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Treaty Immunities And Section 911 Of The Internal Revenue Code

realistically with the case law which gave rise to the rule and the realities of the market place.[97]

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TREATY IMMUNITIES AND SECTION 911 OF THE INTERNAL REVENUE CODE

While the United States has a policy of global income taxation,[1] section 911 of the Internal Revenue Code of 1954 provides for exclusion from gross income of certain amounts earned by United States citizens who are "bona fide residents" of foreign countries for a taxable year.[2]

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[97]A retreat from the per se approach in this area would require additional litigation. The law has, however, met difficulties of litigation by less drastic measures than conclusive presumptions of illegality. In the following passage, Professor Oppenheim suggests using a prima facie case approach:

> Substitution of a prima facie case of illegality for the present per se violation rule in the field of restrictive agreements fully preserves this true burden of proof. In accordance with traditional rules, the respondent should have the burden of proof as to any affirmative defenses, again in the real sense of assuming the risk of non-persuasion. When the government reaches the evidentiary stage of showing the existence of a restrictive agreement alleged to be in violation of the antitrust laws, it would be regarded as having established thereby a prima facie case of violation of the statute. Under the per se violation approach, such proof by the government automatically establishes the fact of illegality. Under the suggested prima facie case, however, the respondent at this point would no longer be foreclosed from proceeding to prove other factors in the way of an affirmative defense. Instead, he would then have the burden of proceeding with rebuttal evidence to show justification within the allowable limits of the antitrust statutory standards. If he fails to make such showing, the government will then have adequately made its showing of illegality.

Oppenheim, *Federal Antitrust Legislation: Guideposts to a Revised National Antitrust Policy*, 50 MICH. L. REV. 1139, 1159 (1952).

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[1]In *Cook v. Tait*, 265 U.S. 47 (1924), the Supreme Court ruled that the United States had the power to tax United States citizens abroad under a theory that the government benefitted the citizen and his property wherever found and therefore had the power to complete the benefit. *Id.* at 56.

[2]INT. REV. CODE of 1954, § 911 provides in part:

> (a) General Rule.—The following items shall not be included in gross income and shall be exempt from taxation under this subtitle:
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> (1) Bona fide resident of foreign country.—In the case of an individual citizen of the United States who establishes to the satisfaction of the Secretary or his delegate that he has been a bona fide resident of a foreign

The term "bona fide resident" is not defined by the Code, but the Treasury regulations under section 911 provide that the principles governing the residency of aliens in the United States shall be used in determining the residency of United States citizens in foreign countries.[3] While these regulations do provide some guidance, bona fide residency still remains an elusive concept.[4] The basic criterion for determining the residency of aliens in the United States is that one who is not a mere transient or sojourner is a resident for income tax purposes.[5] Section 911 further provides, however, that a statement of nonresidency by a United States citizen to the authorities of a foreign country is conclusive evidence of nonresidency in that country for income tax purposes, if the taxpayer escapes foreign resident income tax by his statement.[6]

A test to determine foreign residency has not been developed,[7] but the Treasury regulations focus on the intent of the taxpayer with respect to the length and nature of his stay in the foreign country.[8] When a United States citizen enters a foreign country to work pursuant to a treaty, a problem arises regarding the nature of his stay.[9] In some situations where a

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country or countries for an uninterrupted period which includes an entire taxable year, amounts received from sources without the United States (except amounts paid by the United States or any agency thereof) which constitute earned income attributable to services performed during such uninterrupted period. The amount excluded under this paragraph for any taxable year shall be computed by applying the special rules contained in subsection (c).

[3]Treas. Reg. § 1.911-2(a)(2), T.D. 6665, 1963-2 CUM. BULL. 27 (for services performed after 1962); Treas. Reg. § 1.911-1 (a)(2), T.D. 6426, 1959-2 CUM. BULL. 90 (for services performed before 1963).

[4]Commissioner v. Matthew, 335 F.2d 231, 234 (5th Cir. 1964), *cert. denied*, 380 U.S. 943 (1965); Commissioner v. Swent, 155 F.2d 513, 515 (4th Cir. 1946), *cert. denied*, 329 U.S. 801 (1947).

[5]Treas. Reg. § 1.871-2 (b) (1958) 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.

[6]INT. REV. CODE of 1954, § 911 (c)(6).

[7]Nelson v. Commissioner, 30 T.C. 1151, 1153 (1958).

[8]Treas. Reg. § 1.871-2 (b)(1958). As to length of stay see note 51 *infra*.

[9]There may also be problems concerning source of income, but consideration of the aspects of source of income is beyond the scope of this comment. *See* Commissioner v. Wolfe, 361 F.2d 62 (D.C. Cir.), *cert. denied*, 385 U.S. 838 (1966); Note, *Federal Income Taxation—Exclusion of Income Earned Aboard—Interpretation of the Exception to Section 911 (a) of the Internal Revenue Code*, 41 TUL. L. REV. 480 (1967). For an analysis of source of income as relates to United States citizens in Israel see Bachrach, *Income Tax Responsibilities of U.S. Citizens Living in Israel*, 45 TAXES 485 (1967).

taxpayer's presence in a foreign country was closely associated with a treaty, it was held that the taxpayer's presence could not ripen into residency regardless of the length of the taxpayer's stay.[10] The Commissioner has also taken the position that some treaties amount to the equivalent of an affirmative statement of nonresidence to the authorities of the country in question.[11] Both of these positions were recently rejected by the Court of Claims in *Scott v. United States.*[12]

In Scott, taxpayers, who were United States citizens and college professors, were engaged by the Food and Agricultural Organization of the United Nations (hereinafter FAO) to render services in Argentina. They worked in Argentina pursuant to a United Nations-Argentine treaty, which granted certain privileges and immunities to the taxpayers including freedom from Argentine income tax.[13]

Dr. Scott, one of the taxpayers, was in Argentina for the tax year 1961

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[10]Commissioner v. Matthew, 335 F.2d 231 (5th Cir. 1964), *cert. denied,* 380 U.S. 943 (1965); Boyd v. Commissioner, 46 T.C. 252 (1966). *Contra,* Benfer v. Commissioner, 45 T.C. 277 (1965).

[11]Rev. Rul. 449, 1969-2 CUM. BULL. 155; Rev. Rul. 553, 1968-2 CUM. BULL. 311, provided that entry into a country pursuant to the Multilateral-Mutual Defense Assistance in Indochina Agreement was equivalent to a statement of nonresidence to the authorities of that country.

[12]432 F.2d 1388 (Ct. Cl. 1970).

[13]*Id.* at 1390. Taxpayers were under the immunities of the Convention on the Privileges and Immunities of the Specialized Agencies, *Approved* November 21, 1947, 33 U.N.T.S. 261. Section 19 of the Convention provides:

> Officials of the specialized agencies shall:
> *(a)* Be immune from legal process in respect of words spoken or written and all acts performed by them in their official capacity;
> *(b)* Enjoy the same exemptions from taxation in respect of salaries and emoluments paid to them by the specialized agencies and on the same conditions as are enjoyed by officials of the United Nations:
> *(c)* Be immune, together with their spouses and relatives dependent on them, from immigration restrictions and alien registration;
> *(d)* Be accorded the same privileges in respect of exchange facilities as are accorded to officials of comparable rank of diplomatic missions;
> *(e)* Be given, together with their spouses and relatives dependent on them, the same repatriation facilities in time of international crises as officials of comparable rank of diplomatic missions;
> *(f)* Have the right to import free of duty their furniture and effects at the time of first taking up their post in the country in question.

33 U.N.T.S. at 274. The taxpayers' contracts with the FAO also provided that where no possibility of tax exemption existed, the FAO would reimburse the minimum legally-due national income taxes levied and paid by the staff member on his FAO-derived income. Scott v. United States, No. 36-66, finding of fact, 12 (Ct. Cl. 1970). Under *Old Colony Trust Co. v. Commissioner,* 279 U.S. 716, 729 (1929), this reimbursement would be taxable income. Since the United States funds the United Nations to a large degree, the cycle of reimbursement and taxation would be financed by the United States. Thus, even if the government had won this case, it would have lost.

and excluded amounts earned from the FAO on his 1961 and 1962 United States income tax returns.[14] Dr. Warnick, the other taxpayer in this case, was in Argentina with his family for the tax year 1963 and excluded amounts earned from the FAO for that year on his 1963 income tax return.[15] Both taxpayers paid deficiencies declared by the Commissioner and sued for a refund in the Court of Claims.[16]

The Court of Claims found that the taxpayers had acquainted themselves with and followed local customs, that they spoke the native language, and that their venture was not prompted by tax-avoidance motives.[17] Based on these findings the court concluded that the treaty immunities were not fundamental enough to deprive taxpayers of section 911 exclusions as bona fide residents of Argentina.[18]

However, the dissent in *Scott* stated that the taxpayers should not be treated as bona fide residents of Argentina because alien United Nations employees in the United States probably would not qualify as United States residents for income tax purposes if their income were taxable.[19] This view is analogous to the position taken in *Commissioner v. Matthew*,[20] where it was held that taxpayers' presence in the foreign

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[14]432 F.2d at 1390. Section 911 (c)(6) was enacted in 1962 and thus inapplicable to Dr. Scott. *Id.* at 1398.

[15]*Id.* at 1391. Dr. Warnick was the target of the government's contention that the treaty was equivalent to an affirmative statement of nonresidence. *Id.* at 1398.

[16]*Id.* at 1397. The trial commissioner found that taxpayers had the requisite intent to remain abroad to accomplish a purpose that required an extended stay and that taxpayers had fully assimilated themselves into Argentine life. *Id.* at 1396. For a discussion of foreign residency requirements and factors considered by the courts see Frank, *Income Earned Abroad: What Constitutes Foreign Residence*, N.Y.U. 21ST INST. ON FED. TAX. 217 (1963).

[17]432 F.2d at 1397. INT. REV. CODE of 1954, § 911 (c)(1) places a $20,000 limit on the exclusion for the first three years of residency and $25,000 thereafter. Neither taxpayer in *Scott* earned more than was allowable as an exclusion. INT. REV. CODE of 1954, § 911 (a)(2) provides for an exclssion of amounts earned from foreign sources by a United States citizen who is present in foreign countries for at least 510 days out of eighteen consecutive months. Even though neither taxpayer in *Scott* relied on the section, the Court discussed it as evidence that Congress did not attempt to limit the meaning of residency in section 911 (a)(1). 432 F.2d at 1398.

[18]*Id.* at 1400. The dissent in *Scott* relied on the language of Treas. Reg. § 1.871-2 (b) which states:

> 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.

The dissent reached this conclusion by comparing this regulation to the classification of non-immigrants under 8 U.S.C. § 1101 (a)(15) (1964), and the regulation of their stay in the United States under 8 U.S.C. § 1184 (b) (1964), to INT. REV. CODE of 1954, § 871. However, since INT. REV. CODE of 1954, § 893 exempts income of aliens working for the United Nations, this analogy has not been tested in the courts. See also Treas. Reg. 1.893-1 (b) (1958) and INT. REV. CODE of 1954, § 7701 (a) (18).

[20]335 F.2d 331 (5th Cir. 1964), *cert. denied*, 380 U.S. 943 (1965).

country was so closely associated with the treaty that they could not become residents.[21] The dissent in *Scott* did not look to the terms of the treaty itself as depriving taxpayers of residency, as did *Matthew*, but appears to have relied on United States policy with regard to international organizations and aliens.[22]

Since a uniform test of residency has not been developed, each case has to be decided on its particular circumstances.[23] *Sochurek v. Commissioner*[24] set out some of the more important criteria that the courts have used in determining foreign residency.[25] However, these criteria have not been consistently applied and the cases involving foreign residency appear to be irreconcilable.[26] While it is clear that more than

[21]In *Matthew*, the court found that taxpayers, employees of Pan American World Airways working on British islands pursuant to a United States-British missile testing treaty, had been granted such rights and privileges as to set them apart from the general community. They were free from local taxation, immune to criminal and civil process, immune to immigration laws, and the treaty itself resulted in exclusive jurisdiction in the United States. 335 F.2d at 236.

[22]Under 8 U.S.C. § 1184(b) (1964), once an alien United Nations employee loses his authority from the United Nations to be present in the United States the legality of his stay ends. *See* note 19 *supra*. Thus the nature of an alien United Nations employee's stay with regard to both time and purpose is controlled by the United Nations and the alien cannot of his own volition stay. 432 F.2d at 1400. This position differs from *Matthew* in that it is the law of the United States that prevents alien United Nations employees from becoming residents and not the various United Nations treaties.

[23]Nelson v. Commissioner, 30 T.C. 1151, 1153 (1958).

[24]300 F.2d 34 (7th Cir. 1962).

[25]The list set out by the court in *Sochurek* included:

> (1) intention of the taxpayer;
> (2) establishment of his home temporarily in the foreign country for an indefinite period:
> (3) participation in the activities of his chosen community on social and cultural levels, identification with the daily lives of the people and, in general, assimilation into foreign environment;
> (4) physical presence in the foreign country consistent with his employment;
> (5) nature, extent and reasons for temporary absences from his temporary foreign home;
> (6) assumption of economic burdens and payment of taxes to the foreign country;
> (7) status of resident contrasted to that of 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 definite or specified time;
> (11) good faith in making his trip abroad; whether for purpose of tax evasion.

300 F.2d at 38.

[26]Benfer v. Commissioner, 45 T.C. 277, 289 (1965).

physical presence is required for section 911 (a)(1) residency,[27] residency is something less than an intent to make the foreign country a fixed and permanent home.[28]

In determining whether or not a taxpayer is eligible for section 911 treatment, courts have looked to factors such as the taxpayer's social involvement in the local community,[29] presence of the taxpayer's family abroad,[30] ties remaining between the taxpayer and the United States,[31] and the time required for the taxpayer to accomplish his purpose abroad.[32] Primary emphasis has been placed on affirmative ties to the foreign country rather than absence of ties to the United States.[33] While the lack of affirmative connections in the United States is not viewed as a relevant factor in determining foreign residency,[34] the existence of such connections has a detrimental effect on an attempt to qualify as a foreign resident.[35]

Similarly, when a taxpayer is present in a foreign country pursuant to a treaty, the treaty by its terms may deprive the taxpayer of the opportunity to qualify as a resident.[36] In several cases where the treaty involved was between the United States and a foreign country, it was held that the treaty and the nature of the taxpayer's assignment abroad

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[27]Commissioner v. Matthew, 335 F.2d 231 (5th Cir. 1964), *cert. denied*, 380 U.S. 943 (1965).

[28]Fuller v. Hofferbert, 204 F.2d 592 (6th Cir. 1953); Commissioner v. Swent, 155 F.2d 513 (4th Cir. 1946), *cert. denied*, 329 U.S. 801 (1947).

[29]Weible v. United States, 244 F.2d 158 (9th Cir. 1957); Fly v. United States, 20 Am. Fed. Tax R.2d 5073 (S.D. Fla. 1967).

[30]Fuller v. Hofferbert, 204 F.2d 592 (6th Cir. 1953); Pierce v. Commissioner, 22 T.C. 493 (1954).

[31]Thorsell v. Commissioner, 13 T.C. 909 (1949); Nolde v. Commissioner, 36 P-H Tax Ct. Mem. ¶ 67,171 (1967); Foster v. Commissioner, 34 P-H Tax Ct. Mem. ¶ 65,246 (1965).

[32]*E.g.*, Downs v. Commissioner, 166 F.2d 504 (9th Cir.), *cert. denied*, 334 U.S. 832 (1948); Benfer v. Commissioner, 45 T.C. 277 (1965); Treas. Reg. § 1.911-2(a)(2), T.D. 6665, 1963-2 CUM. BULL. 27.

[33]*Krichbaum v. Unitd States*, 138 F. Supp. 515 (E.D. Tenn. 1956), sets out the history of INT. REV. CODE of 1954, § 911 (formerly INT. REV. CODE of 1939, § 116). Prior to a 1942 amendment putting the section in its present form requiring one year bona fide residence, the section required six months absence from the United States. Abuse of the section led to shifting of emphasis which required establishment of foreign residency. 138 F. Supp. at 521. The development of the section is at least partly responsible for the varied principles used in applying this section because of the shift from absence from the United States to the requirement of affirmative ties to a foreign country by bona fide residence. *See* 138 F. Supp. at 521. *See also* Swenson v. Thomas, 164 F.2d 783 (5th Cir. 1947).

[34]*See* Sochurek v. Commissioner, 300 F.2d 34, 38 (7th Cir. 1962).

[35]Thorsell v. Commissioner, 13 T.C. 909 (1949).

[36]Commissioner v. Matthew, 335 F.2d 231 (5th Cir. 1964), *cert. denied*, 380 U.S. 943 (1965); Baden v. United States, 233 F. Supp. 185 (N.D. Ohio 1964); Boyd v. Commissioner, 46 T.C. 252 (1966). *But see* Brueck v. Commissioner, 228 F. Supp. 112 (N.D. Ind. 1963); Benfer v. Commissioner, 45 T.C. 277 (1965).

precluded the necessary contact and involvement with the foreign country for the taxpayer to qualify under section 911.[37] However, in *Benfer v. Commissioner,*[38] it was held that when taxpayers had otherwise qualified as bona fide residents, the terms of the treaty would not defeat their claims of bona fide residency.[39] *Scott* follows *Benfer* by viewing treaty immunities as only a factor to be considered in determining foreign residency.[40] While no one fundamental characteristic is considered a condition precedent to qualification under section 911, the courts have relied on different combinations of these characteristics in determining foreign residency.[41]

The thrust of the government's argument in *Scott* was that when a treaty is involved which grants immunities to the taxpayer payment of foreign income taxes should be a condition precedent to bona fide residency.[42] Nonetheless, it has been held that the payment of foreign income taxes is not a condition precedent to a section 911 exclusion.[43] To overcome this interpretation, the government in *Scott* relied on the original legislative purpose of section 911 which was to encourage Americans to work abroad by placing them on an equal footing with foreign competitors by leaving them subject only to the income taxes of the country where they are employed.[44] The effect of the FAO treaty in *Scott* was to leave the taxpayers without income tax liability to either the United States or Argentina. Since Argentina has an income tax, this result runs counter to the original intent of section 911. However, the

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[37]*E.g.*, Downs v. Commissioner, 166 F.2d 504 (9th Cir.), *cert. denied*, 334 U.S. 832 (1948); Johnson v. Commissioner, 7 T.C. 1040 (1946).

[38]45 T.C. 277 (1965).

[39]The treaty involved in *Benfer* stated "no person shall enter or remain as a permanent resident unless so authorized by the High Commissioner." 45 T.C. at 283. The taxpayer did not apply for residency.

[40]432 F.2d at 1388, 1395-1396. In *Matthew* it was held as a matter of law that taxpayers could not qualify as residents. 335 F.2d at 234-36.

[41]*See* 432 F.2d at 1394.

[42]*Id.* at 1392.

[43]Weible v. United States, 244 F.2d 158 (9th Cir. 1957); Meals v. United States, 110 F. Supp. 658, 662 (N.D. Cal. 1953); White v. Hofferbert, 88 F. Supp. 457, 461 (D. Md. 1950); Chidester v. United States, 82 F. Supp. 322, 326 (Ct. Cl. 1949); Rose v. Commissioner, 16 T.C. 232, 238 (1951).

[44]Commissioner v. Mooneyhan, 404 F.2d 522, 525 (6th Cir. 1968), *cert. denied*, 394 U.S. 1001 (1969); *see* Brief for the Government at 12-13, Scott v. United States, 432 F.2d 1388 (Ct. Cl. 1970) (hereinafter Brief for the Government). The United States was one of the few countries that undertook to tax its citizens no matter where they were. Therefore a Frenchman and an American working in Spain were not on an equal tax footing. Section 911 was designed as a remedy for this by placing the American on the same footing as the Frenchman. For a discussion of the development of section 911 on this point see Note, *Federal Income Taxation—Exclusion of Income Earned Abroad—Interpretation of the Exception to Section 911(a) of the Internal Revenue Code*, 41 TUL. L. REV. 480 (1967).

section has not been applied according to its original legislative purpose, but has often been read literally or in connection with other developments in the Code.[45]

In this connection, section 911 provides that amounts paid by the United States or any of its agencies shall not be subject to either the bona fide residency exclusion or the physical presence exclusion.[46] The United States employee exception was included in the Internal Revenue Code to curtail the widespread abuse under the old section by United States employees who escaped income taxes at home and abroad.[47] Under a literal reading of section 911 (a)(1), even if the taxpayer were a bona fide resident of a foreign country, he could not exclude amounts received from the United States government.[48] The government, relying on the legislative purpose of the United States employee exception,[49] argued that the taxpayers in *Scott* should be treated in the same manner as United States employees. However, the Court of Claims found that Congress intended the exception to apply only to United States employees.[50]

An alternative reading of section 911 was offered in *Commissioner v. Mooneyhan*[51] where the taxpayer was denied an exclusion under the physical presence rule of section 911 (a)(2).[52] The court in *Mooneyhan* stated that there must be a direct relationship between the taxpayer and his foreign employer,[53] and that in order to give the legislative purpose full

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[45]Downs v. Commissioner, 166 F.2d 504 (9th Cir.), *cert. denied*, 334 U.S. 832 (1948) (development and analysis of section 911). The government in its brief was advocating a return to the original purpose of the section. *See* Brief for the Government at 11; *cf.* Meals v. United States, 110 F. Supp. 658 (N.D. Cal. 1953).

[46]INT. REV. CODE of 1954, §§ 911(a)(1)-(a)(2).

[47]Krichbaum v. United States, 138 F. Supp. 515, 519-20 (E.D. Tenn. 1956) (discussion of legislative purpose). *See* Commissioner v. Mooneyhan, 404 F.2d 522 (6th Cir. 1968), *cert. denied*, 385 U.S. 1001 (1969); Commissioner v. Wolfe, 361 F.2d 62 (D.C. Cir.), *cert. denied*, 385 U.S. 838 (1966).

[48]The government may have used this type of reading and argument because it had stipulated all the facts that amount to bona fide residency excluding payment of foreign income taxes. 432 F.2d at 1396.

[49]Brief for the Government at 23; Reply Brief for the Government at 3, Scott v. United States, 432 F.2d 1388 (Ct. Cl. 1970).

[50]432 F.2d at 1394.

[51]404 F.2d 522 (6th Cir. 1968), *cert. denied*, 394 U.S. 1001 (1969).

[52]INT. REV. CODE of 1954, § 911(a)(2) provides for an exclusion:

> In the case of an individual citizen of the United States who during any period of 18 consecutive months is present in a foreign country or countries during at least 510 full days in such period, amounts received from sources without the United States (except amounts paid by the United States or any agency thereof) which constitute earned income attributable to services performed during the 18-month period.

[53]404 F.2d at 626. Taxpayer was employed by the Iran Division of the Bureau of Public Roads, under the Department of Commerce of the United States. Iran was providing funds to the United States for payment of salaries. *Id.* at 524.

effect, the exclusion and the exception should be read together to deny the taxpayer the necessary direct relationship.[54] If this approach were taken in reading section 911 (a)(1) to determine bona fide residency, a United States employee could not become a bona fide resident of a foreign country. On this basis, the analogy offered by the government would have been strengthened.[55]

The dissent in *Scott* attempted to analogize the position of alien residents present in the United States to that of the taxpayers in order to preclude a section 911 exclusion.[56] Beyond the basic definition provided in Treasury Regulation § 1.871-2, the analogy of United States citizens in foreign countries to aliens present in the United States is not valid.[57] This might be explained by the fact that section 871 is used to derive a tax from resident aliens,[58] while section 911 is used to exempt residents from taxation. Since the Commissioner will argue each case in a light most favorable to the government, inconsistent positions necessarily result in a comparison of cases under section 871 with cases under section 911.[59] Thus, to try to extend the analogy of the sections beyond the basic definition would only serve to further confuse this area.

The final analogy attempted in *Scott* was that the entry by a taxpayer into a country pursuant to a treaty is tantamount to an affirmative statement of nonresidence to the authorities of that country.[60] The court rejected this claim, effectively overruling two Revenue Rulings.[61] The language of section 911 (c)(6) requires an affirmative statement to the foreign authorities before this subsection will operate to defeat the

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[54]*Id.* at 526.

[55]If United States employees cannot qualify as bona fide residents as a matter of law, those who fall within circumstances similar to United States citizens on a factual finding could be ruled as a matter of law not to be bona fide foreign residents. However, if United States employees can be bona fide residents, but as a rule of law they cannot get a section 911 exclusion, an analogy to United States employees would still make the party a bona fide resident.

[56]Scott v. United States, 432 F.2d 1388, 1399-1400. (Ct. Cl. 1970).

[57]Cases such as *Rose v. Commissioner*, 16 T.C. 232 (1951), and *Johnson v. Commissioner*, 7 T.C. 1040 (1946), found an American enclave abroad so as to prevent taxpayers becoming integrated into the locality. However, no such test is applied to New York's "Little Italy" or San Francisco's "Chinatown." *See* B. BITTKER & L. EBB, UNITED STATES TAXATION OF FOREIGN INCOME AND FOREIGN PERSONS 198 (2d ed. 1968).

[58]Treas. Reg. § 1.871-1 (1957) provides that resident aliens shall be taxed on all income derived from all sources, including those without the United States, while nonresident aliens are taxed only on income from sources within the United States. Hence, it is often beneficial to the government to classify aliens as residents.

[59]Compare the position of the government in *Meals v. United States*, 110 F. Supp. 658 (N.D. Cal. 1953), with its position in *Begassiere v. Commissioner*, 31 T.C. 1031 (1959).

[60]432 F.2d at 1398-99.

[61]432 F.2d at 1399. *See* note 11 *supra*.

taxpayer's exclusion.[62] The purpose of this subsection was to end abuses by taxpayers who successfully claimed nonresidence to the authorities of both the foreign country and the United States[63] as was done in *Weible v. United States.*[64] It would seem to be a misinterpretation of this subsection to say that the treaty was tantamount to a statement of nonresidency, especially where failure to file a statement of intent to become a resident did not defeat residency even when required by treaty.[65]

The effect of *Scott* will be to reinforce cases such as *Benfer v. Commissioner*[66] where treaty immunities were considered only as relevant factors in determining bona fide foreign residency, and reduce the impact of cases such as *Commissioner v. Matthew*[67] where the treaty was held as a matter of law to preclude bona fide foreign residency. If the court in *Scott* had granted the government its request for a rule of law that payment of foreign income tax is a condition precedent to bona fide residency when the taxpayer is granted immunities pursuant to a treaty, it would have gone against the legislative intent.[68] The better rule under the present statutory framework would be that payment of foreign income taxes and treaty immunities are factors to be considered in conjunction with other fundamental characteristics of residency as set out in *Sochurek v. Commissioner.*[69]

This result does not solve the problems of double taxation and total tax avoidance. These problems seem inextricable from the legislative purpose of encouraging Americans to work abroad.[70] Since *Scott* noted that Congress is aware that some taxpayers may completely escape

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[62]INT. REV. CODE of 1954, § 911(c)(6) provides:

> Test of bona fide residence.—A statement by an individual who has earned income from sources within a foreign country to the authorities of that country that he is not a resident of that country, if he is held not subject as a resident of that country to the income tax of that country by its authorities with respect to such earning, shall be conclusive evidence with respect to such earnings that he is not a bona fide resident of that country for purposes of subsection (a)(1).

[63]S. REP. No. 1881, 87th Cong., 2d Sess. 75 (1962), while stating that the subsection was designed to prevent individuals from taking inconsistent positions as to residency, stated it would not deny an exclusion to a bona fide resident, if under consistent positions to both governments he was held to be a nonresident by both governments.

[64]244 F.2d 158 (9th Cir. 1957).

[65]Benfer v. Commissioner, 45 T.C. 277 (1965).

[66]*Id.*

[67]335 F.2d 231 (5th Cir. 1964), *cert. denied*, 380 U.S. 943 (1965).

[68]The court in Scott points out that Congress was aware of the possibility that certain taxpayers would escape all income taxes. 432 F.2d at 1394.

[69]Note 24 *supra.*

[70]For a thorough discussion of the economic failures of section 911 to achieve its purpose of encouraging Americans to work abroad see Note, *Section 911 Tax Reform*, 54 MINN. L. REV. 823 (1970).

taxation,[71] there are grounds for placing United Nations employees abroad in a favored position under the present statutory structure. However, such treatment seems inequitable in light of the fact that other taxpayers, such as members of the Peace Corps doing similar work, are not eligible for the exclusion.[72] Perhaps the inequities created by such cases as *Benfer* and *Scott* could be eliminated either by amendment to the Internal Revenue Code or by treaty. The amendment or the treaty provision should require that the taxpayer pay income tax either in the country of his permanent home or in the country in which he works.

The problem of double taxation, while inseparable from encouraging Americans to work abroad, should be and has been dealt with independently. The foreign tax credits of sections 901 to 906 and tax treaties[73] offer workable solutions. While tax credits offer relief where it would not otherwise be available, they operate in a manner which prevents the taxpayer from receiving a windfall by going abroad.[74] The tax treaties should work in a manner by which a taxpayer would pay income tax only to the country where he has earned his income. However, this view is contrary to the United States policy of global taxation.

It should be noted that section 911 in its present form is also contrary to the policy of global taxation and operates to allow windfalls to certain taxpayers. Therefore, the determination that should be made is whether section 911 should continue to be used to allow a windfall to a class of

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[71]432 F.2d at 1394.

[72]INT. REV. CODE of 1954, § 911(c) places limits of $20,000 and $25,000 on the amount excludable by a bona fide foreign resident for one year, which prevents large scale exploitation. INT. REV. CODE of 1954, § 912(3) exempts Peace Corps termination payments and leave allowances, indicating the affirmative policy of how much of a tax break Peace Corps volunteers are to get.

[73]The United States currently has tax treaties with many countries. For a discussion of the operation of United States tax treaties in connection with administering the Internal Revenue Code abroad see Newman, *Tax Administration in Striped Trousers: The International Operations Program of the Internal Revenue Service*, 12 TAX L. REV. 171, 205-08 (1957). However, the peculiar problem presented in *Scott* could be solved by use of article 4 of the OECD, *Draft Double Taxation Convention* (1963). The Organization of Economic Cooperation and Development in its tax convention set up priorities for determining which country will be allowed to tax an individual with ties to more than one country. This changes disputes from being between the taxpayer and the countries to placing disputes before the countries themselves.

[74]INT. REV. CODE of 1954, §§ 901-906 provide credits computed in different manners. Section 904 places an overall limit on the credit for income tax that does not allow a taxpayer to pay less tax than he would pay if all his income were earned in the United States but does not give him total credit if the tax rate of a foreign country is higher than that of the United States. For an explanation of the operation of foreign tax credit see Bodner & Shapiro, *The Fundamentals of the Foreign Tax Credit*, 47 TAXES 424 (1969). For an analysis of the operation of income taxes in relation to an American in Israel see Bachrach, *Income Tax Responsibilities of U.S. Citizens Living in Israel*, 45 TAXES 485 (1967).