

BEFORE THE MONTANA TAX APPEAL BOARD

FILED

JUN 04 2018

Montana Tax Appeal Board

CASE No: IT-2017-14

WAYNE C. AND OXANA CURRY,

Appellants,

v.

**STATE OF MONTANA,
DEPARTMENT OF REVENUE,**

Respondent.

**FINDINGS OF FACT,
CONCLUSIONS OF LAW, ORDER,
AND OPPORTUNITY FOR JUDICIAL
REVIEW**

Wayne C. and Oxana Curry appeal from the Montana Department of Revenue (DOR) Office of Dispute Resolution (ODR) Order of July 25, 2017. ODR upheld the DOR's final determination that the Currys did not qualify for the foreign earned income exclusion for the 2013 and 2014 tax years.

At the taxpayer's request, this Board heard the matter on the record. Taxpayer is currently employed and working in Amman, Jordan. The record includes all materials submitted to ODR, the ODR hearing transcript, and additional materials submitted by the parties.

For the reasons provided herein, the Currys' appeal is denied.

ISSUES

Whether Mr. Curry qualifies for the foreign earned income exclusion under 26 U.S.C. §911.

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Findings of Fact

1. Wayne Curry is an international consulting engineer, who has maintained a residence in Whitefish, Montana, since 2012. *ODR Order ¶ 2.*
2. Mr. Curry possess a current Montana Driver's License, and has since he became a resident in 2012. *ODR Order ¶ 23.*
3. For the tax years at issue, Mr. Curry's wife Oxana Curry and their two children lived in the residence in Whitefish. *ODR Order ¶3.*
4. Mr. Curry has worked overseas since at least 2005. *ODR Hearing Transcript 2:23-25.*
5. Mr. Curry worked for AECOM International Development, in Afghanistan during 2013 and in Afghanistan and Haiti during 2014. *ODR Record Ex. A-2 (Federal Form 2555 Foreign Earned Income).*
6. While Mr. Curry worked overseas during the tax years at issue, he spent extended periods of time between job assignments with his family in Whitefish. *ODR Record Ex. A-2 and Ex. 7.*
7. Taxpayers who work overseas and meet certain requirements may elect to take the foreign earned income exclusion. Taxpayers must attach a Federal Form 2555 (Foreign Earned Income) to their annual income tax return each year they claim the exclusion. The Form 2555 requires taxpayers to list their foreign address, employer, tax home, information about the type of housing they resided in overseas, and all dates the taxpayer returned to and left the U.S. during the tax year. *See Form 2555.*
8. Mr. Curry filed a Form 2555 with each income tax return they filed for the two tax years at issue.

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9. On his 2013 Form 2555, Mr. Curry reported that he left the U.S. on 4/10/2013 for Afghanistan, that he lived in in housing furnished by his employer, and that he entered Afghanistan on a Business Visa. *ODR Record Ex. A-2*.
10. On his 2014 Form 2555, Mr. Curry reported that he returned to the U.S. on 1/31/2014, departed on 5/20/2014, and returned on 12/22/2014. *Id.* He reported living in both Afghanistan and Haiti, in housing furnished by his employer, and that he entered Haiti on a tourist visa. *Id.*
11. The dates that Mr. Curry reported on his Federal Form 2555 do not match the dates he submitted to this Board on a spreadsheet titled “Wayne C. Curry – Periods Working or Residing with Abode and Tax Home Outside the USA”. *Taxpayer’s Submission* dated January 2, 2018. While his Form 2555 for 2013 indicated that he was in the U.S. for the months of January, February, March and the first ten days of April, the spreadsheet he prepared for this Board indicates he was only in Montana for the months of January and February. Likewise, his Form 2555 for 2014 indicated that he was physically present in the U.S. for the months of February, March, April, twenty days in May and nine days in December, his spreadsheet indicates he was only in Montana for the months of February, March and April.
12. The DOR introduced records from Montana Fish, Wildlife and Parks, that show Mr. Curry purchased resident hunting and fishing licenses in person at the Sportsman and Ski Haus, located in Kalispell, on June 27, 2013 and November 3, 2014, both dates he represented he was working outside the U.S. *ODR Record Ex. 5*. During the ODR Hearing, Mr. Curry offered some vague and non-specific testimony that when he comes back to Montana on leave he likes to go fishing: “maybe I’m back for two

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weeks, and I go fishing a couple times, that doesn't mean that I'm there for more than this, this doesn't establish a time period, it only establishes the date that I bought the license, that's it." *ODR Hearing Transcript* 20:11-16 and 221-5. Mr. Curry never explained why he did not report these dates he was certainly physically present in Montana, even if it was just for two weeks, on either the Federal Form 2555 or the spreadsheet he submitted to this Board.

13. Mr. Curry's LinkedIn™ profile confirms that his employment history has been consistently located outside the United States, but it also reflects the project-by-project nature of his employment. Between 2007 and 2016, he has had seven different employment assignments, ranging from 8 months to 17 months in duration, for six different employers all outside the United States. *ODR Record* Ex. 9.
14. Between June 2011 and August 2012 his profile indicates that Mr. Curry worked for JV Grontmij-ICON-Integrated as a Technical Unit Leader managing the development and implementation of civic infrastructure projects in Northern Afghanistan. *Id.*
15. Between April 2013 and January 2014 his profile indicates that Mr. Curry worked for AECOM International Development, ultimately as Acting Chief of Party for the USAID-funded Irrigation and Watershed Management Project in north-west Afghanistan, which was intended to be a five-year project but was shut down early and Mr. Curry managed the project during the closeout period. *Id.*
16. Between May 2014 and December 2014 his profile indicates that Mr. Curry worked for AECOM International Development in Haiti as a short-term Consultant to manage the preconstruction phase of building hospitals and clinics in the northern region of Haiti. *Id.*

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17. From March 2016 through present, his profile states that he is working for CDM Smith as the Team Leader/Project Manager of a wastewater infrastructure construction project in northeast Amman, Jordan. *Id.*
18. On March 23, 2016, the DOR disallowed the Curry's foreign earned income exclusion, on the basis that Mr. Curry did not provide any documentation to show that he qualified for the exclusion. *ODR Record, Ex. 4.*
19. The Curry's appealed that decision to the ODR, from which this appeal ensues.
20. To whatever extent the following conclusions of law may be construed as findings of fact, they are incorporated accordingly.

Conclusions of Law

21. To whatever extent the foregoing findings of fact may be construed as conclusions of law, they are incorporated accordingly.

Jurisdiction

22. The Board has jurisdiction over this appeal. MCA § 15-2-302.
23. The parties jointly agreed to hear this appeal on the record and both parties submitted briefs and additional materials in support of their claims.

Foreign Earned Income Exclusion

24. The DOR is an agency of the executive branch of government, created and existing under the authority MCA §2-15-13. The DOR is charged with the administration and enforcement of the Montana Code Annotated, Title 15, chapter 20 (Individual Income Tax) and the ancillary Administrative Rules of Montana Title 42, chapter 15.

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25. If, in the opinion of the DOR, a return of a taxpayer is in any essential respect incorrect, the agency may revise the return. MCA §15-30-2605(1).
26. For purposes of determining whether Mr. Curry is entitled to the foreign earned income exclusion, Montana follows federal law for purposes of calculating gross income and adjusted gross income. MCA 15-30-2101(10) and 2110(1).
27. Unless a specific income exclusion applies, a taxpayer is required to include in gross income all income from whatever source derived. 26 U.S.C. §61(a). 26 U.S.C. §61 provides that gross income means all income from whatever source derived – citizens of the United States, and likewise residents of Montana, are taxed on their worldwide income unless a specific exclusion applies.
28. Tax deductions are a matter of legislative grace and it is the taxpayer's burden to clearly demonstrate the right to the claimed deductions. *Robinson v. DOR*, 2012 MT 145, ¶12, 265 Mont. 336, 340, 281 P. 3d 218, 222. The "burden of showing the right to the claimed deduction is on the taxpayer." *INDPCO, Inc. v. Commissioner*, 503 U.S. 79, 84 (1992).
29. Exclusions from income are narrowly construed, and taxpayers must clearly establish their entitlement to any such exclusion. *Lock v. Commissioner.*, 2017 Tax Ct. Summary LEXIS 11, *15, citing *Arnett v. Commissioner*, 126 T.C. 89, 91 (2006), aff'd, 473 F.3d 790 (7th Cir. 2007). "A taxpayer must substantiate the amounts which give rise to the claimed deduction, and if he does not, respondent is not arbitrary or unreasonable in denying the deductions." *Cook v. Commissioner*, 1991 Tax Ct. Memo LEXIS 640 at 7-8.

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30. 26 U.S.C. §911 as in effect in 2013 and 2014, allows a “qualified individual” to elect to exclude up to \$97,600 in 2013 and \$99,200 in 2014 of foreign earned income from gross income.
31. To be a “qualified individual” who can make the election to exclude foreign earned income, a taxpayer who is a United States citizen must satisfy two distinct requirements:
 1. he must be an individual whose “tax home” is in a foreign country; and
 2. he must be either:
 - a. a bona fide resident of one or more foreign countries for an uninterrupted period which includes an entire taxable year, or
 - b. be physically present in such country or countries during at least 330 days in a 12-month period (physical presence test). 26 U.S.C. §911(d)(1).
32. Mr. Curry has conceded that he does not satisfy the physical presence test for either 2013 or 2014, therefore, Mr. Curry must prove (1) that during 2013 his tax home was in Afghanistan and during 2014 his tax home was in Haiti, and (2) that he was a bona fide resident of Afghanistan in 2013 and a bona fide resident of Haiti in 2014.

Tax Home

33. 26 USC 911(d)(3) defines the term “tax home” as an individual's home for purposes of section 162(a)(2) [26 USCS § 162(a)(2)] (relating to traveling expenses while away from home). An individual, however, 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. 26 U.S.C. §911(d)(3); *Linde v. Commissioner*, 2017 Tax Ct. Memo LEXIS 183 *10, citing *Harrington v. Commissioner*, 93 T.C. 297, 307 (1989).

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34. 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 – “abode” has a domestic rather than vocational meaning, and stands in contrast to “tax home” as defined for purposes of §162(a)(2). See *Bujol v. Commissioner*, T.C. Memo 1987-230, aff'd without published opinion, 842 F.2d 328 (5th Cir. 1988).
35. Mr. Curry argues that he has spoken to many consultants he works with, who (he claims) all similarly work outside the United States and also own homes within in the United States and claim the exclusion on their taxes every year. While this Board does not doubt the veracity that many consultants who work outside the United States claim the exclusion year after year, as the abundant number of United States Tax Court Cases indicates after an audit, many taxpayers who have claimed the exclusion did not meet the legal criteria to be eligible for the exclusion.
36. The United States Tax Court has issued numerous opinions where they have examined and contrasted a 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 a particular period. See *Harrington v. Commissioner*, 93 T.C. at 307-308; *Eram v. Commissioner*, T.C. Memo 2014- 60; *Daly v. Commissioner*, T.C. Memo 2013-147; *Struck v. Commissioner*, T.C. Memo 2007-42; *Moudy v. Commissioner*, T.C. Memo 1989-216; *Benham v. Commissioner*, T.C. Memo 1989-215; *Bosarge v. Commissioner*, T.C. Memo 1989-15; *Hummer v. Commissioner*, T.C. Memo 1988-528; *Lemay v. Commissioner*, T.C. Memo 1987-256, aff'd, 837 F.2d 681 (5th Cir. 1988).

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37. 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 U.S. Tax Court has held that his abode remained in the United States, especially when his ties to the foreign country were transitory or limited during that period. *Linde* at 11.
38. Thus, Mr. Curry bears the burden to prove that his "tax home" was outside the United States. In the current case Mr. Curry provided no documentation or evidence at all regarding how he spent his non-working time overseas, and the record is devoid of any information regarding whether Mr. Curry maintained any foreign bank accounts, foreign credit cards, foreign driver's license, his attempts to personalize his living arrangements, the extent of his attempts to socialize with the citizens of those countries, his attempt to learn a foreign language, or any of the other many factors the U.S. Tax Court has considered when determining whether or not a taxpayer's "tax home" is located outside the United States.
39. Mr. Curry bears the burden to provide evidence to show that he is entitled to claim the foreign earned income exclusion. Mr. Curry presented this Board with no evidence whatsoever regarding what attempts he made, if any, to integrate himself with the international communities where he was employed. He presented no evidence indicating that his home was in any of the foreign countries where he was working. Mr. Curry has not convinced this Board that the foreign locations were anything more than his place of business.
40. In this case, Mr. Curry maintained (1) a home in Montana; (2) a Montana driver's license; (3) lived and returned to Montana in between job assignments; (4) purchased Montana resident hunting and fishing

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licenses while he was on leave, in Montana, during periods of time that he reported he was working outside the United States; and finally (5) the project-by-project nature of his employment as opposed to permanent employment for an indefinite period of time; convinces us that his abode remained within the United States, even while he was working overseas.

Bona Fide Residence

41. Even if Mr. Curry could establish a tax home outside the United States, he would still have to qualify for the exclusion under the bona fide residence test.
42. The determination of whether a United States citizen is a bona fide resident of a foreign country within the meaning of section 911(d)(1)(A) is primarily a factual question requiring an analysis of all relevant facts and circumstances. *Dawson v. Commissioner*, 59 T.C. 264, 268 (1972); *Harvey v. Commissioner*, 10 T.C. 183, 188 (1948). When making this factual determination the Tax Court looks, to the extent practicable, to the principles of section 871 and the regulations 4 thereunder relating to determining residency of aliens within the United States. *Riley v. Commissioner*, 74 T.C. 414, 420 (1980); *Maclean v. Commissioner*, 73 T.C. 1045, 1054 (1980); section 1.911-2(c), Income Tax Regs.; section 1.871-2, Income Tax Regs. The Tax Court also consider the following factors, originally set forth in *Sochurek v. Commissioner*, 300 F.2d 34, 38 (7th Cir. 1962), in determining whether a United States citizen has established bona fide residency in a foreign country: (1) intention of the taxpayer; (2) temporary establishment of a home in a foreign country for an indefinite period; (3) participation in the activities of the chosen community both socially and culturally, identification with the daily lives of people and, in general assimilation with the foreign environment;

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- (4) physical presence in the foreign country consistent with employment; (5) the nature, extent and reasons for temporary absences from the foreign home; (6) assumption of economic burdens and foreign tax obligations; (7) status as resident rather than transient or sojourner; (8) treatment accorded his income tax status by his employer; (9) marital status and residence of his family; (10) nature and duration of his employment, whether his assignment abroad could be promptly accomplished within a definite or specified time; and (11) whether the trip abroad is for purposes of tax evasion. *Dawson v. Commissioner*, supra.
43. While all these factors may not be present in every situation, those appropriate should be properly considered and weighed. *Carpenter v. United States*, 348 F. Supp. 179, 184 (N.D.Tex.1972). A taxpayer must offer "strong proof" of bona fide residence in a foreign country to qualify for the foreign earned income exclusion under section 911. *Jones v. Commissioner*, 927 F.2d 849, 853-854 (5th Cir. 1991), citing *Schoneberger v. Commissioner*, 74 T.C. 1016, 1024 (1980).
44. In this appeal, Mr. Curry failed to produce any evidence that would help this Board make a determination regarding whether Mr. Curry was a bona fide resident of either Afghanistan or Haiti. The record is simply devoid of any facts that would help this Board consider and weigh the eleven factors that the courts utilize to make this determination. Without any factual evidence to support a finding, the Board must conclude the Mr. Curry did not satisfy the "bona fide resident" test.

Taxpayer's Arguments

45. Mr. Curry argues that because he elected to take the exclusion under the physical presence test in 2009, he continues to qualify for the exclusion

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under the bona fide presence test until he decides to revoke the election. Mr. Curry's argument is not a correct interpretation of the law. The exclusion is not automatically granted year after year simply because a taxpayer qualified under the physical presence test in a prior year and continues to be employed outside the United States. A taxpayer must meet the requirements to qualify for the exclusion in each and every tax year the taxpayer claims the exclusion. The Board does not have any facts in front of it to determine whether, or not, Mr. Curry was eligible to claim the exclusion in 2009; the Board does however, have the necessary facts to make a determination that Mr. Curry was not eligible to claim the exclusion in 2013 and 2014.

46. Finally, Mr. Curry argues that the Internal Revenue Service ("IRS") accepted his returns and that he prepared his tax returns using the Turbo Tax computer program which "conducts an internal audit . . . to identify if any errors have occurred." Neither of these arguments are determinative of the outcome in this appeal.
47. Mr. Curry produced no evidence that indicated the IRS has audited his returns and thus made a conclusive determination regarding Mr. Curry's qualifications to claim the exclusion. As evidenced by the numerous U.S. Tax Court cases cited in this opinion (which is only a small representative fraction of the total number of cases), many taxpayers who work outside the United States claim the foreign earned income tax exclusion. The inquiry is not simply whether or not the taxpayer was employed outside the United States, but rather a very fact intensive inquiry into the taxpayer's state of mind and corresponding actions as to what they considered to be their home. The fact that Mr. Curry has filed federal income tax returns claiming the exclusion for many years, does

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not have any bearing on whether or not Mr. Curry is entitled to claim the exclusion.

48. We recognize that Turbo Tax is a widely and commonly used software program and it may indeed have an internal audit system, however, once the DOR initiated an audit of his return the burden is on Mr. Curry to provide the evidence necessary to support the exclusion claimed on his returns. Mr. Curry has failed to produce any information to support his claim that he is eligible to elect the foreign earned income exclusion. The case at issue is not whether the Turbo Tax internal audit check worked correctly, the issue is whether Mr. Curry's individual income tax return complied with Montana law.
49. This Board finds that Mr. Curry did not establish that (1) he has a "tax home" outside the United States and (2) he established a "bona fide residence" outside the United States. Thus, this Board concludes that Mr. Curry is not a "qualified individual" for purposes of claiming the foreign earned income exclusion as provided for in 26 U.S.C. §911.

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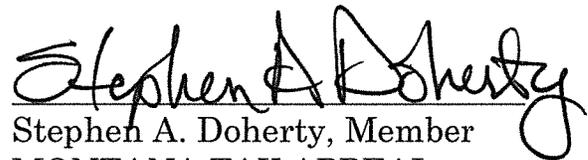
ORDER

IT IS HEREBY ORDERED that Wayne C. and Oxana Curry's appeal is DENIED and the taxes, penalty and interest assessed by the Department of Revenue are properly due and owing.

Ordered June 4th, 2018.




David L. McAlpin, Chairman
MONTANA TAX APPEAL
BOARD


Stephen A. Doherty, Member
MONTANA TAX APPEAL
BOARD


Valerie A. Balukas, Member
MONTANA TAX APPEAL
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Notice: You may be entitled to judicial review of this Order by filing a petition in district court within 60 days of the service of this Order. Mont. Code Ann. § 15-2-303(2).

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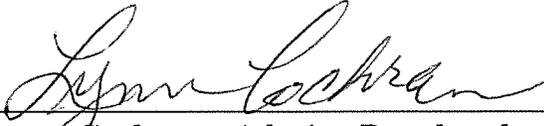
Certificate of Service

I certify that I caused a true and correct copy of the foregoing *Findings of Fact, Conclusions of Law, and Opportunity for Judicial Review* to be sent by United States Mail via Print and Mail Services Bureau of the State of Montana on June 4, 2018 to:

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7347 Farm to Market Road
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Curry Email for Jordan: wcurry25@yahoo.com

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Lynn Cochran, Admin. Paralegal
MONTANA TAX APPEAL BOARD