



## Tax Reduction Letter

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### Action on Decision 1991-014

#### ISSUE

Whether Jones was a "qualified individual" within the meaning of sections 911 and 913 of the Internal Revenue Code.

#### DISCUSSION

The 5th Circuit reversed the Tax Court's decision (T.C. Memo. 1989-616) in this case. The 5th Circuit held that Jones, a foreign-based airline crew member was a Japanese resident, had a tax home in Japan and therefore was a "qualified individual" within the meaning of sections 911 and 913 of the Code.

An individual may qualify for certain exclusions and a housing cost amount deduction under section 911 and for pre-1982 years could have qualified, under section 913, for certain deductions of expenses incurred while living abroad. An individual is a "qualified individual" if the individual has his tax home in a foreign country and the individual is either a bona fide resident of a foreign country for an entire taxable year (the "bona fide residence test") or physically present in the foreign country for at least 330 full days during a period of 12 consecutive months (the "physical presence test"). 2

With respect to the court's finding that Jones was a bona fide resident of Japan, we disagree. The court stated that a "taxpayer's intent plays perhaps the most important part in determining the establishment and maintenance of a foreign residence." The Court found that Jones intended to become a resident of Japan. However, as was stated in *Duley v. Commissioner*, 41 T.C. Memo 1981-246, "since the taxpayer's professed intent is not determinative in such cases, we must rely primarily on an analysis of certain objective factors which the courts have found to be relevant in past decisions." The Court in *Jones* ignored the objective factors that generally determine intent. In this case, the objective evidence clearly contradicts the taxpayers stated intent. It is our view that based on Jones' strong personal and economic connections to the United States and lack of connections to Japan, Jones failed to establish that he became a bona fide resident of Japan.

Section 1.911-2(b) of the Regulations provides that an individual's tax home is considered to be at his principal place of business or employment. 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. Although abode is not defined anywhere in the Code or regulations, it has been defined by various courts as "one's home, habitation, residence, domicile or place of dwelling." *Lemay v. Commissioner*, 837 F.2d 681 (5th Cir. 1988) quoting from *Bujol v. Commissioner*, 53 T.C.M. 762, 763 (1987), which cited *Black's Law Dictionary* 7 (5th ed. 1979). Given the particular facts of this case, it is our opinion that Jones maintained an abode in the United States and

therefore could not have a tax home abroad. The court erred in deciding that Jones' tax home was in Japan.

We disagree with the conclusions of the 5th Circuit in this case. We will continue to litigate essentially identical cases outside of the 5th Circuit. Because the determination of the bona fide residence of an individual is based on all the facts and circumstances of each case, within the jurisdiction of the 5th Circuit, we will only follow Jones to the extent that the facts are identical to those of this case.

#### RECOMMENDATION

Because the determination of the bona fide residence of an individual is based on all the facts and circumstances of each case, we recommend that a petition for certiorari not be filed and that a petition for re-hearing in the 5th Circuit not be filed.

#### REVIEWERS

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<sup>1</sup> Section 913 was repealed effective for tax years beginning after December 31, 1981. Tax year 1981 was in issue in this case. However, future application of the issues discussed in this AOD is limited to cases arising under section 911.

<sup>2</sup> Under section 913, the qualifying period for the physical presence test was 510 days during any period of 18 consecutive months.