

Petitioners protested the Bureau's determination stating [Redacted] tax home was in Afghanistan and Iraq during the years in question as evidenced by his passport, his employer, and other travel documents. Petitioners stated [Redacted] worked on U.S. Air Bases in those countries despite the fact his family resided elsewhere. Petitioners concede [Redacted] was not a bona fide resident of Afghanistan or Iraq, but he didn't have to be because he was clearly present in those countries for the physical presence test of Internal Revenue Code (IRC) section 911. Petitioners stated the Bureau reliance on the fact pattern of Daly v. CIR, T.C. Memo 2013-147 (2013) as applied to their situation is misplaced since there are a number of distinguishing facts between the two. Petitioners stated, the only commonalities between the Daly case and their case was that [Redacted] and Mr. Daly were both contractors working for the Department of Defense and they were both in Afghanistan and Iraq. Most everything else is distinguishable. Petitioners stated [Redacted] met the physical presence test, 100 percent of the family income was earned overseas, and [Redacted] posts were indefinite; [Redacted] tax home was not in the United States.

Petitioners did concede that their returns contained errors regarding the employee business expenses claimed. Petitioners stated that since [Redacted] tax home was in a foreign country, his travel expenses should not have been deducted. Petitioners stated they relied on the expertise of their tax preparer for the deductions available to ex-pats.

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. The Tax Commission also sent Petitioners a list of additional questions designed to obtain more

information for determining whether [Redacted] abode was in the United States during the years in question.

Petitioners contacted the Tax Commission and stated that the Internal Revenue Service (IRS) had looked into their foreign earned income exclusion but concentrated on the number of days for meeting the physical presence test. Petitioners also stated they believed the IRS accepted that [Redacted] tax home was in a foreign country. Petitioners stated they would fax the IRS letters to the Tax Commission.

The Tax Commission did not receive any faxed information from Petitioners but about a week later Petitioners contacted the Tax Commission again. Petitioners stated [Redacted] was out of country and they needed to consult an attorney. In addition, [Redacted] had some medical needs that she was attending to and asked to have 30 days to respond to the Tax Commission. Petitioners were allowed the additional time and at the end of that time the Tax Commission received a letter from Petitioners as well as responses to its questions.

In their letter, Petitioners stated that [Redacted] spent nearly all his time overseas on military installations that were or are maintained with the host country. Petitioners stated, [Redacted] complied with the 330 day rule and was not in the United States for more than 30 days for each of the four years in question. Petitioners stated [Redacted] slept, ate, relaxed, and worked in either Afghanistan or Iraq. Petitioners believed they were correct in electing the foreign earned income exclusion on their 2009 through 2012 income tax returns.

Other information Petitioners provided in response to the Tax Commission's questions were as follows. [Redacted] is a helicopter mechanic. He went to Iraq and Afghanistan to support the operations of the U.S. military. [Redacted] usually worked 12 or more hours a day, 7 days a week. Petitioners stated [Redacted] was restricted to the base.

While in Iraq and Afghanistan, [Redacted] lived in either tents, metal sided buildings, or a converted shipping container, all provided by the U.S. government through military housing. [Redacted] furnished his living quarters with a TV, wardrobe closet, dresser, microwave, bedding, small refrigerator, rugs, and cleaning supplies. [Redacted] provided and paid for his own internet access, cell phone, and cell service. In addition, [Redacted] purchased all his necessities for daily living.

[Redacted] ate most of his meals at the military mess halls on the bases where he worked. Occasionally, [Redacted] would dine on microwavable food he purchased at the post-exchange, on-line, or what was sent to him by [Redacted]. He also occasionally ate at civilian restaurants which were available on the larger bases.

[Redacted] recreation consisted of using the gym and rec center. He would go to movies, play games, and check out books to read. Some of the bases where [Redacted] worked also had football/soccer fields and volleyball courts. Petitioners stated [Redacted] would also attend the occasional concert that was brought in by the military.

[Redacted] interaction with the local populace was limited to the civilians that were allowed on base for either work purposes or for selling goods. [Redacted] could not leave the base to visit any of the surrounding cities. Petitioners stated any interaction [Redacted] had with the locals was usually professional in nature. [Redacted] did not cultivate any personal friendships with the Afghans or Iraqis.

[Redacted] medical needs were attended to by either an on-post contracted civilian medical provider if available or he would have to go out of country to Dubai, Kuwait, or the United States. Petitioners stated [Redacted] used the medical provider when his jaw was infected, but all other medical needs were done when he was on his 30-day leave of absences to

the United States. In fact, Petitioners stated most of [Redacted] leave time in the United States was spent going to doctors and dentists. All of [Redacted] medical expenses were paid out-of-pocket by Petitioners.

Petitioners stated, [Redacted] did his banking online and he purchased goods online, through the Exchange, or at the local shops on the base. Petitioners stated [Redacted] transportation was provided by busses or by walking. Since [Redacted] was not allowed off the base, whatever goods and services allowed on the base were what [Redacted] had access to.

As previously stated, when [Redacted] came back to the United States on leave most of his time was spent seeing his doctors and dentist. Petitioners stated on one of [Redacted] leaves he flew to Chicago to watch his son graduate from boot camp. Petitioners stated all flights in and out of Iraq or Afghanistan for leave purposes were paid for by Petitioners. Petitioners stated the time [Redacted] spent on leave in the United States was not long enough to establish relationships or re-establish old relationships.

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 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 encompassed taxable years 2009, 2010, 2011 and 2012 looking specifically at the foreign earned income exclusion Petitioners claimed each year. The Bureau determined [Redacted] had stronger ties to the United States than to either foreign country and therefore, [Redacted] abode was in the United States.

Since [Redacted] abode was in the United States rather than in a foreign country, [Redacted] was not considered to have a tax home in either Iraq or Afghanistan. Consequently, [Redacted] was not a qualified individual for the foreign earned income exclusion. Therefore, the Bureau disallowed the foreign earned income exclusion Petitioners claimed for the years in question.

Petitioners argued that [Redacted] met the physical presence test and he was not in the United States for more than 30 days in each of the four years in question. Petitioners stated [Redacted] slept, ate, relaxed, and worked in a foreign country and that is all that is required to show that his abode was not in the United States. Petitioners believe they were correct in electing the foreign earned income exclusion.

The issue in this case is [Redacted] tax home for the taxable years 2009 through 2012. As previously stated, IRC section 911 refers to IRC section 162(a)(2) for the determination of an individual's tax home. However, the general rule of tax home found in IRC section 162(a)(2) is subject to an overriding exception placed in IRC section 911(d)(3) for the purposes of the foreign earned income exclusion. 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's 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 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, supra.

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 generally a year in duration and he only returned to the United States once per contract period. [Redacted] off duty time was no more than 32 days per contract during the years in question and usually less. From the information available 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. On the contrary, [Redacted] presence in the foreign country was regular and consistent.

[Redacted] employment in Iraq and Afghanistan was indefinite. As long as [Redacted] performance was satisfactory and his employer was able to maintain its contract with the U.S. government, [Redacted] could continue to renew his employment contracts. Petitioners stated [Redacted] employment intent was to use his skills in support of U.S. armed forces. He did not intend temporary or transitory stays in either Iraq or Afghanistan.

Using the definition of abode, that it has a domestic rather than vocational meaning, (Bujol, 53 T.C.M. at 763) the courts have concluded, based upon the blocks of time spent in the United States and other factors, such as a U.S. bank account, U.S. driver's license, and U.S. voter's registration, that taxpayers with these characteristics had strong familial, economic and personal ties in the United States and only transitory ties in the foreign country where the taxpayers worked, and thus those taxpayers were held to have a U.S. abode.

However, with the case at hand, [Redacted] did not have the significant or repeated blocks of time in the United States which seems to be a key factor in the determination of where a taxpayer's stronger ties lie for purposes of the taxpayer's abode. Seeing that [Redacted] employment was indefinite and that he did not frequently and regularly return to the United States, the Tax Commission finds that [Redacted] had stronger ties to Iraq and Afghanistan for

purposes of abode. As a result, [Redacted] tax home was in a foreign country and he was a qualified individual for the foreign earned income exclusion.

Petitioners claimed employee business expenses for travel, meals, and other business expenses while [Redacted] was in Iraq and Afghanistan. Generally, employee business expenses are only allowable if the taxpayer is away from his tax home overnight. *See* IRC section 162(a)(2). Since in the previous discussion it was determined [Redacted] tax home was in Iraq and Afghanistan, any expenses related to traveling to and from those countries are considered personal commuting expenses and therefore nondeductible. Likewise, meals and lodging are considered personal living expenses within the area of a taxpayer's tax home and are nondeductible. Therefore, the Tax Commission disallowed Petitioners' claimed employee business expense for tax years 2009 through 2012.

CONCLUSION

Seeing that [Redacted], a citizen of the United States, was physically present in a foreign country for a full 330 days during the relevant periods for the taxable years 2009, 2010, 2011, and 2012, and that his tax home was in a foreign country, [Redacted] was a qualified individual for the purposes of the foreign earned income exclusion. However, because [Redacted] tax home was in a foreign country all travel, meals, lodging, entertainment, etc. incurred in, around, or getting to his tax home are personal living expenses rather than employee business expenses. Personal living expenses are not deductible and are hereby disallowed.

THEREFORE, the Notice of Deficiency Determination dated August 22, 2013, and directed to [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>
2009	\$858	\$203	\$1,061

2010	163	33	196
2011	748	112	860
2012	924	105	<u>1,029</u>
		TOTAL DUE	<u>\$3,146</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

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.