BRACE YOURSELF, PILOTS: YOUR TAX HOME DOES NOT FLY WITH YOU

Author
Gianluca Mazzoni

Tags
Abode
Bona Fide Resident
Foreign Earned Income
Form 2555
Tax Home

Gianluca Mazzoni holds an S.J.D. '20 and L.L.M. '16 from the University of Michigan Law School.

INTRODUCTION

The Internal Revenue Code (the "Code") provides a foreign earned income and housing cost exclusion to qualified individuals.[1] These benefits are subject to certain ceilings on each of the benefits.[2]

Generally, a U.S. taxpayer can elect to exclude foreign earned income ("F.E.I.") from gross income in two circumstances. The first is that the taxpayer is an individual whose tax home is in a foreign country or countries. The second is that the taxpayer is either (i) a *bona fide* resident of a foreign country or countries for an uninterrupted period that includes an entire tax year or (ii) physically present in a foreign country or countries for at least 330 full days during any period of 12 consecutive months.[3] An individual is not considered to have a tax home in a foreign country for any period in which the individual's abode is in the U.S.[4]

In *Cutting v. Commr.*,[5] the Tax Court addressed the meaning of tax home under Code §911, focusing on the facts that must exist for an individual to be a qualified individual. While only a Memorandum Opinion of the Tax Court,[6] its importance is enhanced because the I.R.S. Large Business and International division ("L.B.&I.") added the foreign earned income exclusion ("F.E.I.E.") to the list of its compliance campaigns,[7] targeting taxpayers who have claimed the benefits of the F.E.I.E. without meeting the L.B.&I. view of the statutory requirements. Taxpayers and their tax advisors should consider this decision in determining the steps required to be compliant with the F.E.I.E.

---

1. Code §911(a).
2. As to the earned income exclusion, see Code §911(b)(2); as to the housing cost exclusion, see Code §911(c)(2) (c)(2). In 2021, the maximum amount of the foreign earned income exclusion is $108,700 and the maximum amount of the housing cost exclusion is $17,392 (16% of the maximum exclusion of foreign earned income).
3. Code §911(d)(1).
4. Code §911(d)(3).
5. *Cutting v. Commr.,* T.C., Memo. 2020-158.
6. A Memorandum Opinion is issued when the law is settled or the decision is factually driven.
7. For more information, see the I.R.S. website here.

FACTS

Mr. Cutting is a U.S. citizen who was employed by Omni Air International ("O.A.I."), a domestic company headquartered in Tulsa, Oklahoma. He worked as a pilot, primarily transporting military personnel and cargo on international routes. In 2005, the same year he began working for O.A.I., he married a woman who lived in Thailand and began to spend most of his days off in Thailand with his wife and stepdaughter. He regularly entered Thailand on a temporary transit and nonimmigrant visa that was granted automatically each time he entered Thailand. It expired after 30 days and on at least two occasions he attempted to extend his visas. Each time, the Thai Government denied his requests. As a temporary visitor to Thailand, he was not allowed to own or lease any real property.

"Code §61(a) broadly defines gross income as 'all income from whatever source derived' except as otherwise provided. One such exception is the F.E.I.E., which allows a qualified individual to exclude F.E.I. from gross income subject to some limitations which are set out in Code §911(b)(2)."

As a U.S. taxpayer, Mr. Cutting filed Form 1040, *U.S. Individual Income Tax Return*, for each of 2012, 2013, and 2014, listing his filing status as "single" for each year and listing his father's address in Campbell, California, as his mailing address. He also attached Forms 2555, *Foreign Earned Income*., reporting his entire salary from O.A.I. as F.E.I. and claiming the maximum F.E.I.E. allowed for each year. The I.R.S., relying on information submitted by Mr. Cutting, such as his California State income tax returns, and the fact that he used his father's address as his employment address of record and mailing address, disallowed the exclusion in its entirety for each year at issue. Mr. Cutting disagreed and filed a petition with the Tax Court.

ANALYSIS

It is a well-settled rule that U.S. citizens are subject to U.S. income taxation on worldwide gross income unless a specific exclusion applies.[8] Code §61(a) broadly defines gross income as "all income from whatever source derived" except as otherwise provided.[9] One such exception is the F.E.I.E., which allows a qualified individual to exclude F.E.I. from gross income subject to some limitations which are set out in Code §911(b)(2). Code §911(b)(1)(A) defines F.E.I. as "the amount received by such individual from sources within a foreign country or countries which constitute earned income attributable to service performed by such individual."[10]

Tax Home Abroad

To be entitled to the F.E.I.E., a taxpayer must satisfy a two-part test.

- The first part of the test has both a positive and a negative aspect. The positive aspect is that the taxpayer must affirmatively show that he or she has a tax home in a foreign country. The negative aspect is that the taxpayer must show that he or she has not retained an abode within the U.S.

---

8 *Cook v. Tait,* 265 U.S. 47, 56 (1924); *Specking v. Commr.,* 117 T.C. 95, 101102 (2001); *Haessly v. Commr.,* 68 F. App'x 44 (9th Cir. 2003); *Huff v. Commr.,* 135 T.C. 222, 230 (2010).

9 Code §61(a).

10 Code §911(b)(1)(A).

- The second part of the test is satisfied by showing that the taxpayer is either: (i) a "*bona fide* resident" of one or more foreign countries,[11] or (ii) physically present in such country or countries during at least 330 days in a 12-month period.

Code §911(d)(3), which defines tax home as applied to the F.E.I.E., incorporates the travel business expense provision of Code §162(a)(2). It provides as follows:

> The term tax home means with respect to any taxpayer such taxpayer's home for purposes of section Code §162(a)(2) (relating to traveling expenses while away from home).

Thus, under Code §162(a)(2), a taxpayer's home is generally considered to be the location of taxpayer's regular or principal place of business.[12]

In this case, the court considered whether Mr. Cutting had a tax home in Thailand. Mr. Cutting argued that because he was a pilot flying international routes all over the world, he had no regular or principal place of business, and hence, his tax home

---

[11] Code §911(d)(1)(A). *Prima facie*, the *bona fide* residence test applies only to U.S. citizens. However, resident aliens of the United States who are citizens of foreign countries that have an income tax treaty with the United States may qualify for the §911 exclusions under the *bona fide* residence test by application of the non-discrimination article found in most of the bilateral income tax treaties to which the United States is a party. See also Rev. Rul. 91-58, 1991-2 C.B. 340 which held that nationals of the United Kingdom who are residents of the United States within the meaning of Code §7701(b) may qualify for the exclusions and deduction provided by §911 by establishing to the satisfaction of the Secretary that they have been *bona fide* residents of a foreign country or countries under the residency rules of Treas. Reg. §1.871-2(b) for a period that includes an entire taxable year. The conclusions reached in Rev. Rul. 91-58 are also applicable to citizens of all countries which had an income tax treaty with the United States in effect as of the date of the ruling (11/4/1991).

[12] Treas. Reg. §1.911-2(b) provides as follows:

> 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 real and substantial sense * * * .

However, court decisions are split on the meaning of the term home in Code §162(a)(2). Some courts have adopted the I.R.S. view that a taxpayer's home for Code §162(a)(2) purposes is the location of the taxpayer's regular or principal place of business. See *e.g.*, *Markey v. Commr.,* 490 F2d 1249 (6th Cir. 1974); *Daly v. Commr.,* 72 T.C. 190 (1979); Rev. Rul. 75-432, 1975-2 CB 60. Other courts have taken the view that a taxpayer's home for Code §162(a)(2) purposes is the taxpayer's place of abode. See, *e.g.*, *Wallace v. Commr*., 144 F2d 407 (9th Cir. 1944).

should be determined by reference to his regular place of abode,[13] which he argued was in Thailand.

Mr. Cutting's Facts

The Tax Court noted how it consistently rejected this argument in the past by citing several cases, such as *Wojciechowski v. Commr., Sislik v. Commr.,* and *Swicegood v. Commr.,* where the Tax Court consistently held that the principal place of business for a pilot or other individuals in similar profession is his or her base/duty station.[14] In particular, the Tax Court noted how Mr. Cutting's employment arrangement with O.A.I. was similar to the employment arrangements in *Sislik* and *Swicegood*. In each case, a U.S. commercial airline pilot flew international routes, designated his home base at a domestic airport (John F. Kennedy Airport ("J.F.K.")), and chose to live abroad for personal reasons. Despite the fact that not all of the flights originated from or terminated at J.F.K., the Tax Court still held that the base station was the principal place of employment for each airline pilot. Hence, each pilot's tax home was J.F.K. near New York City, where each pilot was responsible to report, not the foreign country in which each chose to spend personal time.

---

[13] *Bujol v. Commr.,* T.C. Memo. 1987-230, provides in pertinent part as follows:

> Abode has been variously defined as one's home, habitation, residence, domicile, or place of dwelling. Black's Law Dictionary 7 (5th ed. 1979). 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 rather than vocational meaning, and stands in contrast to "tax home" as defined for purposes of section 162(a)(2) * * * .

Harrington v. Commr., 93 T.C. 297 (1989), provides in pertinent part as follows:

> In prior section 911 cases, we have examined and contrasted the taxpayer's domestic ties (*i.e.* his familial, economic, and personal ties) to the United States with his ties to the foreign country in which he claims a tax home in order to determine whether his abode was in the United States during any particular period. * * * Even though a taxpayer may have some limited ties to a foreign country, if his ties to the United States remain strong, we have held that his abode remained within the United States, especially where his ties to the foreign country were transitory or limited.

See also *Qunell v. Commr.*, T.C. Summary 2016-86. For a discussion of these cases, see Rusudan Shervashidze & Philip R. Hirschfeld, "Tax Home v. Abode – Are They the Same for Code §911 Purposes?" Vol. 4 *Insights* No. 4, at p. 47.

[14] *Sislik v. Commr.*, T.C. Memo, 1989-495; *Swicegood v. Commr.,* T.C. Memo. 1989-467 (citing *Folkman v. U.S.*, 615 F.2d 493, 496 (9th Cir. 1980); *Wojciechowski v. Commr.,* T.C. Memo. 1991-239; *Dougherty v. Commr.,* T.C. Memo. 1991-442. In *Folkman v. United States,* the 9th Circuit considered the situation of a taxpayer who was employed as an airline pilot out of San Francisco and was also a member of the Air National Guard in Nevada. As a membership condition, the Nevada Air National Guard required its members to reside in the Reno, Nevada area. On the basis that the airline employment constituted the taxpayer's primary source of income and that most of his workdays were spent in San Francisco, the court determined that the taxpayer's tax home was in San Francisco irrespective of the fact that his employment in Nevada required the taxpayer to establish residence in that state.

Mr. Cutting's employment with O.A.I. was governed by a collective bargaining agreement ("C.B.A.") between O.A.I. and the International Brotherhood of Teamsters. While O.A.I. did not require that Mr. Cutting live in the U.S., the C.B.A. required him to a have a "home base," *i.e.* a primary residence as listed on O.A.I.'s personnel and benefit records and to designate a gateway travel airport in the U.S. Mr. Cutting chose San Jose, California, to be his home base and designated San Jose Airport ("S.J.C.") as his gateway travel airport because his parents and brother lived in the area. Those selections came with substantive rights and obligations under the terms of the C.B.A., the Tax Court said. Specifically, under the C.B.A., O.A.I. was responsible for providing "deadhead" travel for Mr. Cutting from S.J.C. to a domestic duty assignment or to a domestic airport of departure for an international assignment and from the domestic airport where the duty period ends to S.J.C. On the other hand, Mr. Cutting was responsible for getting to S.J.C. to start his duty assignments and for returning from S.J.C. to wherever he wished to spend personal time when he was finished. In addition, the C.B.A. required Mr. Cutting to have a certain amount of training per year done in the U.S. Mr. Cutting also spent time each year on reserve for work. During short-call reserve, he had two hours to report for duty, if called. During long-call reserve, he had at least 12 hours to report for duty.

"Based on the above reasons, the Tax Court held that Mr. Cutting's principal place of business, and thus his tax home, was in San Jose, his home base and the location of his gateway travel airport, S.J.C."

Based on the above reasons, the Tax Court held that Mr. Cutting's principal place of business, and thus his tax home, was in San Jose, his home base and the location of his gateway travel airport, S.J.C. Accordingly, he was not a qualified individual and was not entitled to exclude any income under Code §911.

Bona Fide Residence Abroad Not Established

Having determined that Mr. Cutting's tax home was not in Thailand, the Tax Court stated that it did not need to apply the *bona fide* residence or physical presence test to determine that Mr. Cutting was not entitled to the F.E.I.E.

Nonetheless, the Tax Court addressed whether Mr. Cutting was a *bona fide* resident of Thailand during each year in issue. The statute itself does not define the term "*bona fide* resident." The Tax Court in *Nelson v. Commr.*,[15] has described it as an elusive expression and one so peculiarly related to the facts in any given case that each new case must be decided on the basis of its own unique attendant circumstances. Moreover, the Ninth Circuit in *Weible v. U.S.,*[16] in highlighting the differences between "domicile" and "residence," aptly characterized it when it said the following:

> Residence * * * has an evasive way about it, with as many colors as Joseph's coat. It reflects the context in which it is found, whereas "domicile" controls the context. Residence is physical, whereas domicile is generally a compound of physical presence plus an intention to make a certain definite place one's permanent abode, though, to be sure, domicile often hangs on the slender thread of intent alone, as for instance where one is a wanderer over the earth. Residence is not an immutable condition of domicile.

---

[15] *Nelson v. Commr.*, 30 T.C. 1151, 1153 (1958).

[16] *Weible v. United States*, 244 F.2d 158, 163 (9th Cir. 1957).

Per the regulations issued under Code §911, the Tax Court looked to the principles of Code §871,[17] to the extent practical, when determining whether an individual is a *bona fide* resident of a foreign country. Consequently, to determine whether Mr. Cutting was a *bona fide* resident of Thailand, the Tax Court applied the 11 factors set forth by the Seventh Circuit Court of Appeals in *Sochurek v. Commr*.:

- The individual's intent
- The establishment of his or her home temporarily in the foreign country for an indefinite period
- The extent of the individual's assimilation into the life and society of the foreign country
- The physical presence in the foreign country consistent with his or her employment
- The nature, extent and reasons for temporary absences from his or her temporary foreign home
- The payment of income taxes to the foreign country
- The status as resident contrasted to that of transient or sojourner
- The way the employer treated the individual's income for income tax purposes

---

[17] Treas. Reg. §1.871-2(b) provides the following in pertinent part as to the hallmarks of residence:

> An alien actually present in the United States who is not a mere transient or sojourner is a resident of the United States for purposes of the income tax. Whether he is a transient is determined by his intentions with regard to the length and nature of his stay. A mere floating intention, indefinite as to time, to return to another country is not sufficient to constitute him a transient. If he lives in the United States and has no definite intention as to his stay, he is a resident. One who comes to the United States for a definite purpose which in its nature may be promptly accomplished is a transient; but, if his purpose is of such a nature that an extended stay may be necessary for its accomplishment, and to that end the alien makes his home temporarily in the United States, he becomes a resident, though it may be his intention at all times to return to his domicile abroad when the purpose for which he came has been consummated or abandoned. An alien whose stay in the United States is limited to a definite period by the immigration laws is not a resident of the United States within the meaning of this section, in the absence of exceptional circumstances.

In addition, Treas. Reg. §1.871-5 provides the following in pertinent part:

> An alien who has acquired residence in the United States retains his status as a resident until he abandons the same and actually departs from the United States. An intention to change his residence does not change his status as a resident alien to that of a nonresident alien. Thus, an alien who has acquired a residence in the United States is taxable as a resident for the remainder of his stay in the United States.

- Whether the individual's spouse and children also resided in the foreign country
- The nature and duration of his employment, and in particular, whether the assignment abroad could be promptly accomplished within a definite or specified time
- The existence of a good faith element in making the trip abroad or whether it is for purpose of tax evasion[18]

As with all facts and circumstances determinations, no one factor is determinative by itself. In addition, not all of the above factors need be present for a taxpayer to establish *bona fide* residence in a foreign country. However, courts typically consider and weigh the appropriate factors in each situation. Here, six factors weighed against Mr. Cutting claim of *bona fide* residence in Thailand, two factors weighed in favor of Mr. Cutting, and two factors were neutral. According to the Tax Court, the most significant factors preventing Mr. Cutting from being a *bona fide* Thai resident were

- Mr. Cutting relied on temporary transit and nonimmigrant visas and did not pursue residency,
- Mr. Cutting provided a statement to the Thai Government that he was not a resident of Thailand,
- Mr. Cutting did not pay any income taxes to Thailand,
- Mr. Cutting was not a tenant under the terms of his wife's lease, and
- Mr. Cutting's testimony contradicted his Forms 1040 in several aspects.

Regarding the last point, the inconsistencies were as follows:

- Mr. Cutting testified that he was married and lived with his wife and stepdaughter in Thailand, but filed his Forms 1040 as "single" for each year in issue and indicated on his Forms 2555 that he did not live with any family members abroad, by checking "No" on line 12a.
- He stated on each Form 2555 that he was subject to taxes to Thailand, by checking "Yes" on line 13b, but stipulated that he did not pay any income taxes to Thailand during any of the years in issue.
- He indicated on each Form 2555 that he submitted a statement to the Thai Government that he was "not a resident of that country," by checking "Yes" on line 13a. Instructions to Form 2555 provide that if a taxpayer submits a statement of nonresidence to the authorities of a foreign country in which income is earned and the authorities hold that the taxpayer is not subject to income tax laws by reason of nonresidence as to that country, the taxpayer is not considered a *bona fide* resident of that country.
- Mr. Cutting stated on his Forms 2555 that his visa did not limit the length of his stay or employment in Thailand, by checking "No" on line 15c, but testified that he relied solely on temporary transit and nonimmigrant visas that expired after 30 days.

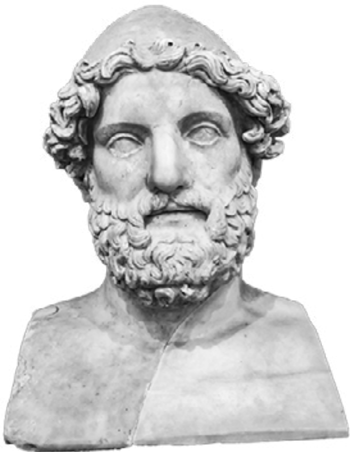
---

[18] *Sochurek v. Commr.*, 300 F.2d 34, 37 (7th Cir. 1962).

Based on the above factors, the Tax Court held that Mr. Cutting was not a *bona fide* resident of Thailand during the years in issue. Therefore, he was not a qualified individual as defined by Code §911(d)(1) because his tax home was in San Jose and because he did not show that he satisfied the *bona fide* residence test. Accordingly, Mr. Cutting was not entitled to exclude any of his income as an O.A.I. pilot under the F.E.I.E. for the years in issue.

The Tax Court pointed out in a footnote that, even if Mr. Cutting was not a *bona fide* resident of Thailand, he could still be a qualified individual if he were physically present in Thailand and elsewhere outside the U.S. for a certain number of days. However, Mr. Cutting did not assert in his returns, petition, or on brief that he satisfied the physical presence test. Indeed, he did not provide any information with respect to the physical presence test on any Form 2555.

LESSONS TO BE LEARNED



The decision in the *Cutting* case teaches a useful lesson about what it takes to be a qualified individual. *Prima facie*, it might seem that U.S. airline pilots flying international flights who are obligated by the terms of the employment agreement to designate a domestic airport as their home base and choose to live abroad for personal reasons are ineligible to claim Code §911 exclusion. However, it has been shown that the question of *bona fide* residence raises a highly fact-specific issue, which requires case-by-case determination. In at least two cases, taxpayers were successful in arguing that they were *bona fide* residents of a foreign country.[19]

In *Schoneberger v. Commr.,*[20] the Tax Court held that a U.S. airline pilot was a *bona fide* resident of France, despite the fact that he was based in New York for employment purposes, he did not pay any French income taxes, and his stay in France was limited by French immigration laws. The Tax Court held that the taxpayer adequately demonstrated "strong proof" of *bona fide* residency in France. According to the Tax Court, the most significant factors which weighed in favor of taxpayer were the following:

- The taxpayer's efforts to become assimilated into the French environment.
- Most of the taxpayer's off-duty hours were spent in France.
- The taxpayer's intent to remain in France for an extended period, evidenced by his rental of an apartment in Paris.
- The taxpayer studied the French language, had French as well as American friends, and dated a French woman whom he thought he might marry and who wanted to remain in France.
- The taxpayer participated in activities with the family of the French woman, which were an important aspect of French social life.

The Tax Court did not draw negative inferences from the fact that taxpayer did not join any French civic or social organizations, as he never belonged to such

---

[19] See also *Cobb v. Commr.,* 62 T.C.M. (CCH) 408, T.C. Memo. 1991-736, Court Opinion and *Jones v. Commr.,* 927 F. 2d 849 (5th Cir. 1991).

[20] *Schoneberger v. Commr.*, 74 T.C. 1016, 1024 (1980).

organizations in the U.S. The Tax Court also placed little weight on the nominal restrictions as to the taxpayer's residency status under French immigration laws.

In *Linde v. Commr.*,[21] a helicopter pilot did not have his abode in the U.S. even though he maintained a marital home in Alabama, to which he returned when his overseas assignment was completed. The taxpayer was a U.S. Army veteran working as a helicopter pilot for a government contractor in Iraq. Evidence indicated that he desired to remain in Iraq indefinitely, and to that end made efforts to create a domestic and personal life in that country. In those facts, the Tax Court held that the ties to Iraq were stronger than the ties to the U.S. during the years in issue. As he did not have an abode in the U.S., his tax home could be in Iraq. The Tax Court further held that the taxpayer met the *bona fide* residence test for the years in issue and was a qualified individual within the meaning of Code §911(d)(1).

CONCLUSION

Based on the above cases, Mr. Cutting should have established a more substantial relationship with Thailand by proactively seeking to obtain a residency visa instead of exclusively relying on 30-day transit visas. Such residency visa would have allowed him to lease or own interests in real property in Thailand and would have showed that his intent was to make a home in Thailand for an indefinite period of time. He should also have presented evidence of his assimilation into the Thai community, social and cultural activities, such as learning the Thai language, enrolling into Thai civic or social organizations, renting an apartment in Thailand, obtaining a Thai driver's license, opening a checking or savings account in Thailand and acquiring Thai credit cards. He also could have reviewed the entries on Form 2555 to ensure that they were consistent with his lifestyle.

"Simply living or working abroad does not mean that a taxpayer's tax home or abode is in a foreign country."

As more evidence is submitted, the easier it is for taxpayers to objectively demonstrate that their familial, economic and personal ties are stronger to the foreign country than to the U.S.[22] Simply living or working abroad does not mean that a taxpayer's tax home or abode is in a foreign country. Taxpayers wishing to take advantage of the F.E.I.E. should seek professional advice to ensure they can comfortably rely on the F.E.I.E. based on the way their lives are lead.

---

21 *Linde v. Commr.*, T.C. Memo 2017-180.

22 Some insight into issues pertinent to Code §911 that the I.R.S. may raise on examination is provided by the F.E.I.E. – Audit Techniques L.B.&I. Process Unit that it has made public. See in particular the list of items the I.R.S. will request and review for purposes of establishing whether the taxpayer had a tax home in a foreign country and determining the location of the taxpayer's abode – *i.e.*, where the familial, economic, and personal ties were strongest, at pp. 18 – 19. International Practice and Process Units ("I.P.U.'s") are prepared to provide I.R.S. staff with explanations of general tax concepts and specific transactions. They are not official pronouncements on law or practice and cannot be relied on or cited as authority. However, I.P.U's provide insight on how I.R.S. examiners will audit taxpayers who made a F.E.I.E election. If a taxpayer is being audited by the I.R.S., tax advisors may be able to anticipate the I.R.S.'s next steps or question an approach that does not follow the guidance in an I.P.U.

Disclaimer: *This article has been prepared for informational purposes only and is not intended to constitute advertising or solicitation and should not be relied upon, used, or taken as legal advice. Reading these materials does not create an attorney-client relationship.*