04-0158
Audit
Signed 12/16/2005

BEFORE THE UTAH STATE TAX COMMISSION

PETITIONER, Petitioner, v. AUDITING DIVISION OF THE UTAH STATE TAX COMMISSION, Respondent.	**ORDER** Appeal No. 04-0158 Tax Type: Individual Income Tax Account No: ##### Tax Year: 2001 Judge: Chapman	

Presiding:
Kerry R. Chapman, Administrative Law Judge

Appearances:

For Petitioner:	PETITIONER (by telephone) PETITIONER REPRESENTATIVE, Representative (by telephone)
For Respondent:	RESPONDENT REPRESENTATIVE 1, Assistant Attorney General RESPONDENT REPRESENTATIVE 2, from the Auditing Division RESPONDENT REPRESENTATIVE 3, from the Auditing Division

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission for an Initial Hearing pursuant to the provisions of Utah Code Ann. §59-1-502.5, on October 4, 2005.

Two issues exist in this appeal. The first issue is whether the Petitioner was a "resident individual" of Utah in 2001 for purposes of individual income tax. The Petitioner had lived and worked as a schoolteacher in CITY 1, STATE 1 for over 30 years prior to August 2000, when he received an offer to become a school principal in COUNTY where his elderly mother lived. The Petitioner explains that the offer unexpectedly came two weeks prior to the start of the school year. Although he was already under contract for the 2000 – 2001 school year as a teacher in the CITY 2, STATE 1 school district, his STATE 1 principal allowed him out of his contract and he retired from the school system. Had his principal not allowed him out of his contract, the Petitioner explains that he would have remained in STATE 1 and worked there. However,

he states that circumstances worked out for him to accept the offer in Utah in order to live with his mother and assist her during the last years of her life. The Petitioner explains that he had become concerned about his mother living alone because of her diminishing health, particularly her increasing dementia, and that he felt an obligation to assist in her care.

Prior to 2000, the Petitioner had come to Utah during the summers for many years to perform a portion of the work required on a farm that he and his brothers own in COUNTY. During 2001, the year at issue, the Petitioner lived with his mother in her home and worked as a school principal and on his farm and continued to do both until his mother died in October 2003. After his mother's death, the Petitioner explains that he remained in Utah until May 2004 to finish the 2003 – 2004 school year and so that he remained employed until he could be rehired in STATE 1 for the 2004-2005 school year. The Petitioner states that he moved back to his home in STATE 1 after the COUNTY School District's 2003 – 2004 school year ended in Spring 2004 and began work as a teacher in STATE 1 in Fall 2004.

During the period in which the Petitioner lived and worked in Utah, including 2001, his wife continued to live at their home in STATE 1, to which he occasionally returned. The Petitioner's wife was present in Utah approximately 30 days in 2001 to visit her husband and grown children who live in various Utah cities. None of the children lived with the Petitioner at his mother's home. The Petitioner explained that while employed in Utah, he spent part of the summers at his home in STATE 1, as well as Thanksgiving and Christmas holidays. The Petitioner claims that he never abandoned his STATE 1 domicile and that, although he was present in Utah more than 183 days in 2001, he never maintained a permanent place of abode in Utah. As a result, the Petitioner claims he is not a Utah "resident individual" for 2001 income tax purposes.

For the 2000 tax year, the Petitioner and his wife filed a joint Utah part-year resident income tax return on which they claimed to be part-year residents from September 1, 2000 through December 31,

2000. For the 2001 tax year, the Petitioner and his wife filed a joint Utah nonresident income tax return on which they claimed and paid Utah income tax on their Utah source income (i.e., Utah farm income, Utah oil royalties and the Petitioner's income as principal). For the 2000 and 2001 tax years, the Petitioner and his wife filed joint returns with a STATE 1 address for both federal and Utah income tax purposes.

Auditing Division ("Division") determined that the Petitioner was a Utah "resident individual" in 2001 on the basis that he was: 1) "domiciled" in Utah in 2001; or in the alternative, 2) maintained a "permanent place of abode" in Utah and spent at least 183 days in Utah in 2001. The Division asserts that the Petitioner primarily changed his residence to Utah to avail himself of employment opportunities, not to care for his mother during her declining years. As a result, the Division issued a Statutory Notice of Audit Change on September 11, 2003, in which it imposed additional individual income tax and interest on the basis that the Petitioner was a Utah resident individual for 2001.

The second issue in this appeal only arises if the Petitioner is determined to be a Utah "resident individual" for the 2001 tax year. The issue concerns the taxability of the Petitioner's retirement income from the STATE 1 school district at which he was a teacher prior to his retirement in 2000. The Division assessed Utah income tax on the entirety of the Petitioner's retirement income. If the Petitioner is deemed a Utah non-resident for 2001, the STATE 1 retirement income is not subject to Utah taxation. If the Petitioner is deemed a Utah "resident individual" for 2001, his retirement income is subject to Utah taxation. The Petitioner, however, claims that because STATE 1 is a community property state, one-half of his retirement income should be attributed to his wife, who is clearly not a Utah resident individual. For these reasons, the Petitioner argues that one-half of his STATE 1 retirement income is not subject to Utah taxation, even should the Commission determine him to be a Utah resident individual.

APPLICABLE LAW

Under Utah Code Ann.§59-10-104(1), "a tax is imposed on the state taxable income . . . of every **resident individual**" (emphasis added). For purposes of Section 104(1) and for the year in question, Utah Code Ann. §59-10-103(1)(k)[1] defined "resident individual" to include:

> 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.

To administer these statutes, the Commission has enacted Utah Admin. Rule R965-9I-2 ("Rule 2") to further explain when a person is domiciled in Utah for income tax purposes. During 2001, Section D. of Rule 2[2] provided as follows:

> "Domicile" means 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 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 domicile, a new domicile must be shown.

For the 2001 tax year, a definition of "permanent place of abode" did not exist in Utah law. However, Rule 2 has subsequently been amended to provide in Section B. that "[p]ermanent place of abode does not include a dwelling place maintained only during a temporary stay for the accomplishment of a

1 Since 2001, this subsection has been renumbered Subsection 103(1)(s) and reorganized, but, substantively, remains the same.
2 The definition of "domicile" in Rule 2 has been amended since 2001. However, this matter is governed by the definition of "domicile" that existed

particular purpose. For purposes of this provision, temporary may mean years." As there existed no definition of "permanent place of abode" in statute or rule in 2001, the Commission may consider whether the definition found in the current rule also applies to 2001 taxes.

Also for purposes of Section 59-10-104, UCA §59-10-112 provides that "'[s]tate taxable income' in the case of a resident individual means his federal taxable income (as defined by Section 59-10-111) with the modifications, subtractions, and adjustments provided in Section 59-10-114 . . . ."

For purposes of Section 59-10-112, UCA §59-10-111 provides that "'[f]ederal taxable income' means taxable income as currently defined in Section 63, Internal Revenue Code of 1986."

For purposes of Section 59-10-111 and as defined in the Internal Revenue Code at 26 U.S.C. 63, "taxable income" means ". . . gross income minus the deductions allowed by this chapter (other than the standard deduction)."

UCA §59-10-114(3)(d) addresses the ownership of retirement income and specifically provides as follows:

> For purposes of determining ownership of items of retirement income common law doctrine will be applied in all cases even though some items may have originated from service or investments in a community property state. Amounts received by the spouse of a living retiree because of the retiree's having been employed in a community property state are not deductible as retirement income of such spouse.

The Utah Legislature has specifically provided that the taxpayer bears the burden of proof, with limited exceptions, in proceedings involving individual income tax before the Tax Commission. UCA §59-10-543 provides, as follows:

> 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;

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in the rule in 2001.

> (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.

UCA §59-10-539(8) provides that ". . . there shall be added to the tax due interest payable at the rate and in the manner prescribed in Section 59-1-402 for underpayments." For purposes of Section 59-10-539, UCA §59-1-402(5) provides that "[i]nterest on any underpayment, deficiency, or delinquency of any tax or fee administered by the tax commission shall be computed from the time the original return is due, excluding any filing or payment extensions, to the date the payment is received."

DISCUSSION

The Petitioner is challenging the Division's assessment of additional income tax by contending that he was not a Utah "resident individual" for the 2001 tax year. Under Section 59-10-103(1)(k), a person is deemed a resident individual for purposes of Utah income tax purposes if that person is: 1) domiciled in Utah; or 2) is present in Utah at least 183 days of the year and maintains a "permanent place of abode." Should the Petitioner be determined a resident individual under either of these criteria, the Petitioner also asserts that only one-half of his retirement pay from STATE 1 should be subject to Utah tax because STATE 1 is a "community property" state and one-half of his retirement pay is "owned" by his wife, who the Division does not contest was a STATE 1 domiciliary during 2001.

I. Domicile. For the 2001 tax year, the Commission has defined the term "domicile" in Section D. of Rule 2, as follows:

> "Domicile" means 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 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 domicile, a new domicile must be shown.

The rule establishes a two-prong test, so that the Commission must decide first whether the Petitioner abandoned his domicile in STATE 1 and second whether he intended and actually established a new domicile in Utah.

Both parties proffer a number of facts to show where, in 2001, the Petitioner "has voluntarily fixed the habitation of himself and family, not for a mere special or temporary purpose, but with the present intention of making a permanent home." Without question, the Petitioner was domiciled in STATE 1 until September 2000 when he accepted employment in COUNTY and moved into his mother's home.

Facts exist that suggest that the Petitioner may have abandoned his STATE 1 domicile for purposes of the 2001 tax year. First, he had employment in and resided in Utah for the majority of 2001. The Petitioner also owned a farm in COUNTY, where he worked during hours he was not employed as a principal. In addition, the Petitioner also used his mother's post office box to receive mail concerning his employment with the COUNTY School District and attended church with his mother at a ward in COUNTY during those periods in which he was in Utah.

Furthermore, the Division has shown that the Petitioner experienced some health problems while working in COUNTY and received medical attention from doctors he had not seen before moving to Utah in 2000. For example, the Petitioner had a kidney stone ailment treated in CITY 3, Utah in 2000 and

received a treadmill and stress test in CITY 4, Utah at a later date. The Petitioner's health insurance was paid for, in part or in whole, by COUNTY School District during his employment in Utah.

Some of the facts neither suggest that the Petitioner abandoned nor did not abandon his STATE 1 domicile upon moving to Utah. For example, after moving to Utah, the Petitioner had his truck reregistered from STATE 1 to Utah, and he relinquished his STATE 1 driver's license and obtained a Utah driver's license. The Division argues that these actions indicate his intent to change his domicile from STATE 1 to Utah. The Petitioner states that he only completed these actions because he thought he was required to under Utah law. The Petitioner is correct. The definitions of "resident" as found in the Utah Motor Vehicle Act, which administers the registration of vehicles, and in the Utah Public Safety Code, which administers the licensing of drivers, are both broader than the definition of "resident individual" as found in the Utah Individual Income Tax Act. UCA §41-1a-202(1)(b),(2) requires a "resident," who is defined to include a person who remains domiciled in another state but is present in Utah more than six months of a calendar year and as a person who accepts employment that is not seasonal and does not commute to work, to register his or her vehicle in Utah. Furthermore, UCA §§53-3-102(23) & 53-3-202(1) require a "resident," who is defined as a person who remains domiciled in another state but is present in Utah more than six months or accepts other than seasonal employment in Utah, to obtain a Utah driver's license. Under these Utah laws, the Petitioner was required to register his truck in Utah and obtain a Utah driver's license, even if all parties agreed that he remained a domiciliary of STATE 1. Accordingly, the fact that the Petitioner complied with Utah registration and licensing laws is inconclusive concerning the issue of his domicile.

Although the Petitioner and his wife filed a joint part-year resident Utah income tax return for 2000, they filed a joint non-resident Utah income tax return for 2001. Because the Petitioner's wife

never changed her domicile to Utah, it is apparent that one of the two returns was incorrect. As a result, this evidence is inconclusive.

The Petitioner responded on documents proffered by the Division that he did not vote in Utah in 2000 or 2001. However, at the hearing, the Petitioner stated that he voted in Utah one time prior to ending his Utah employment and returning to STATE 1 in 2004. Although this fact may add one additional argument to a contention that he changed his domicile in the year in which he voted, it is inconclusive concerning the year at issue.

The Division also proffers evidence that the Petitioner claimed a moving expense on his 2000 federal return of $$$$$ as a taxable deduction relating to his move to Utah. The page of the return on which the moving deduction was calculated states, however, that the moving expense is allowed if the taxpayer moves a specific number of miles to a different home because of a change in job location. Certainly, the Petitioner moved the requisite mileage from his own home in STATE 1 to his mother's home because of his change in job location. The Division has not shown that the deduction is allowed only if you change your domicile. Without such information, this evidence is inconclusive.

The Division also showed that while in Utah, the Petitioner contracted with a cell phone carrier for an account with a Utah telephone number. However, the Petitioner also pointed out that, even after moving back to STATE 1, he has retained the account and telephone number. He explains that he kept the account because the telephone was expensive and that his coverage includes both Utah and STATE 1, where he places the most calls. If this evidence is proffered to suggest that a person who changes domicile changes carriers or gets an account with the telephone number in the state in which he is domiciled, it fails because the Petitioner did not get a STATE 1 cell phone number upon returning there in 2004. This evidence is also inconclusive.

The Petitioner also explains that, in 2001, six of his eight children lived in Utah, with one living in STATE 2 and one in STATE 1. Although the majority of the Petitioner's grown children lived in Utah, it was not shown or stated that any of them lived with the Petitioner or at his mother's home while he lived in Utah. Furthermore, the testimony proffered suggests that none of the children who attended Utah schools paid Utah resident tuition as a result of the Petitioner living in Utah. In fact, one daughter who attended (X) in 2000 through 2001 paid non-resident tuition her first year there, then upon establishing residency on her own, paid resident tuition thereafter. This evidence would suggest that the Petitioner had not established domicile in 2000, but without additional information, is inconclusive.

Much of the evidence proffered, however, convinces the Commission that the Petitioner did not abandon his STATE 1 domicile upon accepting employment in and moving to Utah in 2000. First, it appears credible that the Petitioner's acceptance of the job and move to Utah was temporary, as he argues, due to his concern for his mother and her declining health. For many years, the Petitioner had spent part of his summers working on his farm and helping his brothers, so the move does not appear to be primarily for this purpose. Nor does the move appear primarily to afford the Petitioner an opportunity to receive both retirement pay and regular income. The immediacy of the retirement and the Petitioner's apparent ability to both retire and also have employment as a teacher in STATE 1 at pay equivalent to the Utah principal job suggest otherwise. Furthermore, the Petitioner's relatively quick return to STATE 1 at the end of the school year following his mother's death suggests that his relocation to Utah was for a temporary purpose, as he proclaims, and not a permanent one.

The Commission also believes that the Petitioner's wife never intended to move to Utah, although she had the opportunity because she has never worked outside of the home, and that the Petitioner always intended to move back to the home they had established and shared together. The Petitioner never

bought or rented a home in Utah. He lived at his mother's home where she paid the expenses, which supports his argument that his primary motive for temporarily locating in Utah was to help care for his mother. In addition, the Petitioner and his wife never legally separated, and he retained his church membership at a ward in CITY 1, STATE 1, where he continued to pay tithing during the duration of his stay in Utah.

The Petitioner also never changed his will that had been executed in STATE 1, and never changed his bank accounts, all of which were in STATE 1. In fact, not only was his STATE 1 retirement pay deposited directly into one of his STATE 1 accounts, but his pay from the COUNTY School District was also deposited directly into a STATE 1 account during his employment in Utah. The Petitioner also retained the same professional relationships he had developed while previously working and living in STATE 1. He continued to retain PETITIONER REPRESENTATIVE as his accountant and continued a relationship with his long-time doctor and dentist, who where located in CITY 5, Utah. Also, the Petitioner continued to receive a majority of his mail at his STATE 1 residence while living in Utah. The Division's evidence shows that the Petitioner claimed a STATE 1 address for purposes of filing both his federal and Utah tax returns in both 2000 and 2001.

The Commission finds that a preponderance of the evidence and testimony show that the Petitioner did not abandon his STATE 1 domicile for 2001 income tax purposes and, as a result, was not domiciled in Utah in 2001 for these purposes.

II. Permanent Place of Abode. The Division argues that the Petitioner also qualifies as a Utah resident individual in 2001 under the second criteria of Section 59-10-103(1)(k); i.e., that he spent at least 183 days in Utah during 2001 and that he maintained a permanent place of abode. The parties are in agreement that the Petitioner spent at least 183 days in Utah in 2001. Accordingly, the only

issue is whether the Petitioner's living in his mother's home for the purposes described above qualify as maintaining a "permanent place of abode." Neither party argued what "maintained" meant for purposes of the statute. The Petitioner states that it was his mother's home and that his mother paid the utilities, except for the short period he lived there after her death, when he paid the utilities.

For the 2001 tax year, Utah law provides no definition for the phrase "permanent place of abode." However, in 2002, the Commission found that a college student domiciled in another state, but who rents an apartment or house for those years he or she attends college in Utah, has not necessarily maintained a "permanent place of abode" in Utah and, as a result, is not necessarily a Utah resident individual for income tax purposes.

Furthermore, the Commission has subsequently amended Rule 2 to provide that "[p]ermanent place of abode does not include a dwelling place maintained only during a temporary stay for the accomplishment of a particular purpose. For purposes of this provision, temporary may mean years." As no definition for this phrase existed in 2001, the Commission believes it may apply the criteria contained in the definition for the year at issue. In this matter, the evidence suggests that the Petitioner lived in his mother's home during a temporary stay for the accomplishment of a particular purposes; i.e., once his mother's health deteriorated to a certain point, he moved to Utah for the particular purpose to help care for her. Once she died, the Petitioner returned to STATE 1. Although he stayed nearly four years to accomplish this particular purpose, the Commission believes that his stay was temporary in nature and, in accordance with the rule, the dwelling in which he lived was not maintained as a permanent place of abode. Accordingly, the Commission finds that the Petitioner did not maintain a permanent place of abode in Utah in 2001 and, as a result, was not a Utah resident individual for the 2001 tax year.

In summary, the Commission finds that the Petitioner does not qualify as a Utah resident individual under either of the criteria set forth in Section 59-10-103(1)(k). For this reason, the issue of whether one-half of the Petitioner's retirement income is Utah source income does not arise.

DECISION AND ORDER

Based upon the foregoing, the Commission determines that the Petitioner was not a Utah resident individual in 2001 for individual income tax purposes. Accordingly, the Commission grants the Petitioner's appeal and reverses the Division's assessment. It is so ordered.

This decision does not limit a party's right to a Formal Hearing. However, this Decision and Order will become the Final Decision and Order of the Commission unless any party to this case files a written request within thirty (30) days of the date of this decision to proceed to a Formal Hearing. Such a request shall be mailed to the address listed below and must include the Petitioner's name, address, and appeal number:

Utah State Tax Commission
Appeals Division
210 North 1950 West
Salt Lake City, Utah 84134

Failure to request a Formal Hearing will preclude any further appeal rights in this matter.

DATED this _____ day of _____, 2005.

_____
Kerry R. Chapman
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

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