

LB&I International Practice Service Concept Unit

Shelf		Individual Outbound		
Volume	9	Jurisdiction to Tax – Outbound	UIL Code	9431
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Chapter	9.6.5	Foreign Earned Income Exclusion (IRC § 911)	Level 3 UIL	9431.06-05
Chapter	9.6.6	Housing Deduction/Exclusion	Level 3 UIL	9431.06-06

Unit Name	IRC § 911 Election and Revocation
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General Overview

IRC § 911 Election and Revocation

Unlike most other countries, the United States (U.S.) taxes U.S. citizens and resident aliens on their worldwide income even if they are no longer tax residents of the U.S. U.S. citizens and resident aliens residing in another country may be subject to tax in that other country and foreign tax credits may be available to offset the U.S. tax on income sourced in the foreign country. In addition, citizens and resident aliens living and working outside the U.S. may be entitled to a foreign earned income exclusion that reduces their U.S. taxable income. For 2013, the maximum earned income exclusion is \$97,600 per taxpayer (indexed annually for inflation). The foreign earned income exclusion is available only for wages or self-employment income earned for services performed outside the U.S. The exclusion is claimed on IRS Form 2555. Special rules apply to U.S. foreign service and military personnel.

The taxpayer may also be able to exclude housing expenses in excess of a base amount and subject to a limit. The base amount is equal to 16% of the maximum foreign earned income exclusion multiplied by the number of qualifying days within the tax year. The IRC limits the housing expenses eligible for the housing exclusion to 30% of the maximum foreign earned income exclusion. The result of the limitation is then multiplied by the number of days in the qualifying period that fall within the tax year. Self-employed taxpayers can qualify for a housing deduction rather than a housing income exclusion for employer-provided amounts.

This unit discusses how a taxpayer may make a valid election to exclude foreign earned income and the cost of foreign housing from gross income under Internal Revenue Code (IRC) § 911. It also discusses the revocation of a previously made election.

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Relevant Key Factors


IRC § 911 Election and Revocation


Key Factors

IRC § 911(a) allows a “qualified individual,” as defined in IRC § 911(d)(1), to elect to exclude his or her foreign earned income and housing cost amounts from gross income. In order to be eligible to make an election under IRC § 911, a taxpayer must:

- Have foreign earned income,
- Have a tax home in a foreign country, and
- Meet either the bona fide residence or physical presence test.

Each of these concepts are discussed in detail in other units. See Slide 12 for a list of related International Practice Units.


 **CAUTION:** A taxpayer may not get a double benefit by taking a credit that may be available under a treaty attributable to amounts excluded from gross income under IRC § 911(a). Treas. Reg. § 1.911-6(a), and Rev. Rul. 79-199; 1979-1 C.B. 246.

 **CAUTION:** Not all overseas locations are “foreign countries.” For example, Antarctica, U.S. possessions and territories, and certain other locations are not foreign countries.

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Detailed Explanation of the Concept

IRC § 911 Election and Revocation

Analysis	Resources	6103 Protected Resources
<p><u><i>Making the Election</i></u> The election to exclude foreign earned income and the election to exclude the cost of foreign housing are separate elections. A taxpayer may make one or both elections.</p> <p> CAUTION: An individual who has made either election may not take any deductions, exclusions, or credits with respect to the excluded amount(s).</p> <p>These elections are made by attaching Form 2555 and Form 2555-EZ or a comparable form for each election to the taxpayer's income tax return for the first taxable year that the election is effective. Treas. Reg. § 1.911-7(a)(1).</p> <p>These elections must be made with:</p> <ul style="list-style-type: none"> ▪ a timely filed return (including any extensions), ▪ a return amending a timely filed return during the claim period of IRC § 6511(a), or ▪ a late-filed return filed within one year from the original due date of the return (determined without regard to any extensions) 		

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<p>In addition, the elections may be made on a return filed after the periods described above, provided:</p> <ul style="list-style-type: none"> ▪ the individual owes no federal income tax after taking the exclusion(s) into account, or ▪ the individual owes federal income tax after taking the exclusion(s) into account but files a return electing the exclusion before the IRS discovers that the individual failed to make the election. <p>NOTE: If an individual owes federal income tax after taking the exclusion into account, and the IRS discovers that the individual failed to make the election, the individual may request a private letter ruling under Treas. Reg. § 301.9100-3 in accordance with the instructions contained in the first Revenue Procedure issued by the IRS each year.</p> <p>The elections apply to the taxable year for which they are made and to all subsequent taxable years, unless the individual revokes them. IRC § 911(e)(1).</p>		

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Detailed Explanation of the Concept


IRC § 911 Election and Revocation

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<p>Revoking the Election</p> <p>Each election , the election to exclude foreign earned income and the election to exclude the cost of foreign housing , must be revoked separately. An election may be revoked by:</p> <ul style="list-style-type: none"> ▪ Filing a statement with the income tax return or amended return for the taxable year for which the revocation is to take effect (Treas. Reg. § 1.911-7(b)(1)), or ▪ By taking a position on the return that is inconsistent with claiming the exclusion. Rev. Rul. 90-77, 1990-2 C.B. 183. However, computational errors made in good faith in determining the amount of the exclusion which might affect the amount of the allowable credit are not considered a revocation. <p>EXAMPLE 1: In Year 1, the taxpayer makes a valid section 911 election. However, in Year 2, the taxpayer is living and working in a high tax country and claims the foreign tax credit with respect to foreign earned income or housing in lieu of the foreign earned income exclusion. The IRS considers that in Year 2, the taxpayer has revoked the section 911 election that he made in Year 1.</p> <p>NOTE: Claiming the foreign tax credit may serve to revoke either or both the income and housing exclusions depending on the amount of the FTC claimed. See Rev. Rul. 90-77, situation 2.</p> <p>EXAMPLE 2: Claiming deductions, such as travel and meals, for travel to a foreign country that is inconsistent with having a tax home in a foreign country. See PLR 8346093 which cannot be cited as precedent.</p>		

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Detailed Explanation of the Concept

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 <p>CAUTION: Once an election is revoked, the individual may not make another election before the sixth taxable year after the first year for which the revocation was effective. IRC § 911(e)(2) and Treas. Reg. § 1.911-7(b) Example: If an election is revoked for taxable year 2013, the taxpayer may not make another election until taxable year 2019. If the taxpayer wants to reelect exclusion within five years of the revocation, he must obtain permission from the IRS. Treas. Reg. § 1.911-7(b)(2).</p>		

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Examples of the Concept

IRC § 911 Election and Revocation

Examples

EXAMPLE 1: A taxpayer who did not make a timely election to exclude foreign earned income as provided for in the regulations was not entitled to file late elections to claim the exclusion. *Faltsek v. Commissioner*, 92 T.C. 1204 (1989) (also establishing that the regulations of IRC § 1.911-7 are valid).

EXAMPLE 2: A qualified individual made a valid election and properly excluded foreign earned income for the tax years 2007 and 2008. This individual returned to the United States in 2008 and then moved abroad again in 2011. Because a move from the foreign country back to the United States is not considered a revocation of the foreign earned income exclusion, such an individual would not have to reelect the exclusion. S. Rep. No. 97-176, at 203 (1981). However, he or she would need to meet the other criteria under section 911 in order to exclude foreign earned income and/or the cost of foreign housing (*i.e.*, have a tax home in a foreign country and either be a bona fide resident of a foreign country or meet the physical presence test).

EXAMPLE 3: A qualified individual made a valid election for the 2011 tax year and properly excluded foreign earned income. For 2012, this individual excluded only a portion of the income eligible for exclusion under IRC § 911(a) in order to maximize the refundable Additional Child Tax Credit. The foreign earned income is an all-or-nothing exclusion. An individual cannot elect to exclude only a portion of his or her eligible foreign earned income. Further, the IRS considers this as an inconsistent return position which may constitute a revocation of the election. This issue has not been tested in the courts, but it seems the likely outcome; if so, the earliest year for which the taxpayer may make another election to exclude foreign earned income under IRC § 911 is tax year 2018, unless he or she obtains permission from the IRS by following the procedures in Treas. Reg. § 1.911-7(b)(2).

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Training and Additional Resources

IRC § 911 Election and Revocation

Type of Resource	Description(s) and/or Instructions for Accessing	References
White Papers / Guidance	<ul style="list-style-type: none"> Memorandums issued by Associate Chief Counsel (International) 	<ul style="list-style-type: none"> 200202072 200226010
Podcasts / Videos	<ul style="list-style-type: none"> FY 11 IIC CPE Session: 911 and FTC 	
Bloomberg BNA	<ul style="list-style-type: none"> BNA Tax Management Portfolios – Foreign Income Series - Taxation of U.S. Persons' Foreign Income 	<ul style="list-style-type: none"> 918-2nd Section 911 I.B (4) Tax Home

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Glossary of Terms and Acronyms

Acronym	Definition
DCN	Document Control Number
IRC	Internal Revenue Code
IRS	Internal Revenue Service
PLR	Private Letter Ruling

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Index of Related Issues

Issue	Associated UIL(s)	References
Bona Fide Resident for Purposes of IRC § 911	9431.06	DCN:JTO/9431.06_xx(201x)
Foreign Earned Income Exclusion (IRC § 911)	9431.06-05	DCN:JTO/9431.06_xx(201x)
Physical Presence Test for Purposes of Foreign Earned Income Exclusion	9431.06	DCN:JTO/9431.06_xx(201x)
Foreign Housing Deduction or Exclusion	9431.06-06	DCN:JTO/9431.06_xx(201x)
Tax Home for Purposes of IRC § 911	9431.06	DCN:JTO/9431.06_05(2013)