

**IN THE UNITED STATES TAX COURT**

Petitioner, )  
vs. ) Docket No.  
COMMISSIONER OF INTERNAL REVENUE )  
SERVICE, )  
Respondent )

**PETITIONER’S MEMORANDUM BRIEF IN OPPOSITION TO RESPONDENT’S  
MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF  
PETITIONER’S CROSS MOTION FOR PARTIAL SUMMARY JUDGMENT**

Pursuant to Tax Court Rule 121, Petitioner submits the following Memorandum Brief in Opposition to Respondent’s Motion for Summary Judgment and in Support of Petitioner’s Cross Motion for Partial Summary Judgment as follows:

**INTRODUCTION**

Respondent has fairly stated the central issue of this case in its Motion for Summary Judgment and the Petitioner agrees with the computation for the adjustment of income and the amount of the proposed, but disputed, deficiency in tax. For the reasons set forth below, the Petitioner believes that the Respondent’s Motion for Summary Judgment should be denied, and that Petitioner’s Cross Motion for Partial Summary Judgment should be granted. There does not appear to be a genuine issue as to any material fact and a decision may be rendered as a matter of law.

**ISSUES**

1. Is a U.S. citizen employed in Antarctica entitled to the exclusion from gross income pursuant to IRC §911?

2. Do IRC §§863(d)(1) and (2) and regulations thereunder provide specific sourcing rules that affect the characterization of income earned as an employee by a U.S. citizen employed in Antarctica?

### **ARGUMENTS**

1. Treasury Regulation §1.911-2(h) should be construed to include Antarctica within the meaning of “foreign country.”

2. The doctrine of *stare decisis* requires that this Court determine that Antarctica is a foreign country for the purposes of IRC §911.

3. IRC §863(d) does not provide sourcing rules for wage/salary income earned by U.S. citizen resident aliens in Antarctica for the purposes of IRC §911.

### **BACKGROUND**

The Petitioner is an employee with Raytheon Support Service Company and the taxpayer’s sole source of income is employee compensation derived from services rendered in Antarctica. Raytheon Support Service Company is under contract with the National Science Foundation, an agency of the United States, for certain research conducted in Antarctica. The Petitioner is one of many persons employed by Raytheon in Antarctica and resides at the McMurdo Station on Ross Island.

There are long-standing claims of sovereignty over the Ross Island Dependency by the New Zealand government. The territorial claims to Ross Island date back to the late 19<sup>th</sup> and the early 20<sup>th</sup> centuries. A number of British explorers during the years 1840 through 1920 made the initial claims necessary to establish territorial rights in the Antarctic region. On July 30, 1923, the British government, with the approval of the government of New Zealand, issued an Order of Council declaring that, “Part of His Majesty’s dominions in the Antarctic Seas which

comprises all of the islands and territories between the 160<sup>th</sup> degree of East longitude and the 150<sup>th</sup> degree of West longitude which are situated South of the 60<sup>th</sup> degree of South latitude shall be named the Ross Dependency.” Pursuant to this proclamation, the Governor General of New Zealand was vested with authority, “to make all such rules and regulations as may be lawfully be made by His Majesty’s authority for the peace, order and good government of the said Dependency.” The Order of Council was published in *The New Zealand Gazette* on August 16, 1923.

L.B. Quartermain, a recognized Antarctic historian, in his book, *New Zealand and the Antarctic*, states:

“While it is clear that the initial purpose of the Order of Council was to assert the sovereignty of Britain Herself over the Ross Dependency by allocating its administration to New Zealand, it has long since become practice, even in the official United Kingdom circles, to regard it as a dependency of New Zealand.”

“As a signatory to the Antarctic Treaty of 1959, New Zealand agreed to the ‘freezing’ for 30 years of all territorial claims in the Antarctic region. This treaty makes it clear that it is not to be interpreted as a ‘renunciation of previously asserted rights of or claims to the territorial sovereignty in Antarctica’ and before the treaty came to force, New Zealand had, beyond question, added the necessary validation to its claim to sovereignty over the Ross Dependency provided by regular occupation and effective administration.”

See Quartermain, *supra*.

While it appears clear that New Zealand undertook those steps necessary under international law to establish a sovereignty over the Antarctic region, it is also clear that the

United States has not recognized the sovereignty claims, and the effect of the treaty is such that all such claims are now placed in abeyance while the treaty is in effect.

The resolution of New Zealand's claims on the Ross Dependency to the treatment under IRC §911 for U.S. citizens working in the Antarctic region is not dependent upon the validity of the New Zealand claims but, rather, on construing IRC §911, the treasury regulations thereunder, and applicable case law. Respondent's argument for excluding the Antarctic region from the reach of IRC §911 is based upon its interpretation of Treas. Reg. §1.911-2(h), and certain case law of the United States Tax Court, neither of which are sufficient to sustain the deficiency. The Respondent's position is also inconsistent with the terms of the treaty.

While U.S. citizens and resident aliens of the United States are subject to U.S. tax on worldwide income, IRC §911 provides an exclusion for qualified individuals who live and work abroad for a base amount of foreign earned income and employer provided housing costs. See IRC §911(b)(2)(d). Under IRC §911, the taxpayer's tax home must be in a foreign country. The sum of the exclusions and deductions may not exceed a taxpayer's foreign earned income, and for the year 2000, the exclusion amount is \$76,000.00. For the year 2001, the excluded amount is \$78,000.00, and for the year 2002 and thereafter, the excluded amount is \$80,000.00.

Congress adopted IRC §911 in 1981 as part of the Economic Recovery Tax Act ("ERTA"). Prior to 1981, IRC §913 provided certain deductions from gross income for foreign workers, an entirely different scheme than that under the existing IRC §911. Prior to 1978, a previous Code §911 was applicable to citizens of the United States living abroad. This previous Code section contemplated an income exclusion but one that was substantially different from the

current IRC §911. No reported case has directly ruled upon the issue of whether Antarctica is a foreign country under the new code section.

IRC §911 states as follows:

“Exclusion from Gross Income - At the election of a qualified individual (made separately with respect to ¶¶1 and 2), there shall be excluded from gross income of such individual, and exempt from taxation under this subtitle, for any taxable year-(1) The foreign earned income of such individual, and (2) The housing cost amount of such individual.”

IRC §911(d) provides certain definitions and special rules. IRC §911(d)(1) limits application of this section to a “qualified individual,” which means an individual whose tax home is a foreign country and who is a citizen of the United States and a bonafide resident of a foreign country for an interrupted period, which includes an entire year, or a citizen or resident of the United States who, during any period of up to 12 consecutive months, is present in a foreign country or countries during at least 330 full days in such period.

“Earned income” is defined to include wages, salaries or other professional fees, IRC §911(a)(2). The term “tax home,” pursuant to IRC §911(d)(3) means, with respect to any individual, such individual’s home for purposes of IRC §162(a)(2).

Treasury Reg. §1.911-2(h) states:

“The term ‘foreign country’ when used in the geographical sense includes any territory under the sovereignty of a government other than that of the United States. It includes the territorial waters of the foreign countries (determined in accordance with the laws of the United States), the air space over the foreign country, and the seabed and subsoil of those submarine areas which are adjacent to the territorial waters of the foreign country and over which the foreign country has exclusive rights, in accordance with international

law, with respect to the exploration and exploitation of natural resources.”

In the Notice of Deficiency sent to the Petitioner, the Answer filed by Respondent and its Motion for Summary Judgment, Respondent has asserted that the only issue in this case is whether Antarctica is a “foreign country” for the purposes of IRC §911. The Respondent also claimed in its Amended Answer that the income is treated as being sourced in the United States pursuant to IRC §863(d)(1)(a) and §863(d)(2)(a), but did not address IRC §863 in its Motion for Summary Judgment. Accordingly, the determination of the issue in this case will involve only the determination of whether or not Antarctica is a foreign country within the meaning of IRC §911(b)(1)(a).

Respondent has cited Treasury Regulation §1.911-2(h) as support for the proposition that Antarctica is not a foreign country because it is not a territory under the sovereignty of a government other than that of the United States. Respondent has further cited as authority *Martin v. Commissioner*, 50 T.C. 59 (1969) case which, under prior Code §911, held that Antarctica was not a foreign country for the purpose of IRC §911. Again, this case was decided under the previous §911, not the current section which came into effect under ERTA. Accordingly, the case cannot be construed as a direct precedent in the case at bar.

In *Martin*, the Tax Court took a mechanical view of the determination of whether or not Antarctica was a foreign country within the meaning of old IRC §911. Because the court found that the Department of State does not consider the Antarctic region to be under the sovereignty of any government, the court held that in matters of foreign affairs, generally, and a determination of a sovereignty in particular, the courts must accept the position taken by the executive branch. The court went on to state, “moreover, even apart from the claims of some

nations to portions of Antarctica, the area which may be referred to as the United States sector (which contains the Byrd Station) does not appear to be claimed by any government. Accordingly, it is clear that neither Antarctica as a whole nor that portion containing Byrd Station is a “foreign country” within the meaning of the regulations. See Rev. Rul. 67-52, 1967-1(c)(b)186.” 50 T.C. at p. 56. Unlike the situation in *Martin*, New Zealand has claims to Ross Island.

The rationale of the Court in *Martin* has been superseded and overruled by the holding of the United States Supreme Court in *Smith v. U.S.*, 507 U.S. 197 (1993). There, the United States Supreme Court determined whether Antarctica is a “foreign country” for the purposes of the Federal Tort Claims Act (“FTCA”). The United States Supreme Court did not adopt a rule that the judiciary must accept the determination of sovereignty by the executive branch but, rather, made an independent determination of the status of Antarctica for the purpose of the FTCA. Accordingly, the rationale for the *Martin* case cannot now be applied to the determination of this case, and a determination of the status of this territory must be made on some other basis, as this analytical approach was not adopted by the United States Supreme Court in making such a determination.

In *Smith*, the widow of John Emmett Smith sued the United States under the FTCA. Mr. Smith, a carpenter employed at McMurdo Station on Ross Island for a construction company under contract to the National Science Foundation, died while crossing a crevasse. The fatality occurred while Mr. Smith was on a recreational hike several miles outside of McMurdo Station. The wrongful death action against the United States under the FTCA was filed in the District Court for the District of Oregon, where the United States District Court dismissed petitioner’s claim for lack of subject matter jurisdiction holding that the claim was barred by

Section 2680(k) of the FTCA, which precludes the exercise of jurisdiction over “any claim arising in a foreign country”. The case was affirmed on appeal.

In *Smith*, the petitioner argued that the scope of the foreign country exception to the FTCA turns on whether the United States has recognized the legitimacy of another nation’s sovereign claim over the foreign land, and therefore, the land is not a “country” for the purpose of the FTCA, an argument similar to the holding in *Martin, supra*.

The Supreme Court made two holdings. Although it held Antarctica was a foreign country for the purpose of the FTCA, the Court also ruled that the suit was barred due to the limited relinquishment of common law immunity by the United States. Although the Supreme Court had an opportunity to rule on a limited basis (i.e., that the FTCA would bar the claim because of the common law immunity of the United States), it did not do so and, instead, determined the meaning of “foreign country.”

In *Smith*, the Supreme Court adopted an ordinary meaning approach to the determination of the question. The court noted that the FTCA (like IRC §911 of the Internal Revenue Code), offers no definition of “country.” The court held that:

“The common sense meaning of the term undermines petitioner’s attempt to equate it with “sovereign state”. The first dictionary definition of ‘country’ is simply ‘a region or a tract of land.’” *Webster’s New International Dictionary*, 609 Second Ed. 1935. 507 U.S. at 201. To be sure, this is not the only possible interpretation of the term, and it is therefore appropriate to examine other parts of the statute before making a final determination. **But the ordinary meaning of the language itself, we think, includes Antarctica, even though it has no recognized government.**” (emphasis added) 507 U.S. at 202.

The Supreme Court went on to examine the operation of the FTCA for further support that Antarctica was considered to be a foreign country. Notwithstanding, the primary holding arises from an “ordinary meaning” construction of the statute.

The Supreme Court went on to address the presumption against extra-territorial application of United States statutes:

“It is a long standing principle to American law that ‘the legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.’ See 507 U.S. at 204. . . . In applying this principle, ‘we assume that Congress legislates against the backdrop of the presumption against extra-territoriality.’” 507 U.S. at 205.

The Supreme Court’s holding that Antarctica is a foreign country, even though it has no recognized government also makes sense when considered in the broader global context. Since the current war in Iraq, the former government of Iraq was toppled. Until earlier this year, there was no recognized government in that country, yet it would be hard to argue that during the period of U.S. control that Iraq was not a foreign country. Tying the definition of “foreign country” to any territory under the sovereignty of a government is a definition that is too narrow, given the realities of international affairs.

A similar determination of the status of Antarctica was reached by the United States District Court for the District of Massachusetts in *David Smith, et al. v. Raytheon Co.*, 297 F. Supp. 2d 399 (2004). In this case decided on January 5, 2004, the District Court for the District of Massachusetts interpreted the Fair Labor Standards Act of 1938 (“FLSA”) to exclude overtime pay for Raytheon Company employees (the same employer of the taxpayer herein), for services performed in Antarctica. Under the FLSA, Section 213(f) excludes application of the

overtime pay rate for services performed in a “foreign country.” There, the court held that Antarctica is a foreign country within the meaning of Section 213(f) of the FLSA. First, it stated the apparent; that there could be no disagreement over the proposition that Antarctica is “foreign” to the United States. It then adopted the approach of the United States Supreme Court in *Smith v. U.S.*, *supra*, by defining the word “country” within the term “foreign country” to mean “a region or tract of land.” It held that it is not necessary to look any further than the ordinary common sense meaning of the language of Section 213(f) to reach the conclusion that Antarctica is a foreign country within the meaning of that section.

The question, therefore, becomes, what is the effect of the *Smith* and *David Smith et. al.* cases on the *Miller* case, the regulations, and the prior revenue ruling? Initially, no revenue ruling is binding on the courts. See *Stubbs Overbeck & Assoc. v. U.S.*, 445 F.2d 1142 (5<sup>th</sup> Cir. 1971). Therefore, the ruling of *Smith*, if applicable to this question of law, would overturn Revenue Ruling 67-52. As the Respondent’s citation of *Martin* is under a prior section of law, the only authority applicable to new Code §911 is Treasury Regulation Section 1.911-2(h). While the regulation is a legislative regulation, it is still subject to determination by United States courts as to its operative effect. See *Rowan Cos. v. U.S.*, 452 U.S. 247 (1981). It should be observed that General Counsel for the Respondent has issued contradictory advice on this question in the past. General Counsel Memorandum 33205 dated March 2, 1966 opined that Antarctica is a foreign country for the purpose of IRC §911. While the Petitioner is aware that General Counsel Memoranda can not be cited as authority, the rationale and conclusion of Memorandum 33205 is quite interesting as it adopts the approach taken by the Supreme Court in *Smith v. U.S.*, *supra*.

## ARGUMENT 1

### **Treasury Regulation §1.911-2(h) should be construed to include Antarctica within the meaning of “foreign country.”**

In *Chevron U.S.A. Inc. v. The National Resource Defense Council, Inc.*, 467 U.S. 837 (1984), the United States Supreme Court adopted a doctrine regarding judicial review of agency interpretations of ambiguous statutes. Prior to *Chevron*, two often disparate approaches were taken. Sometimes the court would defer to an agency interpretation that was reasonable in light of a statutory scheme (the so called “differential model”), and the court would not actively interpret the statute at issue, rather, its role was limited to determine whether the agency’s interpretation was reasonable. In other cases, the court would take a primary interpretive authority and independently review the statute in attempt to find the single best interpretation. This method is known as the “independent judgment model.” Under the independent judgment model, even though the court had primary interpretative authority, the agency’s view is not irrelevant but, rather, the agency’s “view of the proper meaning” is a factor in the court’s analysis and is given whatever persuasive effect it appears to merit in the circumstances. Under the independent judgment rule, the court would decide the statute’s single best meaning, even if the court ultimately agreed with the agency’s position. With the *Chevron* case, the Court initially adopted the differential rule, but later returned to the independent judgment rule in *U.S. v. Mead Corp.*, 533 U.S. 218 (2001) in some instances. See 3 Fla. Tax Rev 51 “Muffled Chevron: Judicial Review of Tax Regulations.

Under *Chevron*, when a court is faced with an agency interpretation of an agency-administered statute, *Chevron* instructs that the first step is for the court to determine whether Congress “has directly spoken to the precise question at issue.” Under this first step, a court

should look to the words of the statute and employ traditional tools of “statutory construction” to ascertain whether Congress had expressed its intention on the precise question at issue. If so, the clear will of Congress, as expressed in the statute controls, notwithstanding a contrary interpretation asserted by the agency. Deference to an agency’s statutory interpretation is called for only when the devices of judicial construction have been applied and found to yield no clear sense of congressional intent, 487 US 837, 842-44.

In *Smith* and *David Smith, et al*, the United States Supreme Court and the United States District Court of Massachusetts, respectively, used basic, statutory and traditional tools of judicial construction to interpret the statute. Under both the FTCA and the FLSA, and in the context of determining the meaning of “foreign country” in federal statutes where the term was not defined, the court has found that Congress has directly spoken to the precise question at issue through the use of traditional tools of statutory construction.

Accordingly, the holdings of *Smith* and *David Smith et. al.* should control here. The sole source of authority cited by the Respondent under new IRC §911 is the treasury regulation. Under the *Chevron* analysis, this Court must find that Congress has directly spoken to the precise question at issue, and by using the traditional tools employed by the *Smith* case, that the ordinary meaning of the term “foreign country” includes Antarctica. As the Supreme Court has employed those traditional tools of statutory construction to the term “foreign country” in the context of two other federal statutes that do not define the meaning of the term, it is clear that the Tax Court should also find that the term “foreign country” includes Antarctica, and determine that IRC §911 applies to the tax payer here.

## ARGUMENT 2

**The doctrine of stare decisis requires that this Court determine that Antarctica is a foreign country for the purposes of IRC §911.**

The U.S. Supreme Court has defined “stare decisis” as meaning “the obligation of the courts to abide by, adhere to and decide cases.” See *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992). The doctrine of stare decisis is a fundamental feature of the American common law system of adjudication. In the United States, the doctrine compels lower courts or agencies of the federal government to follow decisions of higher courts on questions of law.

The doctrine of stare decisis is supported by principles that are central to American jurisprudence. Stare decisis prevents courts from deciding cases in an arbitrary way. It reflects the belief that like cases should be treated in a like manner. See *Flowers v. U.S.*, 764 F.2d 759 (11<sup>th</sup> Cir. 1985) where the court said: “Stare decisis means that like cases will receive like treatment in a court of law.” Among the many reasons for adhering to stare decisis, the Supreme Court has emphasized that, “stare decisis is a preferred course because it promotes the evenhanded, predictable and consistent development of legal principals, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.” *Payne v. Tennessee*, 501 U.S. 808 (1991). It has been said, at its most fundamental level, that, “no judicial system could do societies’ work if it eyed each issue afresh in every case that raised it.” *Planned Parenthood of Southeastern Pa. v. Casey*, *supra*.

In order for a court opinion to have the effect of stare decisis, it must meet the following requirements:

1. It must have been rendered by a majority of the judges voting. *United States ex rel. Radich v. Criminal Court*, 459 F.2d 745 (2<sup>nd</sup> Cir. 1972).

2. The decision of the court will constitute precedence only if it determines an issue of law. For stare decisis to be applied, the issue of law must be heard and decided. See *EEOC v. Trabucco*, 791 F.2d 1 (1<sup>st</sup> Cir. 1986).

3. Stare decisis requires a published opinion. See *Hupman v. Cook*, 640 F.2d 497 (4<sup>th</sup> Cir. 1981).

4. Stare decisis requires an actual decision of the issue. The issue must actually be before the court and must not “merely lurk in the record, neither brought to the attention of the court nor ruled upon.” *Webster v. Fall*, 266 U.S. 507 (1925).

For a discussion of the doctrine of stare decisis, see *Moore’s Federal Practice-Civil*, Chapter 134. Clearly, in the *Smith* case, the Supreme Court was faced with a determination of an issue of law as to the legal status of Antarctica, a determination of its status under the law. Based upon the holding in *Smith*, the *Miller* decision, the treasury regulation and the Rev Rul 67-52 have been effectively overturned by the U.S. Supreme Court.

In researching the citation history of the *Smith* case, it does not appear that its effect has been considered by the Tax Court. This is the first case to address the issue since the publication of the *Smith* case. It seems indisputable that the effect of the *Smith* case is to establish the precedent on this question. It is logical to consistently apply the statement of law determined by the Supreme Court, and it would not make sense to treat Antarctica as a foreign country for some purposes and not others. It falls squarely within the stated purpose of the rule in that it gives regularity to judicial determinations. All of the policy statements made by the court as set forth above are clearly met with the determination here that Antarctica is, in fact, a

“foreign country.” The impact of such a ruling will not be that substantial to the fisc as there are only a limited number of employees working in the Antarctic. However, all of those persons are aware of the cases that have been decided that affect them and to rule that Antarctica is a foreign county for some federal purposes and not others will appear unfair and arbitrary, bringing into question the “perceived integrity of the judicial system.” If federal law does not apply to provide some of the basic protections afforded to employees in the United States why should it apply to tax them.

The Respondent has made equitable arguments that by adopting the Petitioner’s interpretation of IRC §911 would do more than relieve the Petitioner from the burden of double taxation. It is stated that this type of windfall was never intended by Congress when it enacted IRC §911. However, this is not the case. IRC §911 operates to exclude income for many taxpayers who are not subject to foreign taxation. Rather, it should be asked why the Internal Revenue Code would not extend the reach of IRC §911 to the Antarctic region. The statute does not include any requirement that the foreign country in which a United States citizen is employed actually impose an income tax on income earned in that country. Certainly, any number of foreign countries do not have an income tax and, therefore, many American citizens working abroad elsewhere are not subject to income tax and receive the benefits of IRC §911. When one is employed in a foreign country it is typical to incur substantial additional living expenses for travel, food, clothing, lodging and other items. The substantial deprivations endured by persons stationed in the Antarctic justifies the extension of the exclusion benefit to them especially where their work benefits the country and society as a whole. There does not seem to be any viable distinction that can be drawn between one working on an island, such as the Ross Dependency (that has an unusual history of its sovereignty due strictly to purposes of international research)

than in any other foreign country. So long as a taxpayer otherwise qualifies for the exclusion, there should be no policy reasons for treating this taxpayer differently than any other taxpayer, and it would seem to be a more even-handed application of the law to adopt a standard consistent with the *Smith* case.

It seems the concern of Congress for adopting the statute is to assist in the dislocations that result from an American employee accepting a foreign post and encourage foreign assignment in light of the U.S.'s unique world-wide tax regime. Congress has also expressed concern about the ability of American businesses to compete in foreign market places and, as a result thereon, adopted the foreign tax credit (IRC §901 et. seq.), to assist the competitiveness of American business. Additionally, Congress perceived that significant problems for American businesses exist when American employees are moved to foreign posts. A foreign transfer of employees raises a host of problems, some personal (language, customs, hardship area) and some professional, not the least of which is cost. Many foreign posts are more expensive than domestic assignments. Even if the new post is not inherently more expensive, it may well be more expensive to the employee if one has to maintain dual residences. Congress has long sought of ways to ease the burden on international business. One method of solving the problem (in addition to the foreign tax credit) has been to reduce the U.S. tax burden on Americans working overseas. That solution makes some sense, because almost every modern country, except the United States, does not tax its citizens who are non-residents. By reducing the non-resident citizen's U.S. tax burden on foreign sourced earnings, "the cost of moving the American employee abroad should be reduced to some degree and may even encourage the expatriate to accept the foreign post." See *Rhoades and Langer*, U.S. International Tax and Tax Treaty §201.

Additionally, a finding by this Court that Antarctica is not a foreign country is inconsistent within the context of the Treaty. In the Antarctic Treaty of 1959 (the “Treaty”), all countries placed all of their sovereignty claims on moratorium for the duration of the Treaty. Certainly the U.S. does not exert any sovereign domain and control over Antarctica similar to its relationship with any other foreign country. A finding that Antarctica is not a foreign country is certainly inconsistent to the position taken in the United States in the treaty in that the United States would, therefore, attempt to impose a sovereignty over the Antarctic region, especially if it attempts to extend the reach of its laws there.

### **ARGUMENT 3**

**IRC §863(d), does not provide sourcing rules for wage/salary income earned by U.S. citizens or resident aliens in Antarctica for the purpose of IRC §911.**

IRC §863 (d) does not determine the source of wage/salary income of individuals earned in Antarctica. IRC §911 has its own separate rules on sourcing income, does not incorporate the rules under IRC §863(d) and has a different statutory framework than IRC §863 (d).

IRC §911(b) states as follows:

(b) Foreign earned income.-

(1) Definition.- **For purpose of this section-** (emphasis added)

(A) In General.- The term “foreign earned income” with respect to any individual means the amount received by such individual from sources within a foreign country or countries which constitute earned income attributable to services performed by such individual during the period

described in subparagraph (A) or (B) of subsection (d)(1),  
whichever is applicable.

The phrase “for the purpose of this section” must be construed to restrict reference to IRC §911 (b) (1) to determine if “foreign earned income” is subject to the exclusion. Using basic rules of statutory construction, the Court should look only to IRC §911, especially as IRC §863 (d) does not even contain a definition of “foreign earned income” or “foreign country.” See *Chevron, supra*.

IRC §911 is contained in a subpart of the Code and is entitled “Earned Income of Citizens or Residents of the United States.” IRC §863 is not contained in that subpart and the section contains a number of rules relating to foreign income, including provisions directed strictly at trade or business activities. IRC §911(b) applies only to individuals and IRC §863's general and miscellaneous rules are not specific to individuals wage/salary income. In considering the application of IRC §911 which provides an exclusion for “foreign earned income” and contains its own defined sourcing rules, an analysis of the question should not get to IRC §863 not only because it contains no definition of the term but also since there is no cross reference to that section and IRC §863 is not otherwise incorporated in IRC §911.

The Petitioner believes that IRC §863(d) should be inapplicable for other reasons as well. That section is entitled “Source Rules For Space and Certain Ocean Activities.-“ The general thrust of the section is that earned income from space activities and ocean activities, if derived by a United States person, is sourced to the United States, and if derived from a person other than a United States person, it is sourced outside the United States. The subsection states that “the term space or ocean activity includes any activity conducted in Antarctica.” IRC §863(d)(2) flush language. This language creates a construction issue. As it is contained in the

paragraph that defines “ocean and space activity,” it seems logical that the inclusion of the term “Antarctica” should be read to mean activities related to space or ocean that are conducted in Antarctica. Its plain meaning does not extend to activities which are not conducted in space or ocean. The services provided by Raytheon employees in Antarctica are varied, ranging from janitorial services, food and beverage services, laundry, maintenance and repair services to certain technical and professional services. It would seem incongruent to find that a janitor in Antarctica would be considered to be engaged in space or ocean activity. Petitioner believes that this special rule should be construed on a limited basis not inconsistent with IRC § 911.

The Court asked that Petitioner to review the legislative history for guidance in this area. It appears from the report of the staff of the Joint Committee on Taxation that concern over an inflated foreign tax credit being claimed by businesses lead to the adoption of IRC §863(d). See *Staff of Joint Comm. On Tax’n. 99<sup>th</sup> Congress, 2<sup>nd</sup> Sess., General Explanation of the Tax Reform Act of 1986, at 933 (Comm. Print 1987)*. That rationale is absent in the context of an individual and, therefore, it would seem that this section was not intended to provide sourcing rules for wage/salary income. Neither the Senate Committee Report nor the Conference Committee Report provide any other clear guidance. They merely state that the term “ocean activities” also includes any activities performed in Antarctica. However, the examples cited by the Senate Committee Reports contemplate the conduct of a trade or business such as the leasing of equipment located in space or beneath the ocean, the licensing of technology or other tangibles for use in space or beneath the ocean, the manufacture of property in space or on or beneath the ocean and the performance and provision of other services that should be construed as being conducted in the context of a trade or business and not as an employee. Further, Proposed Regulations to IRC §863(d) only address activities which could be classified as trade

or business and none of the examples in Proposed Regulation 1.863-8(f) include wage/salary type of income. Also see Jeffrey P. Cowan, “*The Taxation of Space, Ocean, and the Proposed Treasury Regulations,*” the Tax Lawyer, Vol. 55 at pp 143-152.

Contained in the Code are two distinct regimes regarding foreign income. For business, the foreign tax credit applies, and for individuals the exclusion under IRC §911. All of the cases at issue here involve employees of Raytheon in providing services under contract with the National Science Foundation. A reading of IRC §863(d) itself seems to contemplate a trade or business analysis in sourcing items of gross income and not wage/salary income. It is clear that an employee’s trade or business is that of an employee and not the employer’s trade or business. An employee’s performance of services itself constitutes a trade or business. See *D.J. Primuth*, Dec. 29985, 54 T.C. 374. Therefore, the Taxpayer here, and others before this Court, are not engaged in space or ocean activity, rather, they are engaged in the activity of being an employee, which is its own separate trade or business. Accordingly, under the application of basic statutory construction, IRC §863(d)(2) should not be found to be a sourcing rule if otherwise within the ambit of IRC §911.

Various rules of IRC §863 are difficult to reconcile with other Code sections in that subpart. For example, IRC §862(a)(3) states as follows:

- (a) Gross Income From Sources without United States.- The following items of gross income shall be treated as income from sources without the United States:...
- (3) compensation for labor or personal services performed without the United States...”

Indeed, IRC §863(a) allocates items of gross income expense, losses and deductions, other than those items specified in §861(a) and §862(a) under regulations prescribed by the Secretary. On

one hand IRC §863(d) classifies income from “an activity” but does specifically include compensation as “an activity” whereas IRC §862(a)(3) has a specific rule for compensation. If IRC §863(a) allocates items under regulations consistent with IRC §862(a), should IRC 863(d) then operate to bring that same income within its ambit? This would not be logical. Use of the term “activity” more logically excludes compensation income where its addressed specifically under IRC §862(b)(3). Any other construction of IRC §863(a)(3) is confusing, as it is also confusing if one tries to incorporate an analysis of IRC §863(d) into the context of IRC §911.

In *Francisco v. Commissioner of Internal Revenue*, 119 T.C. 20, the Court reviewed the application of IRC §931 to a U.S. citizen residing in American Samoa who was employed as a chief engineer of a fishing vessel. IRC §931 and IRC §911 are quite different provisions and do not use similar terminology. IRC §931 contains no sourcing rule, whereas IRC §911 is an exclusionary rule which contains its own definitions for sourcing income. In *Francisco* the Court ruled that IRC §931 did not define American Samoan source income or “effectively connected” income and the Court was forced to consider sourcing rules contained in IRC §861 through IRC §865 and the regulations in construing those sections. The Court found that IRC §863(d) operated to source his income from without the United States. IRC §931 does not have similar language to that contained in IRC §911 which specifically states for the purpose of such section that its sourcing rules are applicable. The analysis engaged in by the Court in *Francisco* cannot be transplanted to this case because of the specific sourcing rules in IRC §911. See 119 T.C. 20 at page 18. The Court is not faced with that sourcing problem here but rather IRC §911 and the regulations thereunder are applicable.

## SUMMARY JUDGMENT

Summary judgment is intended to expedite litigation and avoid unnecessary and expensive trials. *Florida Peach Corp. v. Comm’r*, 90 T.C. 678, 681 (1988). Summary judgment may be granted with respect to all or any part of the legal issues in controversy “if the pleadings, answers to interrogatories, depositions, admissions, and any other acceptable materials, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that a decision may be rendered as a matter of law.” Rule 121(b); *Sundstrand Corp. v. Comm’r*, 98 T.C. 518, 520 (1992), *affd.* 17 F.3d 965 (7<sup>th</sup> Cir. 1994); *Zaentz v. Comm’r*, 90 T.C. 753, 754 (1988). The moving party bears the burden of proving that there is no genuine issue of material fact, and factual inferences will be read in a manner most favorable to the party opposing summary judgment. *Dahlstrom v. Comm’r*, 85 T.C. 812, 821 (1985).

## CONCLUSION

A review of the motion filed by Respondent and Petitioner’s Response and the Cross Motion for Partial Summary Judgment show that there is no genuine issue as to material fact and that the Petitioner’s Cross Motion for Partial Summary Judgment should be granted, and that the Respondent’s Motion for Summary Judgment should be denied.

RESPECTFULLY SUBMITTED this 13<sup>th</sup> day of August, 2004.

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## CERTIFICATE OF MAILING

The undersigned hereby certifies that on this 13<sup>th</sup> day of August, 2004, a true and correct copy of the **PETITIONER'S MEMORANDUM BRIEF IN OPPOSITION TO RESPONDENT'S MOTION FOR SUMMARY JUDGMENT AND PETITIONER'S CROSS MOTION FOR PARTIAL SUMMARY JUDGMENT** was deposited into the United States mail, postage prepaid, addressed to:

Randall L. Preheim, Esq.  
Rocky Mountain District  
INTERNAL REVENUE SERVICE  
1244 Speer Boulevard, Suite 500  
Denver, Colorado 80204-3583

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