TAX HOME V. ABODE – ARE THEY THE SAME FOR CODE §911 PURPOSES?

Authors
Rusudan Shervashidze
Philip R. Hirschfeld

Tags
Abode
Code §911
Foreign Earned Income
Tax Home

INTRODUCTION

The Internal Revenue Code (the "Code") provides a foreign earned income and housing cost exclusion to qualified individuals, subject to some limitations set out in Code §911(b)(2). Generally, a U.S. taxpayer can elect to exclude foreign earned income from gross income if (i) the taxpayer is an individual whose tax home is in a foreign country, and (ii) the taxpayer is either a *bona fide* resident of one or more foreign countries or physically present in such country or countries during at least 330 days in a 12-month period.[1] An individual cannot have a tax home in a foreign country for any period for which an abode is maintained within the U.S.[2]

In *Qunell v. Commr.*,[3] the Tax Court addressed the meaning of tax home under Code §911 in a summary opinion, and highlighted the difference between the terms *tax home* and *abode*. Even though the summary opinion issued by the court cannot be used as a precedent for other cases, the decision should be considered by taxpayers and their tax advisors when they are seeking to structure their affairs to take advantage of the exclusion.

FACTS

After 17 years of active service in the U.S. Army, Mr. Qunell began working for AECOM Technology ("A.E.C.O.M.") as an atmospheric manager in Afghanistan on July 7, 2010. His assignment related to a contract that A.E.C.O.M. held with the U.S. Department of Defense ("D.O.D.").

His employment with A.E.C.O.M. lasted approximately one year and four months. During that time, Mr. Qunell lived on a U.S. military facility in Kabul, Afghanistan. According to his passport, during 2011 he left Afghanistan from time to time for vacations and to travel to the U.S. to get married. A short time after the wedding, Mr. Qunell returned to Afghanistan without his wife.

During the 2011 calendar year, Mr. Qunell and his wife owned a house in Illinois. His wife and their children lived in the Illinois home and were Illinois residents, while Mr. Qunell was working in Afghanistan. Neither his wife nor any of their children visited him while he was in Afghanistan. Mr. Qunell also maintained several U.S. bank accounts.

On November 18, 2011, due to a disagreement with A.E.C.O.M., Mr. Qunell resigned.

---

1 Code §911(d)(1).

2 Code §911(d)(3).

3 *Qunell v. Commr.* T.C. Op. 2016-86 (Dec. 19, 2016).

Mr. Qunell wanted and believed that he was entitled to an assignment in the U.S. He was unemployed from the time he left A.E.C.O.M. until he returned to the U.S. Army in July 2012.

Mr. Qunell's 2011 Federal income tax return was filed on November 5, 2013, after he was notified that the I.R.S. was preparing a 2011 substitute return. His tax return included Form 2555, *Foreign Earned Income*, where he disclosed the wages he earned from A.E.C.O.M. while employed in Afghanistan. Based on Code §911(a), he took the position that his *tax home* was in Afghanistan, and excluded those wages from the income otherwise reported on that return. The Tax Court accepted his claim that he did so upon the advice he received through a service offered by the Army and a recommendation made by an acquaintance who professionally prepared Federal income tax returns.

Accordingly, the I.R.S. determined that Mr. Qunell was not entitled to the Code §911(a) foreign earned income exclusion for the 2011 tax year. The I.R.S. further determined that the taxpayer was liable for the additions to the tax under Code §§6651(a)(1) and (2), and for the accuracy-related penalty under Code §6662(a) on various grounds.

ANALYSIS

U.S. citizens and tax residents are taxed on their worldwide gross income unless a specific exclusion applies.[4] Gross income means "all income from whatever source derived."[5] One of the exclusions available to the taxpayer is the foreign earned income exclusion, which is provided for a "qualified individual" subject to some limitations which are set out in Code §911(b)(2). To be entitled to this exclusion, a taxpayer must satisfy two requirements:[6]

- The taxpayer must be an individual "whose tax home is in a foreign country."
- The taxpayer must either be a "bona fide resident" of one or more foreign countries, or be physically present in such country or countries during at least 330 days in a 12-month period.[7]

In this case, the court considered whether the petitioner's *tax home* during 2011 was in Afghanistan. Code §911(d)(3) refers to Code §162(a)(2) for the definition of the term *tax home* in the case of an individual. Under Code §162(a)(2), a person's home is generally considered to be the location of his regular or principal place of business.[8] However, Code §911(d)(3) goes on to provide that "[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." That is, an individual whose *abode* is within the U.S. cannot establish that his or her *tax home* is in a foreign country.[9]

---

4 *Specking v. Commr.*, 117 T.C. 95, 101102 (2001); *Haessly v. Commr.*, 68 F. App'x 44 (9th Cir. 2003).

5 Code §61(a).

6 Code §911(a).

7 Code §911(d)(1).

8 *Mitchell v. Commr.*, 74 T.C. 578, 581 (1980).

9 *Jones v. Commr.*, 927 F.2d 849, 856 (5th Cir. 1991); *Harrington v. Commr.*, 93 T.C. 297, 307 (1989).

In *Bujol v. Commissioner*,[10] when considering the meaning of the word *abode* as used in Code §911(d)(3), the Tax Court pointed out that *abode* has been traditionally defined as one's home, habitation, residence, domicile, or place of dwelling. While an exact definition of *abode* depends upon the context in which the word is used, it clearly does not mean one's principal place of business. Thus, *abode* has a domestic (or personal) rather than vocational meaning, and stands in contrast to *tax home* as defined for the purposes of Code §162(a)(2).[11]

"According to the Tax Court, a taxpayer's abode is generally in the country in which the taxpayer has the strongest economic, familial, and personal ties."

According to the Tax Court, a taxpayer's *abode* is generally in the country in which the taxpayer has the strongest economic, familial, and personal ties.[12] During 2011, Mr. Qunell owned a home in Illinois where his wife and children lived and he maintained bank accounts in the U.S. He lived on a military facility in Kabul, Afghanistan, his family did not visit him there, and nothing in the record suggests that he traveled within Afghanistan other than as required by his employment. Moreover, he terminated his employment with A.E.C.O.M. because he wanted to return to the U.S.

His ties to Afghanistan were entirely transitory and did not extend much, if at all, beyond the bare minimum required to perform his duties there. Other than the location of his employment, Mr. Qunell had not established that he had any economic, familial, or personal ties to Afghanistan. The Tax Court was satisfied that Mr. Qunell's economic, familial, and personal ties to the U.S. were sufficiently strong to consider the U.S. to be the location of his *abode* at all times relevant here. Therefore, the wages he earned in Afghanistan during 2011 were not excludable from his income under Code §911(a).

Accordingly, the *tax home* and *abode* are two different things, the taxpayer may have a *tax home* in a foreign country, but if he maintains closer ties with the U.S. for purpose of Code §911, he will not be able to utilize the foreign earned income exclusion. In light of this decision, taxpayers relying on the foreign earned income exclusion should make sure they develop closer ties to the foreign country to claim the foreign earned income exclusion.

It is unclear if this decision will have any effect on Code §865. Code §865(g)(1)(A)(i) defines the term "United States resident" to include any U.S. citizen or resident alien individual who does not have a *tax home* in a foreign country.[13] The term "United States resident" also includes any nonresident alien individual who has a *tax home* in the U.S.[14] For this purpose, *tax home* has the same meaning as in Code §911(d)(3).[15] Generally, gain from the sale or exchange of personal property is U.S.-source income with respect to a U.S. resident seller, and foreign-source income with respect to a non-U.S. resident seller.[16] If the court's opinion is extended to Code §865, it can create new planning opportunities for individuals with cross-border transactions.

---

10 *Bujol v. Commr.*, T.C. Memo. 1987230, 53 T.C.M. (CCH) 762, 842 F.2d 328 (5th Cir. 1988).

11 *Id.*

12 *Id.*; *Jones v. Commr.*

13 Code §865(g)(1)(A)(i)(I).

14 Code §865(g)(1)(A)(i)(II).

15 Code §865(g)(1)(A).

16 Code §865(a).

CONCLUSION

As demonstrated by this recent Tax Court case, taxpayers seeking to take advantage of the foreign earned income exclusion must understand that simply working abroad does not ensure they can rely on this exclusion.

Taxpayers should sit down with their tax advisors and their families to determine the steps required to take advantage of this exclusion. In doing so, they must weigh the benefits against the costs of a possible disruption in their lives, and in the lives of their families, to ensure that a tax choice is the right one to make.