

03-1557
Audit
Signed 06/03/2005

BEFORE THE UTAH STATE TAX COMMISSION

PETITIONER,)	
)	FINDINGS OF FACT,
Petitioner,)	CONCLUSIONS OF LAW,
)	AND FINAL DECISION
)	
v.)	Appeal No. 03-1557
)	
AUDITING DIVISION OF)	Tax Type: Income Tax
THE UTAH STATE TAX)	Tax Period: 1996
COMMISSION,)	
)	Judge: Phan
Respondent.)	

Presiding:

Jane Phan, Administrative Law Judge

Appearances:

For Petitioner: PETITIONER REPRESENTATIVE, Accountant
PETITIONER
For Respondent: RESPONDENT REPRESENTATIVE 1, Assistant Attorney General
RESPONDENT REPRESENTATIVE 2, Manager, Income tax Auditing

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission for a Formal Hearing on March 30, 2005. Based upon the evidence and testimony presented at the hearing the Tax Commission hereby makes its:

FINDINGS OF FACT

1. The issue before the Commission in this matter is Petitioner's appeal of income tax, penalty and interest deficiencies issued against her for tax year 1996. The Statutory Notice of Estimated Income Tax had been issued on November 5, 2003.

2. The amount of the deficiency at issue is as follows:

Year	Tax	Penalty	Interest as of Notice Date
1996	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$

3. Interest continues to accrue on the unpaid balance. The penalties assessed were a 10% failure to file penalty and a 10% failure to pay penalty.

4. Petitioner had not filed a Utah resident or Utah nonresident individual income tax return for the year 1996.

5. For at least several years prior to 1996 Petitioner had been a Utah resident, living and working in Utah. She had been employed by the COMPANY operating out of the CITY 1, Utah office. She owned a residence in Utah, maintained a Utah drivers license and registered vehicles in Utah. She filed Utah resident individual tax returns for several years prior to 1996.

6. Petitioner presented evidence to support her contention that most of her time during 1996 was spent outside of Utah due to her employment base being transferred out-of-state. Clearly she was not in Utah more than 183 days. In early 1996 the COMPANY sent her on the road to open up offices and train staff at various locations outside of Utah. In February and March 1996 she worked in different locations in STATE 1, STATE 2 and STATE 3. While in STATE 1 she stayed at company provided housing. While in STATE 2 or STATE 3 she stayed at hotels. She spent April and May in COUNTRY 1. Much of the time she was able to stay in the same lodging unit at the (X). She would take short trips from there to work at other locations. While traveling, she was able to leave items at the unit. In June, July and August she stayed at various rooms in a (X) in COUNTRY 1. During September and October she was working at locations in STATE 4 and the (X). In November she resided mostly at a hotel in (X).

7. During 1996 Petitioner retained her Utah driver's license. In fact Petitioner renewed her Utah license during 1997. Petitioner used the Utah license and her Utah address to obtain rental cars and on hotel

registrations. All of her mail was sent to her Utah residence. During the tax year at issue she was married and her spouse continued to reside at their residence in Utah. There was no indication that Petitioner's furniture or other possessions were moved from the house in Utah. Petitioner argues that she did not have another address to send her mail because she was not in any place long enough for a permanent mailing address outside Utah. She also states that she could not have obtained a drivers license in COUNTRY 2 unless she had some type of legal resident status, which she did not have.

8. The facts indicate that although she spent very little time in Utah during 1996, Petitioner did not establish a new domicile outside of the state. Staying in hotels or other temporary accommodations in a number of locations through the year, without having a permanent location where she can obtain mail or leave belongings is clearly insufficient to establish domicile outside Utah.

9. In addition the facts indicate that Petitioner did not abandon her Utah domicile that had been established prior to the year at issue. She used the residence she owned jointly in Utah as a permanent address for mail and most of her possessions remained there while she was traveling. She maintained other ties with Utah including a Utah driver's license (renewed after the year in issue) and car registration.

11. As Respondent pointed out, the year at issue is not a first time error on the part of Petitioner. In 1993 and 1994 state nonfiling audits were issued against Petitioner. She apparently did file Utah returns after the audits were issued for those years. In 1995 she had filed a Utah and a federal return, but the federal return was audited and the IRS increased the taxable income. The Respondent then audited the 1995 return based on the increased taxable income. For 1996 Petitioner failed to timely file a federal return as well as a state return and the taxable income was based on an IRS audit.

APPLICABLE LAW

Utah imposes income tax on individuals who are residents of the state, in Utah Code Sec. 59-10-104 as

follows:

...a tax is imposed on the state taxable income, as defined in Section 59-10-112, of every resident individual...

"Resident individual" is defined in Utah Code Sec. 59-10-103(1)(k) as:

(i) an individual who is domiciled in this state for any period of time during the taxable year, but only for the duration of such period; or (ii) an individual who is not domiciled in this state but maintains a permanent place of abode in this state and spends in the aggregate 183 or more days of the taxable year in this state. For purposes of this Subsection (1)(k)(ii), a fraction of a calendar day shall be counted as a whole day.

For purposes of determining whether an individual is domiciled in this state the Commission has defined "domicile" in Utah Administrative Rule R865-9I-2(D)(2001)¹ as follows:

the place where an individual has a true, fixed, permanent home and principal establishment, and to which place he has (whenever he is absent) the intention of returning. It is the place in which a person has voluntarily fixed the habitation of himself or herself and family, not for a mere special or temporary purpose, but with the present intention of making a permanent home. After domicile has been established, two things are necessary to create a new domicile: first, an abandonment of the old domicile; and second, the intention and establishment of a new domicile. The mere intention to abandon a domicile once established is not of itself sufficient to create a new domicile; for before a person can be said to have changed his or her domicile, a new domicile must be shown.

The Utah Legislature has specifically provided that the taxpayer bears the burden of proof in proceedings before the Tax Commission. Utah Code Sec. 59-10-543 provides the following:

In any proceeding before the commission under this chapter, the burden of proof shall be upon the petitioner . . .

¹ The rule defining "domicile" was revised in 2003. The Commission, however, applies the rule in effect during the audit period at issue.

ANALYSIS

Utah Code Sec. 59-10-104 imposes a tax on every "resident individual." "Resident individual" is defined at Utah Code Sec. 59-10-103(1)(k) , which states, ""Resident individual" means: (i) an individual who is domiciled in this state for any period of time during the taxable year, . . . or (ii) an individual who is not domiciled in this state but maintains a permanent place of abode in this state and spends in the aggregate 183 or more days of the taxable year in this state." (Emphasis added.) It is clear that Petitioner did not spend 183 days or more in this state. The issue before the Commission in this matter is the separate and independent alternative basis for residency, whether Petitioner was "domiciled" in Utah during the audit period.

The issue of whether one establishes or maintains a domicile in Utah is a question of fact. The Commission has considered this issue in numerous appeals and the issue has been addressed by the appellate courts in Utah.² As discussed by the courts, the fact finder may accord the party's activities greater weight than his or her declaration of intent.³ Utah Admin Rule R865-9I-(D) provides that a domicile is a permanent home and principal establishment. It also provides that once a domicile has been established two things are necessary to create a new domicile: 1) the abandonment of the old domicile; and 2) the intent to establish and the actual establishment of a new domicile.

Petitioner had been domiciled in Utah prior to 1996. From the facts its is clear that she did not abandon her Utah domicile and she did not establish a new domicile outside the state of Utah for tax purposes. She argued that she used her Utah address because she was not in another place long enough to receive mail.

²The issue of domicile for Utah individual income tax purposes has been considered by the Utah Supreme Court and the Court of Appeals in the following cases: Lassche v. State Tax Comm'n, 866 P.2d 618 (Utah Ct. App. 1993); Clements v. State Tax Comm'n, 839 P.2d 1078 (Utah Ct. App. 1995), O'Rourke v. State Tax Comm'n, 830 P.2d 230 (Utah 1992), and Orton v. State Tax Comm'n, 864 P.2d 904 (Utah Ct. App. 1993).

³ See Clements v. Utah State Tax Comm'n 893 P.2d 1078 (Ct. App. 1995); and Allen v. Greyhound Lines,

This argument supports Respondent's position that Petitioner she did not establish a domicile outside the state. If she had a domicile outside of the state, she would have had an address and a place for mail to be sent. Petitioner also argued that most of the time she was in COUNTRY 2, but that she could not have obtained a COUNTRY 2 drivers license because she did not have a perment residence status. This also supports Respondent's position because one cannot establish a domicile in a foreign country with only temporary immigration status.

It is clear that Petitioner was relying on the 183 days criteria for residency and did not consider the separate alternative test of domicile. Petitioner argues that she left Utah, that she was not present in the state except for brief periods, but she presents no evidence or argument to indicate that she established a new domicile. To change domicile, not only must one abandon the prior domicile, one must establish a new domicile. This principle of domicile is not unique to Utah.

Considering the issue of the penalties, the Commission notes that this is not a first time error. In fact, Petitioner had two prior nonfiling audits within three years of the year at issue as well as error on reporting taxable income. The penalties assessed are for failure to file timely and failure to pay timely. Because of the account history and failure to file a federal return for the year it issue it appears that Petitioner's failure to file and pay timely was not the result of a misunderstanding regarding residency and domicile. The Commission does not find reasonable cause for waiver.

CONCLUSIONS OF LAW

1. The Commission has made a finding of fact that Petitioner was domiciled in Utah during 1996 and was a Utah resident individual on that basis. For this reason the Commission concludes that Petitioner is liable for Utah individual income tax on her state taxable income. Utah Code Sec. 59-10-104.

Inc., 583 P.2d 613, 614 (Utah 1978);

2. The Commission may waive penalties upon a showing of reasonable cause. Utah Code Sec. 59-10-401(10). In this matter the Commission does not find reasonable cause for waiver of the penalties.

DECISION AND ORDER

Based on the foregoing, the Tax Commission sustains the audit of additional income tax, interest and penalties at issue in this matter for tax year 1996. It is so ordered.

DATED this ____ day of _____, 2005.

Jane Phan
Administrative Law Judge

BY ORDER OF THE UTAH STATE TAX COMMISSION:

The Commission has reviewed this case and the undersigned concur in this decision.

DATED this ____ day of _____, 2005.

Pam Hendrickson
Commission Chair

R. Bruce Johnson
Commissioner

Palmer DePaulis
Commissioner

Marc B. Johnson
Commissioner

Notice: Failure to pay within thirty days the balance that results from this order may result in additional penalties and interest. 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. 63-46b-13. 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 Sec. 59-1-601 & 63-46b-13 et. seq.