

04-0949
Audit
Signed 02/08/2008

BEFORE THE UTAH STATE TAX COMMISSION

PETITIONER 1 & PETITIONER 2,

Petitioner,

vs.

AUDITING DIVISION OF THE UTAH STATE
TAX COMMISSION,

Respondent.

**FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND FINAL DECISION**

Appeal No. 04-0949

Tax Type: Income Tax
Tax Period: 2000 - 2002

Judge: Jensen

Presiding:

R. Bruce Johnson, Commissioner
Clinton Jensen, Administrative Law Judge

Appearances:

For Petitioner: PETITIONER REPRESENTATIVE 1, Esq.
PETITIONER REPRESENTATIVE 2, CPA
PETITIONER 1

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

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission for a Formal Hearing on February 22, 2007 and September 10, 2007. 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 and

interest deficiencies issued against him for tax years 2000, 2001, and 2002.

2. The Division issued statutory notices for this taxpayer on April 29 and 30, 2004. Those notices indicated personal income tax deficiencies as follows:

<u>Year</u>	<u>Tax</u>	<u>Penalty</u>	<u>Interest as of Notice Date</u>
2000	\$\$\$\$\$	none	\$\$\$\$\$
2001	\$\$\$\$\$	none	\$\$\$\$\$
2002	\$\$\$\$\$	none	\$\$\$\$\$

3. On June 17, 2004, Petitioner filed a Petition for Redetermination in this matter. The Division initially filed a motion to dismiss that petition for failure to timely contest the Division's action but later withdrew its motion.

4. In his Petition, PETITIONER 1 raised three main issues. First, Petitioner argued that he was not domiciled in Utah for the tax years at issue. Second, Petitioner argued that income from an Indian tribe earned on reservation land within STATE 1 was not subject to Utah state income tax. Third, Petitioner argued that even if Utah can tax income earned on an Indian reservation, The Indian Gaming Regulation Act ("IGRA") and agreements entered into under IGRA provide a separate prohibition on state taxation of earnings from tribal gaming operations.

5. Petitioner, as captioned in this action, includes PETITIONER 2. The parties agree that the status of PETITIONER 2's domicile is not disputed in this action. Further references to "Petitioner" in this order will thus not include PETITIONER 2.

6. In 1999, the year before the years at issue in this action, Petitioner resided part time on Indian reservation land in CITY 1, STATE 1 and part time in a leased residence in STATE 2.

7. In early 2000, Petitioner ended his lease of the STATE 2 property and had a residence constructed in CITY 2, Utah. That residence was ready for occupancy in May 2000. Through 2000, 2001, and 2002, Petitioner lived part time in the CITY 2 residence and continued to live part time in his motor home on reservation land in STATE 1. There is no evidence that Petitioner personally owned or rented any fixed

residences other than the Utah home in 2000, 2001, or 2002. His only home in STATE 1 was the motor home. The tribe's reservation in STATE 1 is nearly all covered with casino operations and parking for the casino operation. Ongoing construction on the reservation during this period required Petitioner to move the motor home from place to place on the reservation. Although Petitioner spent substantial time in Utah in 2000, 2001, and 2002, he did not spend a total of 183 or more days per year in Utah in any of these years. Petitioner testified that he has real property interests in tribal land in STATE 1 and family trust allotments in COUNTRY, all of which continued from 2000 to 2002.

8. The Commission finds that Petitioner's Utah residence was not on an Indian reservation or otherwise part of Indian country. Petitioner made no argument and provided no evidence that his Utah residence was on or part of Indian reservation ground or was otherwise a part of Indian country.

9. Before 2000, Petitioner had a STATE 1 driver's license. In 2000, he applied for and received a Utah driver's license. Petitioner testified that he did so because a Utah Highway Patrol officer made a traffic stop and informed Petitioner that if he was going to be in Utah for more than 30 days, he needed a Utah driver's license. Gaining that Utah license required Petitioner to surrender his STATE 1 license. When completing the application for a Utah driver's license, Petitioner used his address in CITY 2, Utah. The Utah driver's license had an expiration date in 2005. There is no evidence of Petitioner surrendering or canceling his Utah driver's license in 2000, 2001, or 2002.

10. In 2002, Petitioner applied for and received a Utah fishing license. He applied for and received a less expensive resident license rather than the more expensive non-resident license. He used his CITY 2, Utah address to do so.

11. Petitioner used a Utah mailing address for most, if not all, of his financial and other affairs in 2000, 2001, and 2002. He explained that he did so for two main reasons. First, mail sent to him in STATE 1 went to the offices of the (X), the tribe governing the reservation on which Petitioner parked his motor

home. He wanted to keep his mail, including financial matters, more private than to have them sent to and possibly opened at tribal offices. Second, Petitioner testified that his wife at the time expressed suspicion regarding Petitioner's financial and other personal dealings. To allay those concerns, Petitioner had all of his mail sent to his Utah address, where his wife generally lived, as part of an effort to show her that he had nothing to hide from her. That marriage has since ended.

12. Petitioner supplied an April 4, 2005 letter from a caretaker for his Utah residence. The caretaker indicated that he had been taking care of Petitioner's home, including the home, landscaping, spa, and animals since 2001. The caretaker indicated that neither Petitioner nor his wife were around the Utah home much. The caretaker did not indicate where he lived in relation to Petitioner's Utah residence or the extent to which he had the opportunity to observe comings and goings at Petitioner's residence in Utah.

13. Petitioner testified that he had friends and family in STATE 1 with whom he spent leisure time. These friends and family members lived off the reservation where Petitioner resided when in STATE 1.

14. The parties presented documents showing that Petitioner was a party to a legal action for guardianship of a minor filed in Utah and a divorce action filed in STATE 1, but both of these legal actions took place after the end of the 2000 – 2002 period at issue in this action.

15. Petitioner testified that his burial plans are on tribal land set aside for tribe members in STATE 1.

16. For 2000, 2001, and 2002, as well as years before and after that, Petitioner has been an enrolled member of the (X), an Indian tribe with reservation land in Southern STATE 1. During this time, Petitioner has voted and participated in tribal government and generally attended weekly meetings on the reservation in STATE 1 to do so. Petitioner's representative indicated that Petitioner voted in STATE 1 state elections but provided no evidence of STATE 1 voting.

17. In 2002, 2001, and 2002, Petitioner derived most, if not all, of his income from tribal sources.

The tribe paid this income as per capita distributions and as wages, both of which were derived from the tribe's casino operations. Petitioner received his health insurance through the tribe.

18. The Commission finds that Petitioner has not borne the burden of proof required to show that he was not domiciled in Utah beginning on May 31, 2000 and ending on December 31, 2002. Petitioner provided reasons why he centered activities such as his driver's license, real property, and mailing address in Utah for this period, but the fact remains that Utah is the place where he conducted these activities. Although Petitioner spent substantial amounts of time in STATE 1, the time in STATE 1 was more for special purposes such as work and attendance at tribal meetings. The facts, taken as a whole, support a factual finding that Petitioner was domiciled in Utah from May 31, 2000 through December 31, 2002 rather than on an Indian reservation that had no permanent housing.

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). This rule was effective for all of the audit period except from December 9, 2002 to December 31, 2002. It provides 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.

Utah Administrative Rule R865-91-2, effective on December 9, 2002, defines domicile and makes reference to another rule for a list of factors to determine domicile:

A. Domicile.

1. Domicile is the place where an individual has a permanent home and to which he intends to return after being absent. It is the place at which an individual has voluntarily fixed his habitation, not for a special or temporary purpose, but with the intent of making a permanent home.

2. For purposes of establishing domicile, an individual's intent will not be determined by the individual's statement, or the occurrence of any one fact or circumstance, but rather on the totality of the facts and circumstances surrounding the situation.

a) Tax Commission rule R884-24P-52, Criteria for Determining Primary Residence, provides a non-exhaustive list of factors or objective evidence determinative of domicile.

b) Domicile applies equally to a permanent home within and without the United States.

3. A domicile, once established, is not lost until there is a concurrence of the following three elements:

- a) a specific intent to abandon the former domicile;
- b) the actual physical presence in a new domicile; and
- c) the intent to remain in the new domicile permanently.

4. An individual who has not severed all ties with the previous place of residence may nonetheless satisfy the requirement of abandoning the previous domicile if the facts and circumstances surrounding the situation, including the actions of the individual, demonstrate that the individual no longer intends the previous domicile to be the individual's permanent home, and place to which he intends to return after being absent.

B. Permanent 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.

Utah Admin. Rule R884-24P-52 ("Rule 52") sets forth a non-exhaustive list of factors or objective

evidence that is determinative of domicile, as follows:

- E. Factors or objective evidence determinative of domicile include:
1. whether or not the individual voted in the place he claims to be domiciled;
 2. the length of any continuous residency in the location claimed as domicile;
 3. the nature and quality of the living accommodations that an individual has in the location claimed as domicile as opposed to any other location;
 4. the presence of family members in a given location;
 5. the place of residency of the individual's spouse or the state of any divorce of the individual and his spouse;
 6. the physical location of the individual's place of business or sources of income;
 7. the use of local bank facilities or foreign bank institutions;
 8. the location of registration of vehicles, boats, and RVs;
 9. membership in clubs, churches, and other social organizations;
 10. the addresses used by the individual on such things as:
 - a) telephone listings;
 - b) mail;
 - c) state and federal tax returns;
 - d) listings in official government publications or other correspondence;
 - e) driver's license;
 - f) voter registration; and
 - g) tax rolls;
 11. location of public schools attended by the individual; or the individual's dependents;
 12. the nature and payment of taxes in other states;
 13. declarations of the individual:
 - a) communicated to third parties;
 - b) contained in deeds;
 - c) contained in insurance policies;
 - d) contained in wills;
 - e) contained in letters;
 - f) contained in registers;
 - g) contained in mortgages; and
 - h) contained in leases.
 14. the exercise of civil or political rights in a given location;
 15. any failure to obtain permits and licenses normally required of a resident;
 16. the purchase of a burial plot in a particular location;
 17. the acquisition of a new residence in a different location.

The Utah Legislature has provided that the taxpayer bears the burden of proof, with limited exceptions, in proceedings involving individual income tax before the Tax Commission, 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;
- (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.

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.) Petitioner did not spend 183 days or more in this state in any of the years at issue in this action. The issue before the Commission in this matter is thus 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.¹ As discussed by the courts, the fact finder may accord the party's activities greater weight than

¹The 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). Utah courts have also considered state taxation of tribal members, but did so in a case that dealt primarily with issues other than domicile. See Maryboy v. State Tax Comm'n, 904 P.2d 662 (Utah 1995).

his or her declaration of intent.² Utah Admin Rule R865-9I-(D) provides that a domicile is a permanent home and principal establishment. Under this rule, the Commission has made a finding of fact that Petitioner has centered activities such as his driver's license, real property, and mailing address in Utah for the periods from May 31, 2000 to December 31, 2002. The Commission has also determined that although Petitioner spent substantial amounts of time in STATE 1, the time in STATE 1 was more for special purposes such as work and attendance at tribal meetings. On the basis of these factors, the Commission has made a factual determination that Petitioner was domiciled in Utah from May 31, 2000 through December 31, 2002 rather than on an Indian reservation that had no permanent housing.

Having made a finding of fact that Petitioner was domiciled in Utah from May 31, 2000 through December 31, 2002, the Commission considers whether Petitioner's income may nevertheless be free from state income tax for income earned on an Indian reservation. Petitioner's position is that as a resident of reservation land held by the (X), he cannot be subject to state taxation.

Petitioner cites *McClanahan v. State Tax Commission of Arizona*, 411 U.S. 164 (1973), for the proposition that no state can tax "a reservation Indian for income earned exclusively on the reservation." *See id.* at 168. In making this argument, Petitioner cites his close ties with his tribe and tribal governance. It is true that under *McClanahan*, one could draw the conclusion that ties to a tribe or tribal life are the touchstones for determining availability for state taxation. *McClanahan* indicated that its holding did not reach "Indians who have left or never inhabited reservations set aside for their exclusive use or who do not possess the usual accoutrements of tribal self-government." *Id.* at 167. One might also argue that the test should be whether "Indians have left the reservation and become assimilated into the general community." *See id.* at 171. But cases after *McClanahan* make it clear whether a tribal member can be subject to state taxation depends on

² 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).

residence. “To determine whether a tribal member is exempt from state income taxes under *McClanahan*, a court first must determine the residence of that tribal member.” *Oklahoma Tax Commission v Sac & Fox Nation*, 508 U.S. 114, 124 (1993)); *see also*, *Oklahoma Tax Commission v. Chickasaw Nation*, 515 U.S. 450, 462-63 (1995) (argument that tribal members living outside Indian country do not have to pay state income tax “runs up against a well-established principle” that domicile of individual affords states the right to tax all income of its residents even if income earned outside state boundaries). Following these cases from the United States Supreme Court, the Utah State Tax Commission determines that because Petitioner was domiciled in Utah from May 31, 2000 to December 31, 2002, Utah is authorized to levy income tax on Petitioner’s earnings for this period.

The Commission next considers whether IGRA or agreements made under the authority of IGRA provide a separate prohibition to Utah taxing a resident domiciled in Utah. Petitioner argues that under IGRA, any taxation on the tribe or its members violates tribal sovereignty. It is beyond question that IGRA itself provides no prohibition to state taxation of tribal earnings from gaming operations. *Jefferson v. Commissioner of Revenue*, 631 N.W.2d 391, 396 (2001) (noting that IGRA does not mention or reference state taxation). Perhaps in recognition of IGRA’s silence on the issue of state taxation, Petitioner has not cited extensively to IGRA but focuses on language in the Tribal-State Gaming Compact, an agreement between the (X) and the state of STATE 1. Petitioner cites language indicating that the agreement specifically provides for state taxation of those who are not members of the tribe:

As a matter of comity, with respect to persons employed at the Gaming facility, other than members of the Tribe, the Tribal Gaming Operation shall withhold all taxes due to the State as provided in the STATE 1 Unemployment Insurance Code and the Revenue and Taxation Code and shall forward such amounts as provided in said codes to the State.

Tribal-State Gaming Compact Between the (X), a federally recognized Indian Tribe and the State of STATE 1 (October 1, 1999) at § 103(c) (the “Compact”). Petitioner argues that because the Compact specifically

provides for taxation of non-members of the tribe, the converse must also be true: that the Compact does not provide for taxation of tribal members. While this may be true, Petitioner's argument suffers from a more fundamental flaw. The Compact is an agreement with the State of STATE 1. Utah is not a party to the agreement and cannot be bound thereby. Petitioner has provided no evidence of any Compact or other agreement between the (X) and the State of Utah. To the extent that there has been a federal preemption in the area of taxation of tribal members, Utah is bound by federal laws, which, as previously discussed in *McClanahan* and its progeny, allow for state taxation of tribal members domiciled outside of Indian country.

As a part of his position on federal legislation Petitioner argued that his standing in the (X) is like a partner in a partnership and that therefore a tax on an individual partner is an impermissible imposition on the sovereignty of the tribe itself. Petitioner presented no evidence that the tribe ever completed the steps necessary to form a partnership entity or had partnership agreements among its members. Because it has no facts and has made no factual finding that there was a partnership, the Utah State Tax Commission will not create a partnership that an entity did not create for itself.

CONCLUSIONS OF LAW

1. The Commission has made a finding of fact that Petitioner was domiciled in Utah from May 31, 2000 to December 31, 2002. On that basis, Petitioner was a Utah resident individual for that time. For this reason the Commission concludes that Petitioner is liable for Utah individual income tax under Utah Code Sec. 59-10-104 on his state taxable income earned from May 31, 2000 to December 31, 2002.

2. Petitioner was not a resident of Utah before May 31, 2000 and the state of Utah has no basis to collect personal income tax from petitioner for income earned in 2000 before May 31, 2000.

3. Because Petitioner was a resident of Utah from May 31, 2000 to December 31, 2002, Utah may tax income earned outside the state, even if that income was earned on an Indian reservation.

4. Neither the Indian Gaming Regulatory Act nor an agreement between the (X) and the state

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of STATE 1 prohibits the state of Utah from levying personal income tax on Petitioner's income earned while Petitioner was a resident of Utah.

DECISION AND ORDER

Based on the foregoing, the Tax Commission sustains the audit of income tax and interest at issue in this matter for the tax periods from May 31, 2000 to December 31, 2002 but reverses the Division's audit as to periods in tax year 2000 before May 31, 2000. It is so ordered.

DATED this _____ day of _____, 2008.

Clinton Jensen
Administrative Law Judge

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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 _____, 2008.

Pam Hendrickson
Commission Chair

R. Bruce Johnson
Commissioner

Marc B. Johnson
Commissioner

D'Arcy Dixon Pignanelli
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 Sec. 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 et seq. & 63-46b-13 et seq.