

04-0394
Audit
Signed 02/08/2005

BEFORE THE UTAH STATE TAX COMMISSION

PETITIONER,)		
	)	ORDER	
Petitioner,)		
v.	)	Appeal No.	04-0394
	)	Account No.	#####
)		
AUDITING DIVISION OF	)	Tax Type:	Income
THE UTAH STATE TAX	)	Tax Years:	1996, 1997, 1998
COMMISSION,	)	Judge:	Phan
)		
Respondent.)		

Presiding:

Jane Phan, Administrative Law Judge

Appearances:

For Petitioner: PETITIONER
For Respondent: RESPONDENT REPRESENTATIVE 1, Assistant Attorney General
RESPONDENT REPRESENTATIVE 2, Manager, Income Tax Auditing
RESPONDENT REPRESENTATIVE 3, Senior Auditor

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 January 24, 2005.

Petitioner is appealing the assessment of Utah individual income tax and interest for the tax years 1996, 1997 and 1998. The Statutory Notices of Estimated Income Tax were issued on February 12, 2004. Interest continues to accrue on the unpaid balance. The amount of the additional tax, penalties and interest as of the lien date are as follows:

	Tax	Penalty	Interest
1996	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$
1997	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$
1998	\$\$\$\$\$	\$\$\$\$\$.	\$\$\$\$\$

APPLICABLE LAW

A tax is imposed on the state taxable income of every resident individual for each taxable year.

(Utah Code Ann. §59-10-104).

Resident individual is defined in Utah Code Ann. §59-10-103(1)(k) (2001) as follows:

(k) "Resident individual" means:

- (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) as follows:

ADomicile 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 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 Ann. §59-10-543 provides the following:

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

The Tax Commission is granted the authority to waive, reduce, or compromise penalties and interest upon showing of reasonable cause. (Utah Code Ann. §59-1-401(10).)

DISCUSSION

Respondent based its audit on the assertion that Petitioner was a resident of Utah during 1996 and 1997. For 1998 Respondent's audit was based on the assertion that Petitioner was a nonresident or part year resident. Petitioner had not filed Utah Individual Income Tax Returns for any of the years at issue and maintains that for at least 1997 and 1998 he was not a resident of Utah.

The issue in this appeal is whether Petitioner was a "resident individual" in the State of Utah for the purposes of Utah Code Ann. 59-10-103(1)(k) for the years 1996 and 1997. The issue regarding tax year 1998 is whether or not Petitioner received Utah source income.

Petitioner acknowledges in 1996 he would have been a Utah resident. He moved to the state from STATE 1, as he had would start up a business in Utah. He had owned a residence in CITY many years prior to 1996, which had been rented, but the tenants had recently vacated the premises. Petitioner did work for a Utah architect during this year. He registered his vehicle in Utah and obtained a Utah drivers license. He registered to vote in Utah and voted in the election in November 1996. However, most of Petitioner's income received in 1996 appears to have come from a STATE 2 Corporation, COMPANY A. Petitioner indicated that this was a business owned by family members in STATE 2. The W-2 for 1996 issued to Petitioner from this business indicates \$\$\$\$ in wages. Petitioner would not have had to file an income tax return in STATE 2 on this income as there is no state income tax in STATE 2. Had there been an income tax in STATE 2, Petitioner would have been entitled to take a credit on his Utah tax filing for income tax paid to STATE 2 on this income.

In 1997 he indicates that he moved onto his family's ranch in STATE 2 to take on a large project in STATE 2. He indicates that he had no intention of making STATE 2 his permanent residence and was there because of the work project. He did not obtain a STATE 2 drivers license, nor did he register his vehicle there. In fact, he registered a different vehicle in Utah during 1997. In addition he maintained a

residence at his CITY property. He indicates that there was a separate basement unit at the CITY property. He rented out the main unit but he kept the basement unit for his personal use and would frequently stay there. He also left his furniture at the Utah residence. He indicates that he did not have a written lease agreement at the time and Respondent points out that there was no rental income included on his 1997 income tax returns.

For 1998 Petitioner indicates that he moved to STATE 3. He rented an apartment there and rented out both the upstairs and basement unit in his CITY residence, which he did eventually sell sometime later. Petitioner started working in STATE 3 and has continued to reside there. He eventually obtained a Drivers license in STATE 3 and registered vehicles there but that was not until 1999. Respondent's audit however, confirms Petitioner's assertions about 1998, as the determination was only that Petitioner owned tax on the Utah Source income earned during that period. Respondent concluded that out of the \$\$\$\$ he earned that year in federal adjusted gross income, only \$\$\$\$ was subject to Utah taxable income. Petitioner had filed a STATE 3 income tax return for that year. The Utah taxable amount was from a W-2 from COMPANY B, which was a Utah business and Petitioner did not dispute this. The W-2 indicates that some \$\$\$\$ had been withheld and remitted to Utah for Petitioner. There is no credit on the audit for this amount.

Respondent points out that for all three years Petitioner received the primary residential property tax exemption on his CITY residence. The Commission notes, however, that the residence needs only to have been someone's primary residence, not necessarily Petitioner's. This means if it were the primary residence of the tenant, it would qualify for the property tax exemption. The Respondent is correct however, that rental income should have been indicated on the federal tax return and would also be taxable as Utah source income. There was apparently no rental income claimed on the tax return for the years that Petitioner claimed to have been renting out the residence.

From the information presented and as Petitioner acknowledges, he was a Utah resident for tax purposes in 1996. For that reason he is liable for income tax and the audit must be sustained for that year. For

1997 Petitioner apparently did not spend in the aggregate more than 183 days per year in Utah. A resident individual, in the alternative, is one who is "domiciled" in the State of Utah. Petitioner was clearly a resident and domiciled in the State of Utah during 1996. In order to show that he was no longer domiciled in Utah during 1997 Petitioner must show: 1) that he abandoned his Utah domicile; and 2) that he intended to and did in fact establish a new domicile in STATE 2. However, Petitioner acknowledges that he had no intention of establishing a domicile in STATE 2. In addition he clearly did not abandon his Utah domicile as he maintained a residence in Utah, kept his Utah drivers licenses and vehicle registrations.

Turning to tax year 1998, the audit was not based on Petitioner having a Utah residence for tax purposes. The auditors found that Petitioner was liable only for income that was clearly Utah source income. Nonresidents are liable for Utah income tax on Utah source income, however, the state where they file a resident return typically allows a credit for taxes paid to Utah. Petitioner's filings concerning the Utah source income appear to be in error. However, it is clear that there had been some \$\$\$\$ in withholding paid to Utah by the Utah employer for which Petitioner was not given credit in the audit.

Looking at the issue of penalties, the audit included a 10% failure to pay and 10% failure to file penalty for each of the years at issue. For 1996 and 1997 the amount of the penalties were determined by 10% of the tax deficiency. For 1998, because the tax deficiency amount was so low, the penalties assessed were the minim \$\$\$\$ penalties.

For 1996 Petitioner would have been a first time filer as a Utah resident, although it is possible he should have been filing prior as a nonresident to claim the Utah source income he received from his rental property. Petitioner had moved to Utah from STATE 1 where there is no state income tax and most of his income earned during the year came from STATE 2 where there is also no state income tax. As he was a first time filer and the other reasons there is reasonable cause for waiver of the penalties for this year. For 1997, Petitioner's income came from STATE 2 where he worked and lived most of the time. As the domicile issue is

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complicated and Petitioner may have had no understanding that he would be subject to Utah income tax on income he earned while living and working in STATE 2, the Commission will waive the penalties for 1997 as well. For 1998, Petitioner did file a STATE 3 return and only a small portion of his income came from a Utah source and was found to be taxable to Utah. Petitioner had a CPA prepare his STATE 3 and federal return for that year and is possible the need to file a Utah return on Utah source income was overlooked. In addition when credit is allowed for the \$\$\$\$ in withholding the tax owed for 1998 was only \$\$\$\$\$. As the penalties assessed are the minim \$\$\$\$ penalties, one for failure to file and one for failure to pay, the penalties are more than the tax. For these reasons the penalty for 1998 should be waived.

DECISION AND ORDER

Based upon the information presented at the hearing, and the records of the Tax Commission, the Commission finds that Petitioner was a Utah resident for tax purposes during 1996 and 1997. The Commission sustains the audit as to the amount of tax and interest thereon. However, the Commission waives the penalties for both these years. For 1998 the Commission finds that Petitioner is subject to tax on his Utah source income but is entitled to a credit for withholding tax. Respondent is hereby ordered to adjust the tax and interest deficiency accordingly and to waive the penalty. 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.

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: If a Formal Hearing is not requested, failure to pay the balance due as determined by this order within thirty days of the date hereon, may result in a late payment penalty.

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