03-1678
INCOME TAX
TAX YEAR: 2000
SIGNED: 08-31-2006
COMMISSIONERS: P. HENDRICKSON, R. JOHNSON, M. JOHNSON, D. DIXON
GUIDING DECISION

BEFORE THE UTAH STATE TAX COMMISSION

PETITIONER, Petitioner, v. AUDITING DIVISION OF THE UTAH STATE TAX COMMISSION, Respondent.	)	**FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL DECISION** Appeal No. 03-1678 Account No. ##### Tax Type: Income Tax Tax Year: 2000 Judge: Robinson

Presiding:
Commissioner Marc Johnson
R. Spencer Robinson, Administrative Law Judge

Appearances:
For Petitioner: PETITIONER, *pro se*
For Respondent: RESPONDENT REP. 1, Assistant Attorney General
RESPONDENT REP. 2, from the Auditing Division

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission for a Formal Hearing on March 6, 2006.

At issue is the Auditing Division's (the "Division") assessment of Utah individual income tax to the Petitioner for the 2000 tax year. For the 2000 tax year, Petitioner filed a non-resident income tax return on which the Division made two separate assessments: first, a disallowance of health care insurance premiums that Petitioner had deducted; and second, the

assessment on $$$$$ in additional funds that Petitioner received from COMPANY A after termination of his employment in November 1999.

The parties stipulated to introduction of the exhibits admitted during the Initial Hearing. They also stipulated that Petitioner was not eligible to deduct health care insurance premiums for the last eight months of 2000, as Petitioner had health insurance through his employment in COUNTRY, beginning in May of 2000. This issue is resolved. The remaining issue is whether the $$$$$ provided in 2000 to Petitioner by his former employer is subject to Utah income tax. Based on the evidence presented, the Commission makes its:

FINDINGS OF FACT

1. The tax at issue is Utah income tax.

2. The tax year is the 2000 tax year.

3. In August of 1999, Petitioner accepted a position as President and CEO of COMPANY B. If there was a written contract, Petitioner did not provide it.

4. INVESTOR and five other investors owned COMPANY B. INVESTOR was Chairman of COMPANY B and Chairman of COMPANY C

5. As part of his accepting the position with COMPANY B, Petitioner gave a check in the amount of $$$$$ to INVESTOR for the purchase of stock in COMPANY B.

6. On or about December 16, 1999, Petitioner learned his role with COMPANY B was going to be changed. PERSON A, brought in by INVESTOR as the new CEO, told Petitioner that he (PERSON A) would be taking control, though Petitioner could stay on.

Petitioner said that was not consistent with the reasons he came to COMPANY B and that he would not work there under the conditions stated by PERSON A.

7. During a discussion of the change with INVESTOR, INVESTOR gave a check in the amount of $$$$$ to Petitioner. The check was to reimburse Petitioner for the $$$$$ he believed INVESTOR was going to use to purchase stock for Petitioner.

8. Petitioner and INVESTOR signed a letter dated December 16, 1999, in which they mutually agreed to termination of Petitioner's employment by COMPANY B. The letter set forth four additional areas of agreement. First, COMPANY B would pay Petitioner $$$$$ per month through June 30, 2000. Second, Petitioner acknowledged receipt of a $$$$$ check from INVESTOR as a refund and settlement in full of the amount Petitioner had paid for stocks in COMPANY B. Third, COMPANY B would reimburse Petitioner up to $$$$$ for expenses of relocating from CITY 1, Utah, to CITY 2, STATE prior to June 30, 2000. Fourth, Petitioner agreed to be available to assist in the transition within the 30 days immediately after termination of his employment.

9. By signing the letter, Petitioner acknowledged the letter constituted all mutual obligations agreed upon by Petitioner and his former employer and released COMPANY B, COMPANY C, or INVESTOR from present and future claims. By signing the letter, Petitioner relinquished any potential claim that COMPANY B, COMPANY C, or INVESTOR breached the employment agreement that brought Petitioner to COMPANY B as its President and CEO.

10. Petitioner left the State of Utah prior to the end of 1999. He did no work for COMPANY B after December 16, 1999. He was not a resident of Utah in 2000. He returned to

the State of STATE in December of 1999 and remained there until he departed for COUNTRY in May of 2000.

11. Petitioner's agreement to work as President and CEO of COMPANY B, negotiated before his acceptance of the position, did not include anything dealing with severance pay.

12. Following termination of his employment, Petitioner did not receive information regarding continuing his health insurance coverage under what is known as COBRA. See 29 USC 1161, et. seq.

13. COMPANY C issued paychecks to Petitioner during his employment with COMPANY B.

14. COMPANY C issued checks to Petitioner to make the payments to which Petitioner agreed in the December 16, 1999 letter. Petitioner submitted evidence from his bank records of four payments of $$$$$. The last payment reflected in these records was entered on March 31, 2000. With one exception, which lists the payor as COMPANY C payroll, the records list the payor as COMPANY C. Petitioner offered this information to corroborate his statement that COMPANY B, a Utah company, was not the source of his income during or after his employment. The total amount paid was $$$$$.

15. COMPANY C issued a W-2 to Petitioner for the 2000 tax year. It lists $$$$$ as Utah wages. It sent the W-2 to the business address of COMPANY B in CITY 1. It shows $$$$$ withheld as Utah income tax.

16. COMPANY C Markets reported to Utah Job Service the $$$$$ it paid Petitioner in 2000 as wages.

APPLICABLE LAW

Federal adjusted gross income derived from Utah sources includes “adjustable gross income” (as defined by Section 62 of the Internal Revenue Code) attributable or resulting from the carrying on of a business, trade, profession, or occupation in Utah. See §59-10-117 (1)(b).

59-10-116. Definitions - Tax on nonresident individual - Calculation - Exemption.

(1) For purposes of this section:

(a) "military service" is as defined in Pub. L. No. 108-189, Sec. 101;

(b) "servicemember" is as defined in Pub. L. No. 108-189, Sec. 101;

(c) "state income tax percentage" means a percentage equal to a nonresident individual's federal adjusted gross income for the taxable year received from Utah sources, as determined under Section 59-10-117, divided by the difference between:

(i) the nonresident individual's total federal adjusted gross income for that taxable year; and

(ii) if the nonresident individual described in Subsection (1)(c)(i) is a servicemember, the compensation the servicemember receives for military service if the servicemember is serving in compliance with military orders; and

(d) "unapportioned state tax" means the product of the:

(i) difference between:

(A) a nonresident individual's federal taxable income, as defined in Section 59-10-111, with the modifications, subtractions, and adjustments provided for in Section 59-10-114; and

(B) if the nonresident individual described in Subsection (1)(d)(i)(A) is a servicemember, compensation the servicemember receives for military service if the servicemember is serving in compliance with military orders; and

(ii) tax rate imposed under Section 59-10-104.

(2) Except as provided in Subsection (3), a tax is imposed on a nonresident individual in an amount equal to the product of the nonresident individual's:

(a) unapportioned state tax; and

(b) state income tax percentage.

(3) This section does not apply to a nonresident individual exempt from taxation under Section 59-10-104.1.

59-10-117. Federal adjusted gross income derived from Utah sources.

(1) For the purpose of Section 59-10-116, federal adjusted gross income derived from Utah sources shall include those items includable in federal "adjusted gross income" (as defined by Section 62 of the Internal Revenue Code) attributable to or resulting from:

(a) the ownership in this state of any interest in real or tangible personal property (including real property or property rights from which "gross income from mining" as defined by Section 613(c) of the Internal Revenue Code is derived); or

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

59-10-543. Burden of proof.

In any proceeding before the commission under this chapter, the burden of proof shall be upon the petitioner except for the following issues, as to which the burden of proof shall be upon the commission:

(1) whether the petitioner has been guilty of fraud with intent to evade tax;

(2) whether the petitioner is liable as the transferee of property of a taxpayer, but not to show that the taxpayer was liable for the tax; and

(3) whether the petitioner is liable for any increase in a deficiency where such increase is asserted initially after a notice of deficiency was mailed and a petition under Title 59, Chapter 1, Part 5 is filed, unless such increase in deficiency is the result of a change or correction of federal taxable income required to be reported, and of which change or correction the commission had no notice at the time it mailed the notice of deficiency.

CONCLUSIONS OF LAW

1. The Tenth Circuit Court of Appeals determined that when a settlement agreement does not specify what the amount paid is to settle, the most important factor is the intent of the payor. See Knuckles v. Commissioner, 349 F.2d 610 (10th Cir. 1965). See also Amos v. Commissioner, T C Memo. 2003-329. The fact that the employer treated the income at issue as wages supports Respondent's contention that the income resulted from the carrying on of a trade, business, or profession in Utah.

2. As fraud, transfer of property, or an increase in a deficiency are not alleged, the taxpayer bears the burden of proof in this case. See §59-10-543. To prevail, Petitioner must prove that the income at issue was not attributable to the carrying on of a trade, business, or profession in Utah. Absent such proof, the income at issue is Utah source income within the provisions of §59-10-117 and subject to Utah individual income tax under §59-10-116.

DISCUSSION

The parties agree Petitioner was not a Utah resident in 2000. They agree he performed no services in Utah during 2000 in exchange for the $$$$$ he received from COMPANY C. They agree the $$$$$ was income for federal income tax purposes.

The question is whether the $$$$$ is "attributable or resulting from the carrying on of a business, trade, profession, or occupation in Utah." Petitioner has the burden of proving it was not.

There are no published Utah appellate court decisions on this issue. The Commission may look for guidance in decisions from other jurisdictions. In Matter of Donahue v. Chu (104 AD2d 523, 479 NYS2d 889), a non-resident taxpayer entered into a five-year employment contract. It provided that at the end of the five years, the taxpayer would serve as a consultant for the next ten years. In the fifth year of the contract, the parties negotiated a second contract. The second contract terminated the first contract and stated the taxpayer would receive his final year's salary and the sum $$$$$. The court ruled the taxpayer received the lump sum payment in exchange for his relinquishment of his right to future employment. The court said the payment was not New York source income because the right to future employment was originally based on consideration not connected with New York.

In a previous initial hearing decision, Tax Commission Order, Appeal 03-0613, the Commission determined severance pay was Utah source income. In that case, the taxpayer had been employed by a Utah employer since 1992. In 1996 he negotiated, as part of his employment contract, provisions for severance pay. In 1999, the taxpayer's employment ended when his employer merged with another company. The purpose of the severance pay portion of

the new contract was to "encourage the Executive's full attention and dedication to the Company . . ." The Commission found the taxpayer "was entitled to and had earned the severance payments contingent on his terminating employment due to the merger, prior to his leaving the state of Utah."

Utah State Tax Commission Appeal No. 03-0613 was appealed, then settled prior to the formal hearing. Matters going to a formal hearing sometimes result in an outcome different from that reached by the initial hearing. Thus, while this case provides guidance, it should not be given the same weight as a formal hearing decision.

In this case, Petitioner stated he agreed to work as President and CEO of COMPANY B, and that his original hiring agreement did not include a provision for severance pay. Petitioner offered no other evidence of the terms of his employment, including information showing whether he had a right to future employment secured by consideration having no connection to Utah.

Petitioner asks the Commission to infer the payment was in exchange for his forfeiting the ability to pursue legal remedies for an alleged breach of a contractual right to continued employment. The evidence does not establish Petitioner had a right to continued employment. Assuming he did, the letter of December 16, 1999, does not make it clear the payment was in exchange for forfeiture of a right to sue for breach of contract or the relinquishment of the right to continued employment.

The letter specifies payments of $$$$$ per month through June 30, 2000, for a total of $$$$$. The 2000 W-2 from COMPANY C and COMPANY C's report to Utah Job

Services shows the $$$$$ as Utah wages. Apparently, COMPANY C intended the payment to be characterized as wages. Wages are generally attributable or resulting from the carrying on of a business, trade, profession or occupation. Under Knuckles, supra, the intent of the payor is the most important factor.

Petitioner argues if the $$$$$ were intended by COMPANY C to serve as Utah wages, COMPANY C was required to provide him notice of his right to continue his health insurance under COBRA when the last payment was made. He said he received no notice. He assumes COMPANY C did not provide notice. His contention is that failure to provide him notice is inconsistent with characterizing the $$$$$ as wages. However, the test is not whether Petitioner received notice. The test is whether the employer made a good faith effort to provide notice. Jachim v. KUTV Inc., 783 F.Supp. 1328 (Utah 1992). The evidence is insufficient to allow the Commission to determine whether Petitioner's employer made a good faith effort to provide notice. Thus, the fact Petitioner did not receive notice of his right to continue his health insurance under COBRA is of little help.

Petitioner's arguments do not establish the $$$$$ is not attributable or resulting from the carrying on of a business, trade, profession, or occupation in Utah. He has failed to meet his burden of proof.

DECISION AND ORDER

The Commission finds the $$$$$ paid by COMPANY C to Petitioner during 2000 is attributable or resulting from the carrying on of a business, trade, profession or occupation, and, as a result, is subject to Utah income tax. In accordance with the stipulation of the parties,

Petitioner is eligible to subtract his health insurance premiums from his Utah income for 2000 until the time his employer in COUNTRY provided coverage. To that extent, the Division is to amend the audit. In all other respects, the Commission sustains the audit. It is so ordered.

DATED this _____ day of _____, 2006.

_____
R. Spencer Robinson
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 _____, 2006.

Pam Hendrickson
Commission Chair

R. Bruce Johnson
Commissioner

Marc B. Johnson
Commissioner

D'Arcy Dixon Pignanelli
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. §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 Ann. §§59-1-601 and 63-46b-13 et. seq.

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