



DEPARTMENT OF THE TREASURY  
INTERNAL REVENUE SERVICE  
WASHINGTON, D.C. 20224

OFFICE OF  
CHIEF COUNSEL

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MEMORANDUM FOR Shirley A. Bogan  
Quality Staff, Philadelphia

FROM: Phyllis E. Marcus, Branch Chief  
CC:INTL:Br.2

SUBJECT: Late Filed Section 911 Exclusions

This memorandum responds to your e-mail to Jerry Traficanti dated February 25, 2002, requesting clarification about when a taxpayer may claim the section 911 exclusion on a Form 2555 that is filed late. Specifically, your guidelines under Treas. Reg. §1.911-7(a)(2)(i)(D), instruct tax examiners to look at the total tax line before payments to determine whether taxpayers have satisfied the "owes no federal income tax" requirement under that regulation. If a taxpayer owes tax before payments such as withholding, whether or not there is a tax liability remaining after payment, the tax examiner will disallow the claim for the section 911 exclusion, and refer the taxpayer to the Office of Associate Chief Counsel (International) for a private letter ruling addressing retroactive relief. Thus, the issue is whether the phrase "owes no federal income tax" under Treas. Reg. §1.911-7(a)(2)(i)(D), means a taxpayer's tax liability before or after any payments, such as withholding tax, estimated tax, tax credit, and etc.

Treas. Reg. §1.911-7(a) sets forth the procedural rules for making a valid section 911 election. The election must be made on Form 2555 or on a comparable form, and must be filed with an income tax return or with an amended return. With respect to the timing of the election, Treas. Reg. §1.911-7(a)(2)(i) provides that a valid section 911 election must be made:

(A) With an income tax return that is timely filed (including any extensions of time to file);

(B) With a later return filed within the period prescribed in section 6511(a) amending a timely filed return;

(C) With an original return filed within one year after the due date of the return (determined without regard to any extension of time to file); or

(D) With an income tax return filed after the period described in paragraphs (a)(2)(i)(A), (B), or (C) of this section provided -

(1) The taxpayer owes no federal income tax after taking into account the exclusion and files Form 1040 with Form 2555 or a comparable form attached either before or after the Internal Revenue Service discovers that the taxpayer failed to elect the exclusion; or

(2) The taxpayer owes federal income tax after taking into account the exclusion and files Form 1040 with Form 2555 or a comparable form attached before the Internal Revenue Service discovers that the taxpayer failed to elect the exclusion.

Under Treas. Reg §§ 1.911-7(a)(2)(i)(D)(1) and (2), the validity of a taxpayer's section 911 election on a Form 2555 with respect to a late filed income tax return, depends, in part, on whether the taxpayer owes federal income tax after taking into account the exclusion. It is our position that the phrase "owes no federal income tax" under Treas. Reg § 1.911-7(a)(2)(i)(D), means that tax examiners should apply any payments, such as withholding tax, estimated tax, tax credit, and etc. to offset any federal income tax liability, to determine whether the taxpayer "owes no federal income tax". The intent of this regulation section is to allow a taxpayer whose only income at issue is excluded foreign earned income to file a late section 911 election. Thus, the tax examiners should examine whether a taxpayer has a refund or a balance due. If the taxpayer has a refund or no balance due, the taxpayer "owes no federal income tax" under Treas. Reg §§ 1.911-7(a)(2)(i)(D)(1) and (2), and does not need to request a private letter ruling from us.

If you have any questions, please call Kate Y. Hwa at (202) 622-3840.

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(International)