BEFORE THE TAX COMMISSION OF THE STATE OF IDAHO

In the Matter of the Protest of	)	
	)	DOCKET NO. 39182
[REDACTED],	)	
	)	
Petitioners.	)	DECISION
	)	

[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 2011 and 2012 in the total amount of $8,411. Petitioners disagreed that [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 2011 and 2012. On each return, Petitioners claimed an exclusion from gross income for foreign earned income. The Bureau selected Petitioners' returns for examination looking specifically at the foreign earned income exclusion. The Bureau requested information from Petitioners, reviewed it, and determined [Redacted] was not a qualified individual as defined in Internal Revenue Code section 911(d). The Bureau determined [Redacted] tax home was not in a foreign country because his abode was 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 [Redacted] did establish a tax home in Afghanistan to the best of his ability. Petitioners stated the letter of the law does not cleanly fit wartime restrictions placed on U.S. contractors. Petitioners stated the tests in the code were established to fit neatly into a situation where the foreign country was

under the control of an established government with the ability to regulate the actions of business and people within its borders. Petitioners stated [Redacted] spent more than two thirds of his time in Afghanistan; he worked there every day he was there. Petitioners stated it was not possible for a civilian working on a Department of Defense (DOD) contract to establish a tax home that will pass the tests of the tax code. Petitioners stated [Redacted] fully intended to work and live in Afghanistan for the duration of his contract and then continue with other overseas DOD contract work. Petitioners stated [Redacted] started working overseas on DOD contracts in 2006 and only returned to the U.S. in 2012 because of [Redacted] medical condition.

The Bureau acknowledged Petitioners' protest and referred the matter for administrative review. The Tax Commission reviewed Petitioners' case and sent them a letter discussing the methods available for redetermining a protested Notice of Deficiency Determination. Petitioners requested a hearing which was held on October 22, 2015. During the hearing Petitioners provided the following additional information.

[Redacted]' first DOD contract was in 2006 to work in Afghanistan. Petitioners stated [Redacted] was an aviation operations manager whose duties included scheduling and flying employees to various locations in Afghanistan. Petitioners stated [Redacted] intended to only work one year and then return to the United States. However, after that first year he saw the opportunities and continued for the next five years.

Petitioners stated that during that first year [Redacted] followed the guidelines of the Internal Revenue Service's Publication 54 in that he was physically present in a foreign country for at least 330 days in a consecutive twelve month period. Petitioners stated [Redacted]' first year contract only allowed 30 days of vacation or R&R. After the first year, Petitioners were under the impression that [Redacted] was a bona fide resident since he continued working in

Afghanistan for another five years. It was also after that first contract that [Redacted] was put on a work rotation of 70 days on and 30 days off. Petitioners stated [Redacted] always returned home on his 30 day rotation. Upon request, Petitioners later provided a schedule of [Redacted]' 30 day rotation periods when he returned to the United States.

Petitioners stated that while in Afghanistan [Redacted] lived in tents and later in containerized housing. His housing was employer provided and he was required to live on the military base. [Redacted] customized his living quarters with a computer, a monitor and a game console. He also walled off his space when living in a tent. Petitioners stated whenever [Redacted] left Afghanistan on his rotation all his personal items stayed in Afghanistan.

Petitioners stated [Redacted] was not allowed off the military base. All his meals were provided, but he could and did eat at local shops. [Redacted] purchased items at the PX and at base sponsored flea markets. Petitioners stated that [Redacted]' recreation consisted of playing cards, playing computer games, using the gym, and walking around the 5-mile circumference base. Petitioners stated [Redacted] had little contact with the Afghans; however, he did have working relationships and friendships with the other Americans and people from other nations that were on the base.

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. From the information gathered, the Bureau determined [Redacted] retained significant ties to the United States. The Bureau determined [Redacted]' familial, economic, and personal ties to the United States were stronger than his ties to Afghanistan. Therefore, [Redacted]' abode was in the United States and as a result, [Redacted] was not a qualified individual for the foreign earned income exclusion.

Petitioners argued that [Redacted] established a tax home in Afghanistan to the best of his ability given the constraints of the DOD regulations and contracts.

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. 2 d 328 (5th Cir. 1988), and LeMay v. Commissioner, T.C. Memo. 1987-256, affd. 837 F. 2 d 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).

Like the taxpayers in Bujol, LeMay, and Welsh, [Redacted]' worked a rotation of 70-days on then 30-days off, and he was required to leave Afghanistan during his off periods. And like those taxpayers, [Redacted] returned to the United States during his off periods to be with family. Because [Redacted] regularly and consistently returned to the United States when he

was off duty, the Tax Commission found [Redacted]' ties (familial, economic, and personal) were stronger in the United States than in Afghanistan. Therefore, as in Bujol, LeMay, and Welsh, [Redacted]' abode was in the United States and because his abode was in the United States, [Redacted]' tax home was not in Afghanistan for purposes of the foreign earned income exclusion.

Because the Tax Commission determined [Redacted]' tax home was not in Afghanistan, he fails to be a qualified individual and Petitioners' claim that [Redacted] was a bona fide resident of Afghanistan need not be addressed. Nevertheless, the Tax Commission will include a brief discussion as to why it believes [Redacted] was not a bona fide resident of Afghanistan.

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). The burden of proof for showing bona fide residence in a foreign country is "strong proof" versus a preponderance of evidence. Lansdown v. CIR, T.C. Memo 1994-452, (1994). The court in Sochurek v. Commissioner, 300 F. 2 d 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, [Redacted]' employment was determined by a government contract during a wartime occupation and could be terminated at any time. [Redacted] lived in employer or government provided housing and his meals were mostly paid by the government or his employer. [Redacted] had a limited amount of personal effects in Afghanistan and his family was not allowed to accompany him. [Redacted] was paid a stipend for his flights to and from the United States. [Redacted] was required to leave Afghanistan during his periods of off duty.

[Redacted] was not obligated to the government of Afghanistan; in fact, the government more than likely did not know [Redacted] was even in their country. [Redacted] had little to no interaction with the Afghans. Petitioners stated [Redacted]' only social integration was with the individuals on the military base where he lived. The wartime environment severely limited [Redacted]' ability to participate in the social and cultural attributes of Afghanistan.

In looking at the factors enumerated by the Sochurek court it is evident from the facts that [Redacted]' tenure in Afghanistan was determined by his desire for high pay and the employment opportunity it presented. There is no doubt that [Redacted] did not assimilate into the social and cultural aspects of Afghan life or that he had the opportunity too. Nonetheless, lack of opportunity to establish bona fide residence does not prove its existence. Woodward v. CIR, TC Memo 1990-7. Having considered all the facts, the Tax Commission found that [Redacted] was not a bona fide resident of Afghanistan.

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 [Redacted] did not have a tax home in Afghanistan because his abode was in the United States. The Tax Commission found further that [Redacted] was not a bona fide resident of Afghanistan. Since [Redacted] neither had a tax home nor was a bona fide resident, he was not a qualified individual and therefore, Petitioners cannot exclude his foreign earned income on their 2011 and 2012 income tax returns.

THEREFORE, the Notice of Deficiency Determination dated October 7, 2014, and directed to [Redacted] is AFFIRMED.

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

YEAR	TAX	INTEREST	TOTAL
2011	$5,227	$803	$6,030
2012	2,521	294	2,815
		TOTAL DUE	$8,845

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.

_____