

04-0420  
Audit  
Signed 10/07/2005

BEFORE THE UTAH STATE TAX COMMISSION

---

PETITIONER 1 & PETITIONER 2,	)		
	)	<b>ORDER</b>	
Petitioners,	)		
	)	Appeal No.	04-0420
v.	)		
	)		
AUDITING DIVISION OF	)	Tax Type:	Income
THE UTAH STATE TAX	)	Tax Years:	1999 -2001
COMMISSION,	)	Judge:	Phan
	)		
Respondent.	)		

---

**Presiding:**  
Jane Phan, Administrative Law Judge

**Appearances:**  
For Petitioner: PETITIONER 1  
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 August 11, 2005.

Petitioner is appealing the assessment of Utah individual income tax and interest for the years 1999 through 2001. Petitioner had not filed Utah returns for the years at issue. The Statutory Notices of Estimated Income Tax for those years were issued on December 1, 2003. The amount of the additional tax, penalties and interest as of the assessment date for each year are as follows:

	Tax	Penalties	Interest <sup>1</sup>
1999	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$
2000	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$
2001	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$

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:

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 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).)

---

1 Interest continues to accrue on the unpaid balance.

DISCUSSION

The issue in this appeal is whether PETITIONER 1 was a "resident individual" in the State of Utah for the purposes of Utah Code Ann. §59-10-103(1)(k) during the audit years. From the information presented he did not spend in the aggregate more than 183 days per year in Utah during the period in question. A resident individual, in the alternative, is one who is "domiciled" in the State of Utah. Respondent based its audit on the assertion that PETITIONER 1 was a resident of Utah for tax purposes during all three years at issue. Petitioners had not filed resident Utah Individual Income Tax Returns and PETITIONER 1 maintains that he was not a resident of Utah, instead he states that he was a resident of STATE 1. PETITIONER 1 acknowledges that his family, his wife and their three children, were residents of Utah during this period. However, none of the income at issue was attributable to PETITIONER 2.

The question 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 whether someone is a "resident individual" for state tax purposes has been addressed by the appellate courts in Utah.<sup>2</sup> As discussed by the courts in considering this issue, the factfinder may accord the party's activities greater weight than his or her declaration of intent.<sup>3</sup>

It is clear that sometime prior to the audit period at issue, PETITIONER 1 and his family had been residents and domiciled in STATE 1. He indicates that he and his family resided in a residence that they owned in STATE 1 on a four-acre property. However, his daughter had become ill and they finally determined

---

<sup>2</sup>The 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).

<sup>3</sup> See **Clements v. Utah State Tax Comm'n** 893 P.2d 1078 (Ct. App. 1995); and **Allen v. Greyhound Lines, Inc.**, 583 P.2d 613, 614 (Utah 1978);

that she was allergic to the sagebrush in the area. Petitioner indicates that this prompted the family's move to Utah in 1995. They sold their residence in STATE 1. PETITIONER 1 purchased a residence for his family in CITY, Utah.

PETITIONER 2 and the children moved into the Utah residence. The car that she drove was registered in Utah and at some point she obtained a Utah drivers license. Their children attended school in Utah, although not public schools. PETITIONER 1 supported the family financial but continued to work out of the STATE 1 office of his employer. He indicates that he had a sales territory that was in STATE 1, STATE 2 and other areas and that it was not possible to transfer his employment to Utah.

PETITIONER 1 argues that he did not change his domicile to Utah. As a salesperson for the business he traveled extensively through STATE 1 and other states as well as attended trade shows. He states that he purchased from his employers a trailer home in STATE 1. He provided no documentation regarding this purchase and indicates the employer financed the purchase. Payments for the trailer were withheld from his pay. He indicates that bills were generally sent to the Utah residence. He states that sometime in 1998 he obtained a Utah drivers license and registered his vehicle in Utah. He attributes this to being told he should do this by a police officer during a traffic stop. He also indicates that he had bank accounts in both Utah and STATE 1 and that the accounting firm that prepared his federal tax return was a STATE 1 firm.

Petitioner argues that sometime in 1998 and possibly for that year or prior years he was audited by the Utah Tax Commission and that a determination was made at that point that he was not a Utah resident for tax purposes. He indicates that he relied on this in subsequent years when determining he would not file a Utah return. Respondent does not deny that there must have been some type of domicile audit conducted on Petitioners for the prior period, but that each year would depend on the factors of domicile that occurred in the year.

Respondent provided evidence that Petitioners' federal returns during the period at issue were all filed listing the Utah residence as the home address. The W-2's issued to PETITIONER 1 listed the Utah residence as his address. Additionally, on each of the federal returns for the years at issue Petitioner had taken a deduction for taxes paid to Utah, (none had been paid to Utah) which was very similar to the amount of tax Respondent had calculated. This indicates that Petitioners accountant considered them to be Utah residents and certainly could not have determined an amount for the credit without at the very least calculating the Utah tax liability, if not actually preparing Utah returns for Petitioners.

In making its determination as to whether PETITIONER 1 was a Utah resident the Tax Commission considers both the statute and rule. Domicile is defined by Utah Admin. Rule R865-9I-2 (2000)<sup>4</sup> and the rule requires that once a 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. PETITIONER 1 clearly was domiciled in STATE 1 at some point prior to the audit period, but he started changing his domicile to Utah and it may have been a gradual process. Eventually he did change his driver's license, car registration and address for financial documents. These factors all support the fact that domicile had been changed to Utah. Petitioner had argued that there had been an audit for prior years regarding domicile but he has no paperwork or documentation regarding what occurred and what information was provided to the Auditing Division at that time. It is possible that obtaining the Utah driver's license and registration occurred after that audit, or that federal returns were prepared differently at that time. However, presented with the facts that were presented for the period at issue it is clear that for 1999 through 2001 PETITIONER 1 was domiciled in Utah for tax purposes and is liable for Utah individual income tax.

---

<sup>4</sup> Utah Admin. Rule R865-9I-4 was revised in 2003. However, the Commission applies the prior rule concerning domicile that was in effect during the audit period.

Appeal No. 04-0420

Turning to the issue of the penalties, based on the first time filing criteria and that there had been some type of prior audit or action that Petitioner had relied on, the Commission finds that there is reasonable cause for waiver of all the penalties assessed in this matter.

DECISION AND ORDER

Based upon the information presented, the Tax Commission finds that Petitioner PETITIONER 1 was domiciled in Utah and was, therefore, a Utah resident for income tax purposes for the tax years 1999, 2000 and 2001. Therefore, the audit is sustained as to the Utah income tax and interest accrued thereon. Sufficient cause has been shown for waiver of the penalties. 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

Appeal No. 04-0420

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.

JKP/04-0420.int.doc