

04-1297
INCOME TAX
TAX YEARS: 2000, 2001
SIGNED: 07-31-2007
COMMISSIONERS: P. HENDRICKSON, R. JOHNSON, D. DIXON
DISSENT: M. JOHNSON
GUIDING DECISION

BEFORE THE UTAH STATE TAX COMMISSION

<p>PETITIONER 1 & PETITIONER 2, Petitioner, vs. AUDITING DIVISION OF THE UTAH STATE TAX COMMISSION, Respondent.</p>	<p>FINDINGS OF FACT, CONCLUSIONS OF LAW, AND FINAL DECISION</p> <p>Appeal No. 04-1297</p> <p>Tax Type: Income Tax Tax Period: 2000, 2001</p> <p>Judge: Jensen</p>
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Presiding:

Pam Hendrickson, Commissioner
Clinton Jensen, Administrative Law Judge

Appearances:

For Petitioner: PETITIONER REP. 1
PETITIONER REP. 2
PETITIONER 1
For Respondent: RESPONDENT REP. 1, Assistant Attorney General
RESPONDENT REP. 2, Income Tax Auditing

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission for a Formal Hearing on February 8, 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 whether Petitioner was domiciled in Utah in 2000 and 2001. Petitioner appealed the decision of the Auditing Division of the Utah State Tax Commission (the "Division") to assess income tax, penalty and interest deficiencies for tax years 2000 and 2001. The Division

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issued a Statutory Notice of Audit Change for the 2000 tax year on October 13, 2004 and a Statutory Notice of Estimated Income Tax for the 2001 tax year on October 20, 2004.

2. The amounts of the deficiencies at issue are as follows:

<u>Year</u>	<u>Tax</u>	<u>Penalty</u>	<u>Interest as of Notice Date</u>
2000	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$
2001	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$

3. Interest continues to accrue on the unpaid balance. The penalties assessed were a 10% failure to file penalty and a 10% failure to pay penalty.

4. For tax year 2000, Petitioner filed a Utah nonresident individual income tax return. Petitioner did not file a Utah resident or Utah nonresident individual income tax return for tax year 2001.

5. Petitioner moved to Utah in October 1996, where he lived until he moved to CITY 1, COUNTRY in August 1999.

6. Petitioner's 1996 move to Utah and his 1999 move to COUNTRY were both the result of transfers for Petitioner's employer.

7. In 2000 and 2001, Petitioner and his wife maintained Utah driver's licenses as well as COUNTRY licenses. Petitioner indicated that they held no other licenses during this time. The COUNTRY driver license documentation provided by Petitioner indicates that the procedure to obtain a COUNTRY driver's license is to surrender any pre-existing license to the authorities in COUNTRY. If the surrendered license is a CONTINENT license, the COUNTRY authorities return it to the issuing country with a note explaining the reason for its return. But if the license is from other than a CONTINENT country, COUNTRY authorities retain the surrendered license and return it to the holder upon the surrender of the COUNTRY license. Because COUNTRY followed the latter procedure for the licenses surrendered by Petitioner and his wife, Utah never cancelled the Utah licenses and they remained valid throughout 2000 and 2001. Petitioner used his Utah license to rent cars when he traveled in the United States in 2000 and 2001. In 2002, Petitioner moved to STATE 1 and obtained a STATE 1 driver's license.

8. In 2000 and 2001, Petitioner and his wife did not vote and were not registered to vote. In 2002, they registered to vote in STATE 1.

9. In 1999, Petitioner had vehicles licensed in Utah. He sold those vehicles when he moved to COUNTRY in 1999. In 2000 and 2001, Petitioner's and his wife's cars were registered in COUNTRY. In 2002, they both registered their cars in STATE 1.

10. In 1999, Petitioner paid property tax on a home in Utah that he owned. For the 2000 and 2001 tax years, he did not pay any property taxes on real property, although he did pay rent on a home in COUNTRY on

which his landlord paid taxes. In 2002, Petitioner paid property taxes for his home in STATE 1.

11. In 1999, Petitioner owned a home in Utah. In 2000 and 2001, Petitioner did not own a home, but rented a home in COUNTRY under a nine-year lease. In 2001 and 2002, Petitioner rented an apartment in STATE 1 for business there and for an expected relocation to STATE 1. In 2002, Petitioner purchased a home in STATE 1.

12. In 2000 and 2001, Petitioner held no hunting or fishing licenses.

13. In 2000 and 2001, Petitioner had two adult sons. Neither lived with Petitioner. One lived in STATE 1 both years and attended UNIVERSITY 1 in 2000. The other lived in STATE 1 (attending UNIVERSITY 2) in 2000 and in Utah (attending the UNIVERSITY 3) in 2001.

14. Petitioner and his wife spent less than 10 days in Utah for each of the years 2000 and 2001. The trip to Utah in 2000 was a vacation and in 2001 a business trip brought Petitioner to Utah. In 2000 and 2001, Petitioner spent over 30 days per year in STATE 1 and the rest of his time in COUNTRY.

15. Petitioner's job transfer from STATE 1 to Utah in 1996 was for an indefinite period. Petitioner did not know how long the assignment would be or where he would go at the end of the work assignment in Utah. His employer provided no written assurance that it would pay relocation costs at the end of the work assignment in Utah.

16. Petitioner's job transfer from Utah to COUNTRY in 1999 was for an indefinite period. Petitioner did not know how long the assignment would last but he and his employer expected that he would be transferred back to STATE 1 at the end of the work assignment in COUNTRY. As part of his move to COUNTRY in 1999, Petitioner's employer provided written assurances that it would pay Petitioner's relocation costs at the end of the assignment in COUNTRY.

17. In 2000 and 2001, Petitioner belonged to the following clubs: CLUB 1, CITY 2, STATE 1; CLUB 2, CITY 1, COUNTRY; CLUB 3, CITY 2, STATE 1. In 2002, he was a member of CLUB 4, CITY 3, STATE 1. In 2000 and 2001, Petitioner's wife was a member of the CLUB 5, CITY 1, COUNTRY.

18. Petitioner's professional advisers, including his doctors, accountants, estate planners, and investment counselors were all in STATE 1 in 2000 and 2001, with the exception of the accounting firm of FIRM which has offices in STATE 2, Utah, and STATE 1. During 2000 and 2001, Petitioner had bank accounts in Utah, STATE 1, STATE 3, STATE 2, and COUNTRY. No single state predominated as the home of Petitioner's banking.

19. Petitioner's 2000 federal tax return bore Petitioner's address in COUNTRY and listed FIRM's office in CITY 4, Utah as the paid preparer of the return. Petitioner's 2000 federal form 1116, the Alternative Minimum Tax Foreign Tax Credit form, listed "COUNTRY" as the country of residence. Petitioner's 2000 federal form 2555, the Foreign Earned Income form, listed "COUNTRY – 8/28/99" as the tax home during the tax year at issue and listed "Estimated Two Year Assignment" as the contractual term or other conditions relating to the length of employment abroad.

20. Petitioner's 2001 federal tax return bore Petitioner's address in STATE 1 and listed FIRM's office in CITY 4, Utah as the paid preparer of the return. Petitioner's 2001 federal form 1116, the Alternative Minimum Tax Foreign Tax Credit form, listed "COUNTRY" as the country of residence. Petitioner's 2000 federal form 2555, the Foreign Earned Income form, listed "COUNTRY from 08/28/99" as the tax home during the tax year at issue and listed "Estimated Three Year Assignment" as the contractual term or other conditions relating to the length of employment abroad.

21. The government of COUNTRY required Petitioner to have a work permit to work in COUNTRY. Petitioner testified that his understanding was that this was a permit for an extended period of time but was renewed annually. Copies of the work permits themselves show that COUNTRY issued new permits to Petitioner annually.

22. From the time of Petitioner's move from STATE 1 in 1996 to his return there in 2002, Petitioner's wife maintained her certification to teach school in the STATE 1 school system.

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)(2001)¹ 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.

The Utah Legislature has specifically provided that the taxpayer bears the burden of proof in proceedings before the Tax Commission. Utah Code Sec. 59-10-543 provides the following:

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

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.) It is clear that Petitioner did not spend 183 days or more in this state during either 2000 or 2001. The issue before the Commission in this matter is the separate and independent alternative basis for residency, whether Petitioner was "domiciled" in Utah during the audit period.

1 The rule defining "domicile" was revised in 2003. The Commission, however, relies on the prior rule, which is applicable to the audit period at issue.

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.² As discussed by the courts, the fact finder may accord the party's activities greater weight than his or her declaration of intent.³ Utah Admin Rule R865-9I-(D) provides that a domicile is a permanent home and principal establishment. It also provides that once a domicile has been established two things are necessary to create a new domicile: 1) the abandonment of the old domicile; and 2) the intent to establish and the actual establishment of a new domicile.

Utah law requires that a person have a permanent home to claim a domicile. Petitioner correctly notes that Utah courts have, to date, not ruled on the question of whether a "permanent" home, as used in Utah administrative rules and case law, means an intent to remain at a place for life or until some event changes the permanent home or whether an intent to stay for an indefinite period will suffice. Petitioner cites *McKone v. State Tax Commission of STATE 3*, 111 AD.2d 1051 (STATE 3 1985), as persuasive authority for the proposition that a stay for an indefinite period is sufficient to create a permanent home. *McCone* relies on a compilation of case law from American Jurisprudence:

In this respect, the Courts have used the word "permanent" to distinguish the duration of a contemplated residence from "temporary." It is obvious that the use of "permanent" has caused considerable confusion "[T]he intention necessary for acquisition of a domicile may not be an intention of living in another locality as a matter of temporary expediency. It must be an intention to live permanently or indefinitely in that place. "but it need not be an intention to remain for all time; it is sufficient if the intention is to remain for an indefinite period."

McKone, 111 AD.2d at 1053 (quoting 25 Am. Jur. 2d, Domicile, §25 at 19 (1966)). On the basis of this and similar persuasive authority, Petitioner argues that he established a Utah domicile in Utah in 1996, but abandoned that domicile and established a domicile in COUNTRY for 2000 and 2001. As an alternative position, Petitioner argues that if his 1999 move from Utah to COUNTRY was insufficient to extinguish his Utah domicile and establish a new one in COUNTRY, then his 1996 move from STATE 1 to Utah likewise

²The 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).

³ See Clements v. Utah State Tax Comm'n 893 P.2d 1078 (Ct. App. 1995); and Allen v. Greyhound Lines,

did not establish a Utah domicile because both the 1996 move to Utah and the 1999 move to COUNTRY were for work assignments with an indefinite time frame.

The Division argues that Petitioner established a Utah domicile upon moving to Utah in 1996 and kept that domicile until he moved to STATE 1 in 2002. The Division contends that Petitioner's move to COUNTRY in 1999 was for the specific purpose of accepting temporary employment and that the facts of the move to COUNTRY do not evidence an abandonment of the Utah domicile. In support of its position that the move to Utah created a domicile while the move to COUNTRY did not, the Division points out five differences between Petitioner's living arrangements in COUNTRY that are different from his living arrangements in Utah. First, the Division notes that the move to COUNTRY was pursuant to written instructions with an expected duration while the Utah move had no such letter or writing expressing an expected duration. Second, Petitioner did not travel to Utah on a passport as he did when he moved to COUNTRY. Third, Petitioner did not work under a provisional work permit when in Utah like he did when he worked in COUNTRY. Fourth, Petitioner was required to obtain a residence permit to live in COUNTRY but had no such requirement in Utah. Finally, Petitioner had a written agreement that his employer would pay for his return from COUNTRY, but had no such agreement when he worked in Utah. On the basis of these differences, the Division asks the Commission to find that Petitioner established a Domicile in Utah but not in COUNTRY.

Weighing the differences between Petitioner's move to Utah and his move to COUNTRY, the Commission looks to facts surrounding the moves not for their own sake, but as indicators of Petitioner's intention. Thus, the Division's arguments that Petitioner obtained a passport, work permit, and resident permit for COUNTRY but not for Utah are specious at best. These argued differences show that Petitioner was willing to comply with the laws of COUNTRY in obtaining these approvals to live and work there but have no bearing whatsoever on Petitioner's intention to establish a domicile. This leaves two purported differences between the move to Utah and the move to COUNTRY. First, the move to Utah was pursuant to oral instructions with no evidence of a discussion regarding the expected time of the assignment, while the move to COUNTRY was spelled out in writing and contained an expected duration of two years. Second, Petitioner's employer made no promise to pay relocation expenses at the end of the Utah assignment but agreed to pay these expenses at the end of the COUNTRY assignment. These differences are at least relevant, but not

Inc., 583 P.2d 613, 614 (Utah 1978);

sufficient to show that Petitioner had different intentions with regard to the time in Utah and the time in COUNTRY.

Considering the factors that show intent to create a domicile, Petitioner's move to Utah appears to be like his move to COUNTRY. Both were moves for an indefinite period to accomplish a work assignment for his employer. Both involved driving cars registered in the locality in which Petitioner resided. The differences that the Division highlighted, such as passport and work permits, as well as factors that the Division did not separately highlight, such as difference in driver license status, are tied to differences in regulatory environment rather than a difference in intention. Although Petitioner had financial dealings and worked with medical and other professional advisers in several states and in COUNTRY, there is no pattern of favoring Utah or demonstrating intent to return to Utah. If anything, the pattern evidences intent to return to STATE 1 at the end of various assignments for Petitioner's employer.

CONCLUSIONS OF LAW

1. The Petitioner was not a domiciliary of Utah for 2000 or 2001
2. Because Petitioner was not domiciled in Utah in 2000 or 2001, the Commission concludes that Petitioner is not liable for Utah individual income tax for 2000 or 2001 on his state taxable income pursuant to Utah Code Sec. 59-10-104.

DECISION AND ORDER

Based on the foregoing, the Tax Commission reverses the audit of additional income tax, interest and penalties at issue in this matter for tax years 2000 and 2001. It is so ordered.

DATED this ____ day of _____, 2007.

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 _____, 2007.

Pam Hendrickson
Commission Chair

R. Bruce 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.

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CONCURRING OPINION

I agree with the outcome of this decision, except for the ultimate finding that Petitioners were not domiciled in Utah prior to their move to COUNTRY. There are two points to be addressed, one of which might have affected the outcome. First, there was nothing in the record to persuade me as to whether or not the Petitioners had established a Utah domicile. I see arguments on both sides. However, even if I were to find that they were domiciled in Utah, the outcome would not change. Therefore, in the interest of expediency, I defer to the majority, who found that the PETITIONERS had not established a Utah domicile.

The second point, on which I would expand, relates to the situation in COUNTRY. Whereas the majority's ultimate conclusion of law was that Petitioners were not domiciled in Utah, finding that the actions taken for both moves were similar, I see a critical difference. I believe Petitioner has clearly not established domicile in COUNTRY, finding *McCone* to be on point. In that case the court distinguished between "indefinite" and "temporary," holding that the former can be equated to permanent depending on the circumstances. Temporary, on the other hand is not associated with permanency. The record in this case clearly shows that, as the majority opinion states, PETITIONER 1 "move to COUNTRY was spelled out in writing and contained an expected duration of two years." I believe this was an obviously temporary assignment. The transfer to Utah, however, was, in my opinion, indefinite. Thus the possibility is left open that Petitioners' might have established domicile in Utah. Had the Division focused more of its argument on establishing domicile in Utah, rather than attempting to distinguish between the nature of the two moves, I might have raised my concurrence to a dissent. I believe the written assignment for the transfer to COUNTRY is almost by itself sufficient to distinguish from the move to Utah. I find nothing in the record, however, to cause me to disagree with, although I do question, the majority's key finding that Petitioners' had not established a Utah domicile.

Marc B. Johnson
Commissioner