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Taxation - Exemption of a Bona Fide Resident of a Foreign Country

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RECENT CASES

TAXATION–EXEMPTION OF A BONA FIDE RESIDENT OF A FOREIGN COUNTRY

The authority for the exemption of a bona fide resident of a foreign country, from federal income tax, is derived from section 116 (a) of the Internal Revenue Code.[1] The problems most generally arising from this section revolve about the facts which tend to establish an individual as a bona fide resident of a foreign country. In the recent case of *Jones v. Kyle,* 190 F. (2d) 353 (10th Cir. 1951), the plaintiff taxpayer was an Oklahoma pipefitter who went to Saudi Arabia in December, 1944, with the intention of remaining there for a period of up to three years, to work on construction of a refinery, and with the intent to return to Oklahoma and purchase a farm with money thus earned. The taxpayer actually returned to the United States after May, 1946, a period of eighteen months, and purchased a farm in Oklahoma. The taxpayer included in his income tax return for the year 1945, income derived from such employment, and paid the tax thereon. A claim for refund was seasonably filed. No action was taken on the claim, and the taxpayer instituted an action against the Collector of Internal Revenue to recover the amount of the tax paid. The basis of the action was that the income was exempt from tax under section 116 (a) of the Internal Revenue Code. In the court below, judgment was entered for the taxpayer. *Held,* that one constantly living and working at his job as pipefitter in Saudi Arabia throughout the year 1945, pursuant to intent to become a resident of that country for the entire year, was a bona fide resident thereof; and hence exempt from income taxes on wages received by him during such time, whether he lived in a home of his own, a boarding house, bachelor quarters or barracks.[2] The tax collector appealed and the United States Court of Appeals reversed the decision. *Held,* that the taxpayer was not a bona fide resident of Saudi Arabia throughout the taxable year 1945, within the intent and meaning of section 116 (a). The court said: "He went with the firm intention of returning to the United States at the end of eighteen months when his employment with the company terminated, or in any event not later than three years after his arrival there. And his acts and conduct throughout his stay there were uniformily consistent with that intent and purpose." In the instant case there was a dissent which favored the findings of the trial court and adding: "The taxpayer's purpose was of such a nature that an extended stay would be necessary for its accomplishment. It will be further observed that while he intended ultimately to return to his domicile in the United States, the

1. Int. Rev. Code, sec. 116(a) provides: "That in the case of an individual citizen of the United States who is a bona fide resident of a foreign country during the entire taxable year, the amounts received by him from sources without the United States, if such amounts constituted earned income, shall not be included in gross income and shall be exempt from taxation."
2. Kyle v. Jones, 92 F.Supp. 600 (W.D. Okla. 1950), reversed 190 F. (2d) 353 (10th Cir. 1951).

period of his stay beyond eighteen months was indefinite as to time."[3]

The federal income tax law of the United States distinguishes between aliens who are residents and those who are non-residents of the United States.[4] Under this regulation a distinction is made between: (1) a mere transient or sojourner and (2) a resident.[5] The principles of this regulation are applicable to United States citizens present in foreign countries on the question of residence.[6] The same distinction then, becomes important in the case of United States citizens who have earned income from sources without the United States, and who seek exemption under section 116 (a) of the Internal Revenue Code.

For purposes of the income tax, residence does not mean domicile.[7] It is possible for a person to have more than one residence, although he can have only one domicile.[8] He may be a resident of the United States, although he does not have his domicile there, and he may be a non-resident even though domiciled in the United States.[9] "Resident" as used in section 116 (a) is antithetical to "transient" and does not mean that one becomes a foreign resident only if his presence in a foreign country is "animo manendi."[10]

The test applied is whether the taxpayer was a bona fide resident of a foreign country or of foreign countries during the entire taxable year.[11] In determining whether or not the taxpayer was a bona fide resident within the intent and meaning of section 116 (a) it is necessary to look to the intent of Congress when the law was enacted.

The House of Representatives in considering the Revenue Act of 1942 would have repealed section 116 (a) of the Internal Revenue Code as it then existed because it was felt that the exclusion of income earned abroad by a citizen residing outside the United States more than six months during the taxable year had resulted in considerable abuse in the case of persons

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3. Jones v. Kyle, 190 F. (2d) 353, 355, 357 (10th Cir. 1951).
4. Treasury Regulation 111 Sec. 29.211-2 in part provides: "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 consumated or abandoned."
5. Myers v. Commissioner, 180 F. (2d) 969 (4th Cir. 1950). In accord with Jones v. Kyle, supra, in this regard.
6. U.S. Treas. Reg., sec. 29.116-1, see Downs v. Commissioner, 166 F. (2d) 504 (9th Cir. 1948).
7. Commissioner v. Swent, 155 F. (2d) 513 (4th Cir. 1946).
8. In re Newcomb's Estate, 192 N. Y. 238, 250, 84 N.E. 950 (1908).
9. See I. T. 3859, 1947 — 2 C. B. 98, 99.
10. Yaross v. Kraemer, 83 F.Supp. 411 (D.C. Conn. 1949).
11. Downs v. Commissioner, 166 F. (2d) 504 (9th Cir 1948).

absenting themselves from the United States for more than six months for tax evasion purposes.[12] After testimony before the Senate Committee on Finance to the effect that the exclusion was essential to American foreign trade and that its repeal would work a hardship on representatives of American business abroad by making it difficult to compete with other countries whose nationals were exempt from income tax,[13] the present section was adopted by the Senate and the House of Representatives with the purpose of excluding the income of bona fide residents of a foreign country. The test to determine residence was intended to be the same as that applied to determine residence of aliens in the United States.[14]

If an individual leaves the United States on an assignment that is obviously not of temporary duration, for example a "career" in foreign service of a private employer, he is classified as a bona fide resident of a foreign country or countries. This rule is illustrated in the decision in *Harvey v. C. I. R.*[15]

In the *Harvey* case, the taxpayer had been engaged for years and expected to be further engaged in an occupation necessitating work abroad for long periods of time. An important point was the fact that the taxpayer paid foreign taxes. This was not the controlling factor but it was considered to be consistent with the idea of residence in a foreign country.[16] An American citizen who worked on a wartime project in Nassau, made arrangements to work on another job thereafter, took his family with him, and sold his house in the United States, and was considered a resident of Nassau.[17] An American citizen who trained for a permanent position in aviation, but was unable to find such employment in the United States, and who did find such employment in Canada, was held to be a bona fide resident of Canada and not a mere transient because when he first went to Canada he hoped to develop a permanent connection with Canadian aviation and he never had an unqualified intention of leaving Canada upon termination of his immediate employment.[18] But in a long line of war worker cases it has been held, "that a citizen of the United States who is employed in a foreign country on a war construction project and living in more or less temporary quarters which he will in all probability abandon upon termination of such employment in the foreign country, must be classified as a transient with respect to such foreign country, and not as a bona fide resident of a foreign country within the meaning of section 116 (a).[19] And, a citizen of the United States is not a 'resident' of

12. H. R. Rep. No. 2333, 77th Cong., 2d Sess. 50, 93 (1942); Sen. Rep. No. 1631, 77th Cong., 2d Sess. 54 (1942).
13. Hearings before Committee on Finance on H. R. 7378, 77th Cong., 2d Sess. 743-75, 1744, 2123 (1942).
14. Sen. Rep. No. 1631, 77th Cong., 2d Sess. 116 (1942), cf. footnote 4. supra.
15. 10 T. C. 183 (1948).
16. See also Swenson v. Thomas, 164 F. (2d) 783, (5th Cir. 1947).
17. Myers v. Commissioner, 180 F. (2d) 969 (4th Cir. 1950). Not cited as supporting principal case.
18. Yaross v. Kraemer, 83 F.Supp. 411 (D.C. Conn. 1949).
19. Downs v. Commissioner, 166 F. (2d) 504 (9th Cir. 1948).

a foreign country in which he is staying temporarily unless he makes his home temporarily therein, identifying himself in some degree with the customs and lives under and within such customs."[20]

The United States District Court for the District of Wyoming, speaking through Kennedy, D. J., said that "in all questions touching the determination of residence or domicile of an individual it has always been a cardinal principle laid down by the courts that the intention of the person whose residence is being considered, is most persuasive."[21] Weight is given to declarations and motives. However, statements and declarations even if made under oath, for example, for immigration purposes or in income tax returns, are disregarded if they appear to be in conflict with a person's conduct.[22] A declared intention to become a citizen is material,[23] but an intent not to settle permanently is not sufficient to keep one from being a resident.[24]

It has been seen that the intent of Congress in providing section 116 (a) was to promote free competition with other countries whose nationals were exempt from income tax and to simultaneously avoid an undesirable escape from taxation. The cases are all decided on a fine line. Though the facts of a case may cause it to fall within the exemption regulation physically, they must also fall within the regulation mentally, that is to say; certain facts which would otherwise tend to establish residency, must be consistent with the intent to become a resident, within the intent and meaning of section 116 (a). In the instant case the taxpayer was not concerned with becoming a resident and, under the facts, did not compete with nationals of other countries, who were exempt, but rather he was concerned only with acquiring enough money, which would be tax exempt, for the purpose of buying a farm in Oklahoma. In conclusion then, it seems the practice to exempt only those who inadvertently fall within section 116 (a), as the normal events of international commerce and trade transpire, rather than to exempt those who with premeditation seek to accumulate tax exempt income.

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CONSTITUTIONALITY OF SPECIAL BILLS FOR PRIVATE RELIEF

Action by Lucero against the State Highway Department of New Mexico to recover for injuries sustained when he was struck by a tire which blew out on the wheel of a highway department grader being operated by a state employee. The action was brought under Chapter 162, Laws of

20. Hoofnel v. C. I. R., 334 U.S. 833, 68 S.Ct. 1346, 92 L. Ed. 1760 (1948)
21. Cooper v. Reynolds, 24 F. (2d) 150 (D.C. Wyo., 1927).
22. Texas v. Florida, 306 U.S. 398, 59 S.Ct. 563, 83 L. Ed. 817 (1939).
23. Stallforth v. Helvering, 77 F. (2d) 548 (D.C. Cir. 1935).
24. Bowring v. Bowers, 24 F. (2d) 918 (2d Cir. 1928).