DeBlis & DeBlis
HIGH-STAKES TAX DEFENSE & COMPLEX CRIMINAL DEFENSE

1012 Broad Street, 2nd Fl
Bloomfield, NJ 07003
Tel (973) 783-7000
Fax (973) 338-3955
www.DeBlisLaw.com

Examining The Section 911(d)(3) "Foreign" Tax Home Requirement

The concept of "tax home" is deceptively simple. According to recent statistics, it ranks among the most misunderstood terms in the Internal Revenue Code. The source of much of the confusion lies in the fact that there is a general rule with exceptions that all but swallow up the rule. This has led some tax professionals to label it "a riddle wrapped in a mystery inside an enigma."

Indeed, deciphering the true meaning of "tax home" might be just as difficult as cracking the "Triwizard Maze," the third task of the "Triwizard Tournament" in "Harry Potter and the Goblet of Fire." However, it's an essential ingredient to determining whether a U.S. person is eligible for the foreign earned income exclusion. Indeed, not having a non-U.S. abode automatically disqualifies a U.S. person from excluding their foreign earned income from their gross income for U.S. tax purposes. Therefore, it is essential to know the IRS's black letter definition of "tax home" and how the courts have come to interpret the gray areas.

IRC Section 911 and its regulations is used to determine whether a taxpayer has a non-U.S. abode.

For purposes of IRC section 911, "tax home" has the same definition as it does under IRC section 162(a)(2) (relating to traveling expenses while away from home). Under Treas. Reg. § 1.911-2(b), an individual's tax home is considered to be located either:

- 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 due to the nature of the business, then at his regular place of abode in a real and substantial sense.

To throw in a "wrench," the Internal Revenue Code explicitly states that an individual cannot have a tax home in a foreign country during any period in which his abode is in the United States.[i]

How do we reconcile these requirements so that they make sense? First, it is necessary to determine whether the taxpayer has a U.S. abode. If so, then he "flunks" the foreign tax home requirement.

If the taxpayer does not have a U.S. abode, then one might assume the taxpayer's tax home to be his "regular or principal place of business." But this is not always the case. If no regular or principal place of business exists, then the taxpayer's tax home reverts back to his "regular place of abode."

As you can see, this reasoning is circular. Indeed, if one follows the steps in the order described above, then it would be blatantly obvious whether the taxpayer had a U.S. abode from the very beginning.

What does this mean for taxpayers who don't have a U.S. abode yet wants to take advantage of the foreign earned income exclusion? In order to satisfy the section 911(d)(3) "foreign" tax home requirement, such taxpayers must establish that their regular or principal place of business is in a foreign country. Absent that, they must prove that their regular place of abode is in a foreign country – *any* foreign country – under Treas. Reg. § 1.911-2(b).

From this, we can construct a helpful rule: The limitation does *not* require that the taxpayer's abode be in a foreign country, so long as his regular or principal place of business is located there. It only requires that the taxpayer's abode *not* be in the United States.

Beware of a particular fact pattern that at first blush appears to impose a formidable barrier to a taxpayer satisfying the "foreign" tax home requirement. I'm referring to the situation where the taxpayer has both an abode and a principal place of business, the locations of which differ, but are nonetheless foreign.

For example, suppose that a U.S. taxpayer's abode is located in Timbuktu but that his principal place of business is located in France. The rule explicitly states that when the taxpayer's regular or principal place of business is in a foreign country, the location of the taxpayer's abode is utterly meaningless. In other words, a taxpayer's "abode" need not be located in the *same* country as his "principal place of business" in order for the taxpayer to satisfy the "foreign" tax home requirement.

Instead, all that's required is for the abode *not* to be located in the United States. In the example above, the taxpayer still satisfies the tax home requirement, despite the fact that his abode and principal place of business are located half-a-world apart. At the end of the day, all that matters is that the taxpayer's abode – here, Timbuktu – is *not* the United States.

Recall that an individual cannot have a tax home in a foreign country during any period in which his abode is in the United States.[ii] However, Treas. Reg. § 1.911-2(b) blunts the harshness of this rigid rule:

- "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"; and

- "Maintenance of a dwelling in the United State 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." In other words, the Code recognizes that an individual's abode may not necessarily be located in the United States even though the individual maintains a home for his or her family in the United States.

Both the U.S. Tax Court and U.S. Circuit Courts have weighed in on the "tax home" requirement of section 911 in a number of decisions. The leading court decisions are *Bujol v. Commissioner*, 53 T.C.M. (CCH) 762 (1987), affd. without published opinion 842 F.2d 328 (5th Cir. 1988) and *Lemay v. Commissioner*, 53 T.C.M. (CCH) 862 (1987), affd. 837 F.2d 681 (5th Cir. 1988).

In *Bujol* and *Lemay*, the taxpayers alternated blocks of time working abroad with blocks of time at home in the United States where their families lived. Specifically, in *Bujol*, the taxpayer alternated working 28 days abroad and returning home to the United States for 28 days. Similarly, in *Lemay*, the taxpayer spent approximately half of his time with his family in Louisiana.

With respect to the tax home requirement, these courts focused on the requirement that the taxpayer's abode *not* be in the United States. For this purpose, the tax court and appellate courts have applied the following definition of "abode":

> "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).[iii]

Applying the above definition of "abode," most courts have held that the taxpayer had a U.S. abode. As a result, the taxpayers could *not* exclude their foreign earned income from gross income for U.S. tax purposes.[iv]

Below are a few of the more salient points that were instrumental in these courts' decisions:

- Possession of a U.S. bank account and U.S. driver's license;
- A U.S. voter's registration;
- Existence of strong familial, economic and personal ties in the United States

and only transitory ties in the foreign country where the taxpayer worked (conversely, IRC section 911 contemplates that transitory presence in the United States would not constitute a U.S. abode).

As a result of determining that the taxpayers in the cases above had U.S. abodes, these courts dispensed with analyzing the location of the taxpayers' regular or principal places of business since that issue was now moot.

---

[i] See IRC section 911(d)(3).

[ii] IRC section 911(d)(3).

[iii] *Bujol*, 53 T.C.M. at 763.

[iv] See *Harrington v. Commissioner*, 93 T.C. 297 (1989); *Doyle v. Commissioner*, 57 T.C.M. (CCH) 1436 (1989); *Lemay v. Commissioner*, 53 T.C.M. (CCH) 862 (1987), affd. 837 F.2d 681 (5th Cir. 1988), and *Bujol v. Commissioner*, T.C.M. (CCH) 762 (1987), affd. without public opinion 842 F.2d 328 (5th Cir. 1988).

[ii] IRC section 911(d)(3).

[iii] *Bujol*, 53 T.C.M. at 763.

[iv] See *Harrington v. Commissioner*, 93 T.C. 297 (1989); *Doyle v. Commissioner*, 57 T.C.M. (CCH) 1436 (1989); *Lemay v. Commissioner*, 53 T.C.M. (CCH) 862 (1987), affd. 837 F.2d 681 (5th Cir. 1988), and *Bujol v. Commissioner*, T.C.M. (CCH) 762 (1987), affd. without public opinion 842 F.2d 328 (5th Cir. 1988).