

Rev. Rul. 90-77

ISSUE

If a taxpayer does not file a statement revoking a previously made election under section 911 of the Internal Revenue Code of 1986, but the taxpayer chooses to take a foreign tax credit with respect to foreign taxes paid on foreign earned income eligible for exclusion under section 911(a) in a year in which he has an election to exclude foreign earned income in effect, does that choice constitute a revocation of the election under section 911(e)(2)?

FACTS

Situation 1

From January 1, 1984, through February 28, 1986, A was a qualified individual as defined in section 911(d)(1). As of March 1, 1986, A was no longer a qualified individual. A made a valid election to exclude foreign earned income under section 911(a)(1) and claimed the exclusion for the 1984 and 1985 taxable years. In the tax return for the 1986 taxable year, A did not claim the exclusion for which he was eligible for the period of beginning January 1, 1986, and ending February 28, 1986. Instead, A reported all gross income earned during the year and claimed a foreign tax credit for foreign taxes paid on foreign earned income. A did not file a statement with his 1986 tax return specifically revoking the section 911(a)(1) election.

Situation 2

The facts are the same as in Situation 1, except that A also made a valid election under section 911(a)(2) of the Code to exclude his housing cost amount and claimed that exclusion for 1984 and 1985.

Situation 3

B is a qualified individual under section 911(d)(1) for the period from January 1, 1986, through March 31, 1987. In 1987, B is eligible for a housing cost amount exclusion of 6x. However, as the result of an inadvertent miscalculation, B only claims a housing cost amount of 5x on his return and claims a foreign tax credit for 1x against foreign earned income which was excludable but due to the miscalculation was not excluded.

LAW AND ANALYSIS

Section 911(a) of the Code allows qualified citizens or residents of the United States living abroad to elect to exclude from gross income the foreign earned income and housing cost amounts of such individuals. The elections must be made separately with respect to each amount. Section 911(a). A taxpayer who has made either election may not deduct or credit foreign taxes paid or accrued with respect to the excluded amounts. Section 911(d)(6). Section 911(e)(1) of the Code provides that the elections apply to the taxable year for which made and to all subsequent taxable years unless the taxpayer revokes them. Section 911(e)(2) of the Code permits such a revocation, but provides that, without the consent of the Secretary, the taxpayer

may not make another election before the sixth taxable year after the year for which the revocation was effective.

Section 1.911-7(b) of the Income Tax Regulations sets forth a procedure for revoking a section 911 election. An election may be revoked by filing a statement with the income tax return or amended return for the taxable year for which the revocation is to take effect. The revocation is effective for that year and all subsequent years. Each election claimed under section 911(a) of the Code must be revoked separately.

Situation 1

Although the regulations under section 911 of the Code prescribe a method by which a taxpayer may revoke an election to exclude foreign earned income, they do not purport to provide the exclusive method for revoking such an election. Taxpayers are required to revoke their elections and to obtain the consent of the Secretary to reelections to prevent them from abusing the tax benefits provided by section 911 through alternating between electing section 911 benefits and claiming foreign tax credits. Thus, to ensure that the taxpayer cannot abuse the benefits of section 911, the election made under section 911 will be considered revoked because the taxpayer's inclusion of income and the claiming of the foreign tax credit in a subsequent year is inconsistent with that election.

Situation 2

Section 1.911-7(b) of the regulations requires a separate revocation for each section 911 election. If the taxpayer has elected both exclusions, then claiming the foreign tax credit may result in the revocation of one or both of the exclusions, depending on the amount of the foreign tax credit claimed. For example, in 1986, A has foreign earned income of 12x. A may claim a section 911(a)(1) exclusion of 10x, and a housing cost exclusion pursuant to section 911(a)(2) of 2x. Instead of excluding foreign earned income, A claims a foreign tax credit with respect to foreign earned income of 12x. That will be inconsistent with both elections and will serve to revoke them both. If, however, the foreign tax credit had been claimed with respect to foreign earned income of an amount greater than 2x, but less than or equal to 10x, then the section 911(a)(1) election would be revoked but the housing cost exclusion would not be revoked and could be exercised in the future without the consent of the Secretary. If the foreign tax credit had been claimed with respect to foreign earned income of 2x or less, then A would be able to choose which election has been revoked. See 1.911-6(c) and (d) for rules and examples concerning the extent to which a deduction or credit for foreign taxes is disallowed when a taxpayer has foreign earned income that exceeds the amount that may be excluded under section 911(a)(1) and (2).

Situation 3

If the Secretary determines that such errors were made in good faith, computational errors made in determining the amount of foreign earned income that is excludable, which may affect the amount of the allowable foreign tax credit, will not be considered a revocation of a section 911 election.

HOLDING

If a taxpayer who is a qualified individual for a period claims a foreign tax credit with respect to foreign earned income that is eligible for exclusion under section 911(a) instead of excluding that income, then, because claiming the foreign tax credit is inconsistent with the previously made election or elections (the election or elections under section 911(d)(1)), one or both of the previously made elections will be considered revoked under section 911(e)(2). Computational

errors made in good <Page 185> faith in determining the amount of foreign earned income that is excludable, which may affect the amount of the allowable foreign tax credit, however, will not be considered a revocation of a section 911 election.