

10-2791
TAX TYPE: INCOME TAX
TAX YEAR: 2007
DATE SIGNED: 10-2-2012
COMMISSIONERS: B. JOHNSON, M. JOHNSON, M. CRAGUN
EXCUSED: D. DIXON
GUIDING DECISION

BEFORE THE UTAH STATE TAX COMMISSION

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| <p>TAXPAYER-1 AND TAXPAYER-2, Petitioners, vs. AUDITING DIVISION, OF THE UTAH STATE TAX COMMISSION Respondent.</p> | <p>FINDINGS OF FACT, CONCLUSIONS OF LAW, AND FINAL DECISION</p> <p>Appeal No. 10-2791</p> <p>Account No. ##### Tax Type: Income Tax Tax Year: 2007</p> <p>Judge: Phan</p> |
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Presiding:

Marc Johnson, Commissioner,
Jane Phan, Administrative Law Judge

Appearances:

For Petitioner: TAXPAYER, Pro Se, by Telephone
For Respondent: REPRESENTATIVE FOR RESPONDENT, Assistant Attorney
General
RESPONDENT, Manager, Income Tax Auditing

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission for a Formal Hearing on May 17, 2012, in accordance with Utah Code Ann. §59-1-501 and §63G-4-201 et seq. Petitioner ("Taxpayer") had been given two weeks after the hearing, or until June 1, 2012, to provide additional information, but there is no record of the additional information having been received. Therefore, based upon the evidence and testimony presented at the hearing, the Tax Commission hereby makes its:

FINDINGS OF FACT

1. Taxpayer is appealing an audit deficiency of additional Utah individual income tax for the tax year 2007. The statutory Notice of Deficiency and Audit Change had been issued

on October 19, 2010. Taxpayer timely appealed the audit and the matter proceeded to the Formal Hearing.

2. The amount of additional tax due from the audit was \$\$\$\$\$, as of the date of the statutory notice interest had accrued in the amount of \$\$\$\$\$.¹

3. For the 2007 tax year Taxpayer was not a resident of Utah, his place of residency was STATE. He had filed for that year a Utah return as a nonresident and claimed as his Utah portion of his federal adjusted gross income an amount of \$\$\$\$\$. The audit deficiency resulted primarily from Respondent (“Division”) increasing the Utah portion of the adjusted gross income from \$\$\$\$\$ to \$\$\$\$\$. There were additional smaller changes to the audit that were not disputed at the hearing.

4. The Taxpayer testified during 2007 he started employment with EMPLOYER. He testified that it was sometime toward the end of June or early July. He was unsure the exact date during questioning at the hearing. However, on information submitted with his Utah Tax return, filed in April 2008, he had indicated that his start date had been July 16, 2007 and that he had worked for this business for the rest of the year.

5. The Taxpayer testified that he was paid on a salary basis, that he was not paid by the hour and that there had been no employment contract. The amount that he was paid by EMPLOYER during 2007 was \$\$\$\$\$.

6. EMPLOYER issued a W-2 for tax year 2007 to the Taxpayer which indicated that he had been paid \$\$\$\$\$ in wages, tips or other compensation. The W-2 listed the full amount as Utah wages. Utah withholding of \$\$\$\$\$ was indicated on the W-2.

7. EMPLOYER was headquartered in Utah, which was the location of its base of operations. The Taxpayer’s employment was directed from the Utah offices.

8. The Taxpayer testified that the work he performed for EMPLOYER was to conduct week-long training seminars. The three seminars he presented were all held in Utah in 2007. He had traveled to Utah for these seminars. He testified at the hearing that he had spent a total of ##### days in Utah presenting these seminars. The Taxpayer testified that conducting the training seminars was his primary function as an employee of EMPLOYER.

9. The Division pointed out that prior information submitted by the Taxpayer indicated he was working in Utah ##### days, not #####. The Taxpayer indicated that he had also made a trip to Utah upon being hired by EMPLOYER to fill out paperwork and for “meet and greet” purposes.

¹ Interest continues to accrue until the balance is paid in full.

10. When the Taxpayer was not in Utah he returned to his home in STATE. In June 2007 the Taxpayer had acquired his own business franchise, which he operated in STATE. He deducted a number of expenses as indicated on Schedule C from his STATE return related to his business there. The Taxpayer testified that he did have an office in STATE and when in STATE he would continue to provide support “every now and then” over the telephone related to his training seminars or as part of his employment with EMPLOYER. He acknowledged that this might not be every day. When questioned at the hearing, he would not provide a percentage split between working for his employment with EMPLOYER and working on his own BUSINESS in STATE. He would not even give a rough estimate.

11. It is clear that when he was in STATE, the Taxpayer was not spending all of his work time performing tasks related to his employment for EMPLOYER; some of the time was for his own personal business. But there was some work, including telephone calls, which he performed for EMPLOYER as part of his employment while he was in STATE.

12. Prior to the hearing the Division had made a discovery request for information to support the Taxpayer’s position that some of his wages from EMPLOYER were not considered to be Utah sourced. The Taxpayer had not provided the requested information prior to the hearing. The Taxpayer was granted a period of two weeks after the hearing to produce the information, but nothing was provided.

13. When the Taxpayer filed his 2007 Nonresident Utah Individual Income Tax Return he allocated his salary from EMPLOYER based on the number of days he spent in Utah compared to the number of days out of Utah. An attachment to his 2007 Utah return was provided. This indicated that his total employment with EMPLOYER had been from July 16 to December 31, or ##### days total. Of that he states ##### days, or %%% of this time, was spent in Utah and ##### days, or %%% of his time, out of Utah.² He then attributed the %%%, of his total wages from EMPLOYER to Utah as Utah source income on his Utah return in the amount of \$\$\$\$.

14. The Taxpayer provided a letter dated October 19, 2011, from NAME, CFO, for what appears to be a company named EMPLOYER. NAME states in the letter that there had been an error on the W-2 in stating Utah wages in the amount of \$\$\$\$\$. In the letter NAME states:

² The Taxpayer subsequently, in his appeal, indicated that that he was employed with EMPLOYER for ##### days rather than the ##### days reported on his return. His revised calculation was that ##### of the ##### days was #####.

State wages in the amount of \$\$\$\$\$ were reported to the state of Utah, when in fact only \$\$\$\$\$ was earned in Utah and the remaining \$\$\$\$\$ was earned in STATE. TAXPAYER-1 was hired as Vice President of Sales, and was on temporary assignment in Utah for ##### days during 2007 to conduct sales training classes. Upon completion of these classes he returned to his home state of STATE.

15. A witness for the Division, RESPONDENT, Manager, Income Tax Auditing, testified that he had spoken with NAME regarding the letter. RESPONDENT testified that NAME told him that the Taxpayer's employment involved the training seminars in Utah but he did not provide any information about tasks the Taxpayer may have performed as part of his employment in STATE. RESPONDENT also testified that NAME stated that the letter had been prepared based upon the Taxpayer's request.

16. The Taxpayer also worked for EMPLOYER in 2008 and continued to be a nonresident of Utah. The Division made a point that on his 2008 Utah nonresident return, the Taxpayer claimed all income earned from his employment with EMPLOYER to be Utah source income.³

17. For his employment with EMPLOYER, the Taxpayer testified that he was carrying on his occupation both in Utah and in STATE. However, there is no evidence or testimony to document or quantify the amount of work performed for EMPLOYER while he was in STATE. The Taxpayer did not describe the services he performed for EMPLOYER while outside of Utah other than phone calls he made "every now and then."

APPLICABLE LAW

Utah imposes a tax on nonresident individual's income from Utah sources at Utah Code Sec. 59-10-116(2) (2007)⁴ as follows:

(1)(d) "State taxable income" means a nonresident individual's federal taxable income after making the: (required additions, subtractions and adjustments

(2) Except as provided in Subsection (3) or Part 12, Single Rate Individual Income Tax Act, a tax is imposed on a nonresident individual in an amount equal to the product of the nonresident individual's (a) un apportioned state tax; and (b) state income tax percentage.

³ If the Taxpayer did not spend any workdays in Utah, none of the income from EMPLOYER would be sourced to Utah even though the firm was located in Utah.

⁴ The Utah Individual Income Tax Act has been revised and provisions renumbered subsequent to the audit period. The Commission cites to and applies the provisions that were in effect during the audit period on substantive legal issues.

Utah Code Sec. 59-10-117 describes income derived from Utah sources and differentiates personal services from other occupations:

(1) For purposes of Section 59-10-116, adjusted gross income derived from Utah sources includes those items included in adjusted gross income attributable to or resulting from:

. . . .

(b) the carrying on of a business, trade, profession, or occupation in this state.

. . . .

(2) For the purposes of Subsection (1):

. . . .

(c) salaries, wages, commissions, and compensation for personal services rendered outside this state shall not be considered to be derived from Utah sources;

. . . .

The applicable statutes specifically provide that the taxpayer bears the burden of proof in proceedings before the Tax Commission. Utah Code Sec. 59-1-1417 provides: “In a proceeding before the commission, the burden of proof is on the petitioner . . .”

CONCLUSIONS OF LAW

1. The Taxpayer’s allocation of his wages from EMPLOYER to Utah based on the number of days that he spent in the state is not supported by the facts. The Taxpayer is a nonresident of Utah. His Utah source income is subject to Utah individual income tax pursuant to Utah Code Sec. 59-10-116(2). Utah Code Sec. 59-10-117(2)(c) provides that “salaries, wages, commissions, and compensation for personal services rendered outside this state shall not be considered to be derived from Utah sources.” The Taxpayer clearly received wages from his employment with a Utah business for work performed in Utah. The wages for the work performed in Utah are subject to Utah individual income tax.

2. The only issue before the Commission is whether any compensation from EMPLOYER had been paid for services performed outside of Utah. The Taxpayer argues that some of the work which he performed as an employee for EMPLOYER was rendered outside Utah, while he was in STATE. He argued that the number of days he spent in STATE should serve as the basis of his allocation between the working time in and outside of Utah. The Taxpayer described and indentified the amount of actual working time in Utah, but did not do so for time outside of Utah.

3. The Division stated that it was willing to make a fair allocation based on the amount of time that the Taxpayer actually spent working for the Utah employer while he was in

STATE. However, the Division felt that the information was insufficient to conclude that any work was performed in STATE.

4. The Taxpayer has the burden of proof under Utah Code Sec. 59-1-1417 to support his position that the allocation should be made based on the number of days that he was in Utah versus the number of days he was actually working for his Utah employer while he was in STATE. In order to meet the burden the Taxpayer must establish how much work he performed for EMPLOYER outside of Utah.

5. In the absence of direct information, such as pay stubs, time sheets, logs, etc., showing of the amount of income not earned in Utah, an estimation of the Utah and non-Utah source income based on a ratio of work time spent in and out of the state would be an appropriate measure, as long as there was some kind of supporting evidence or testimony. However, the Taxpayer's assumption that Utah and non-Utah source income is determined solely by a ratio of the number of days spent in and outside of Utah is erroneous on one critical count. Under Utah Code Sec. 59-1-117(2)(c) income earned outside of Utah is not sourced to Utah if ". . . compensation for personal services (is) rendered outside this state." (Emphasis added.) Accordingly, the concern is not how much total time he spent outside of Utah while employed by EMPLOYER, but rather how much actual working time he spent. If part of the ##### days time was spent working on his own business, that time should not be included as part of the ##### days used in the denominator of his ratio. Even more important is whether he spent any time at all working for EMPLOYER while in STATE. In other words, if his only services rendered for EMPLOYER were in Utah, the Taxpayer would have no income from EMPLOYER that would be considered to be derived from sources outside of Utah.

6. Although the Taxpayer provided a letter from the CFO that appeared to corroborate the income reported as Utah source income on Taxpayer's tax return, the numbers on the two documents were precisely the same. Because the income reported on the return was calculated by the Taxpayer, and the CFO testified that his letter was solicited by the Taxpayer, this evidence is not persuasive, especially in light of the Taxpayer's W-2. Furthermore, the CFO did not give any indication of the Taxpayer's services performed outside of Utah. The letter did, however, state that the Taxpayer "was on temporary assignment in Utah for ##### days," and that he returned to STATE afterward. But again, the question is not what he did in Utah, which has been established, but rather the amount of time spent on the Taxpayer's specific services outside of Utah.

7. The testimony indicated that the work Taxpayer performed for his Utah employer was providing the seminars which were in Utah. While in STATE, his time was spent on his own business, and according to his testimony phone calls he made “every now and then” for his employment with EMPLOYER. To the extent the occasional phone calls, as well as any other services, were rendered outside of Utah, the compensation for those services clearly would not be derived from Utah sources. The Taxpayer, however, would not give an allocation of how his working time while in STATE was split between tasks performed as part of his employment with EMPLOYER and time spent working on his own business. He did not establish any basis at all for work performed for EMPLOYER while he was in STATE. Without evidence to the contrary, there is nothing to show that any of the Taxpayer’s wages from EMPLOYER should be allocated to work performed outside of Utah. Accordingly, 100% of the Taxpayer’s wages from EMPLOYER should be allocated to Utah as indicated in the audit under Utah Code Sec. 59-10-117.

DECISION AND ORDER

Based on the foregoing, the Commission denies the Taxpayer’s appeal regarding the 2007 Utah individual income tax audit. It is so ordered.

DATED this _____ day of _____, 2012.

R. Bruce Johnson
Commission Chair

Marc B. Johnson
Commissioner

D’Arcy Dixon Pignanelli
Commissioner

Michael J. Cragun
Commissioner

Notice of Appeal Rights: You have twenty (20) days after the date of this order to file a Request for Reconsideration with the Tax Commission Appeals Unit pursuant to Utah Code Ann. §63G-4-302. A Request for Reconsideration must allege newly discovered evidence or a mistake of law or fact. If you do not file a Request for Reconsideration with the Commission, this order constitutes final agency action. You have thirty (30) days after the date of this order to pursue judicial review of this order in accordance with Utah Code Ann. §59-1-601 et seq. and §63G-4-401 et seq.