted absentee, and he returned to Idaho on numerous occasions to visit family. Mr. [Redacted] ties to Saudi Arabia or lack thereof consisted of employer provided housing in a compound, the

inability to speak the language, a Saudi driver's license, a Saudi bank account that was rarely used, a multiple entry business visa, a resident visa, only socializing with Saudi business associates but mostly with individuals living in the compound, and when Mr. [Redacted] took a holiday he left Saudi Arabia for the United States or on occasion another country. It would appear from the information available Mr. [Redacted] economic, familial, and personal ties were stronger toward the United States than to Saudi Arabia. And, since the courts define "abode" as the place where a taxpayer has strong economic, familial, and personal ties (Bujol v. Commissioner, T.C. Memo. 1987-230; Lemay v. Commissioner, 837 F. 2d 681, 683-684 (5th Cir.1988), affg. T.C. Memo. 1987-256; Harrington v. Commissioner, 93 T.C. 297, 307-308 (1989)), it appears Mr. [Redacted] abode was in the United States. Therefore, Mr. [Redacted] could not have a tax home in a foreign country for purposes of the foreign earned income exclusion. (IRC section 911(d)(3)).

Since the Tax Commission determined Mr. [Redacted] did not have a tax home in Saudi Arabia, we need not discuss whether Mr. [Redacted] was a bona fide resident of Saudi Arabia. Nevertheless, the Tax Commission will include a brief discussion as to why it believes Mr. [Redacted] was not a bona fide resident of Saudi Arabia.

"The question of bona fide residence in a foreign country or countries is by no means novel. Despite the many cases where that issue was involved, however, the question is so peculiarly one of fact that each new case must be decided on the basis of its own unique attendant circumstances. The decided cases are of very little aid." (Citations omitted.) Nelson v. C.I.R., 30 T.C. 1151 (1958). The determination of whether a taxpayer is a bona fide resident of a foreign country requires an examination of all relevant facts and attendant

circumstances. Dawson v. Commissioner, 59 T.C. 264, 268 (1972). As stated in Lansdown, supra, the burden of proof for showing bona fide residence in a foreign country is “strong proof.”

The court in Sochurek v. Commissioner, 300 F. 2d 34, 38 (7th Cir.1962), set forth factors to be considered in determining bona fide residence. The factors include: (1) intention of the taxpayer; (2) establishment of a home temporarily in the foreign country for an indefinite period; (3) assimilation into the foreign environment and culture; (4) physical presence in the foreign country consistent with employment; (5) nature, extent, and reasons for temporary absences from temporary foreign home; (6) assumption of economic burdens and payment of taxes to the foreign country; (7) status of resident contrasted to that of transient or sojourner; (8) treatment accorded income tax status by employer; (9) marital status and residence of family; (10) nature and duration of employment (i.e., whether assignment abroad could be promptly accomplished within a definite or specified time); and (11) good faith in making the trip abroad (i.e., whether for purpose of tax evasion).

In Meals v. U.S., 110 F. Supp. 658 (1953), the court stated in determining whether the taxpayer was a bona fide resident of Germany,

The whole pattern of plaintiff's life in Germany is consistent with his claim of residence there. He went to Germany planning to remain there for a substantial and indefinite period of time. He was embarking upon employment which promised to develop into a career. He abandoned entirely the home he had previously maintained in the United States. The apartment he established in Frankfort was a home as complete as most bachelors ever achieve. He worked with German personnel, and entered into the social life of the community to such extent that he married a German girl. The only features of his life that set him apart from the German scene were the courtesies the Army extended to him as an American civilian employed in Germany. He was privileged to buy supplies at the Army Post-Exchange. He occasionally purchased meals at an Army mess. The apartment made available to him by the Army probably afforded him more comfortable living quarters than would otherwise have been obtainable. But, these special privileges which he enjoyed as an American did not isolate him from the foreign environment to such extent as to preclude the establishment of a bona fide residence.

In the case at hand, Mr. [Redacted] was in Saudi Arabia for a definite time; the completion of a specified contract. He lived in employer provided, furnished, living accommodations wherein even the utilities were paid by his employer. Mr. [Redacted] in country transportation was also provided by his employer through access to project car pools. Mr. [Redacted] was only allowed a certain amount of personal effects to be transported to and from Saudi Arabia. He was not allowed to be accompanied by his family. Mr. [Redacted] was reimbursed for his flights to the United States or its equivalent if Mr. [Redacted] chose to vacation elsewhere. Nothing in the record shows Mr. [Redacted] ever vacationed in Saudi Arabia.

Mr. [Redacted] stated he did not pay income tax to Saudi Arabia. He stated his interaction with the Saudis was limited due to his status as an expat and the conservative, closed Muslim society. Mr. [Redacted] stated most of the functions involving Saudi nationals were work related or with individuals assigned to their security detail. Mr. [Redacted] stated the majority of his social integration was in the compound where he lived. Mr. [Redacted] stated he got to know people from around the world who also lived in the compound. He stated he particularly became involved with the British individuals, celebrating various holidays and events with them.

In looking at the factors enumerated in Sochurek, it is evident from the facts that Mr. [Redacted] tenure in Saudi Arabia was determined by his employment contract and even though he could have possibly extended his contract, Mr. [Redacted] returned to the United States; albeit to deal with personal issues. Mr. [Redacted] stated his intention was to continue with overseas employment; however, the information presented did not show that Mr. [Redacted] intended to have a permanent or indefinite residence in Saudi Arabia. Hertig v. C.I.R., 19 T.C. 109 (1952).

Mr. [Redacted] stated he integrated into Saudi life as much as any expat could, considering the eastern beliefs and the closed society. However, lack of opportunity to establish bona fide residence does not prove its existence. Woodward v. CIR, TC Memo 1990-7. In addition, Mr. [Redacted] behavior did not support his claim of status as a resident, but rather that of a transient or sojourner. Dawson v. Commissioner of Internal Revenue, 59 T.C. 264 (1972). Therefore, having considered all the facts of this case, the Tax Commission finds Petitioners have not carried their burden of strong proof that Mr. [Redacted] was a bona fide resident of Saudi Arabia.

### CONCLUSION

A qualified individual for purposes of the foreign earned income exclusion must have his/her tax home in a foreign country and be either physically present in a foreign country or countries for 330 days, or be a bona fide resident of a foreign country. Based upon the information presented and available, the Tax Commission found that Mr. [Redacted] did not have a tax home in Saudi Arabia because his abode was in the United States. The Tax Commission further found that Mr. [Redacted] was not a bona fide resident of Saudi Arabia. Since Mr. [Redacted] did not have a tax home in a foreign country, nor was he a bona fide resident of Saudi Arabia, he was not a qualified individual, and cannot exclude his foreign earned income on his 2009, 2010, and 2011 Idaho income tax returns.

THEREFORE, the Notice of Deficiency Determination dated March 15, 2013, and directed to **[Redacted]** is AFFIRMED.

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

<u>YEAR</u>	<u>TAX</u>	<u>INTEREST</u>	<u>TOTAL</u>
2009	\$3,985	\$996	\$4,981
2010	7,138	1,448	8,586
2011	8,146	1,325	<u>9,471</u>
		TOTAL DUE	<u>\$23,038</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 \_\_\_\_\_ 2016.

IDAHO STATE TAX COMMISSION

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COMMISSIONER

**CERTIFICATE OF SERVICE**

I hereby certify that on this \_\_\_\_\_ day of \_\_\_\_\_ 2016, 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.