

04-1482
Audit
Signed 10/18/2005

BEFORE THE UTAH STATE TAX COMMISSION

PETITIONER 1 & PETITIONER 2,)		
)	ORDER	
Petitioners,)		
)	Appeal No.	04-1482
v.)		
)		
AUDITING DIVISION OF)	Tax Type:	Income
THE UTAH STATE TAX)	Tax Years:	2001 & 2002
COMMISSION,)	Judge:	Phan
)		
Respondent.)		

Presiding:

Jane Phan, Administrative Law Judge

Appearances:

For Petitioner: PETITIONER 1
 PETITIONER 2

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

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.

Petitioners are appealing the assessment of Utah individual income tax and interest for the years 2001 through 2002. Petitioner PETITIONER 1 had filed as separate a Utah resident return for 2001 and PETITIONER 2 had not filed a Utah resident return. For 2002 they filed a married filing joint part-year resident return with the state of Utah. As PETITIONER 1 has filed as a Utah resident for both years, it is PETITIONER 2 income that is at issue. The Statutory Notices of Audit change were issued on November 16, 2004 for tax year 2001 and on November 22, 2004 for tax year 2002. The amount of the additional tax and interest as of the assessment date for each year are as follows:

	Tax	Interest ¹	Total
2001	\$\$\$\$	\$\$\$\$	\$\$\$\$
2002	\$\$\$\$	\$\$\$\$	\$\$\$\$

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) &(E) (2001 & 2002) as follows:

(D) 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.

. . . .

(E) A person in active military service shall not lose his domicile in Utah solely by reason of being absent under military orders. A person in active military service stationed in Utah solely by reason of military orders does not thereby establish a new domicile in this state for income tax purposes. Reference: Soldiers and Sailors Relief Act, Title 50, U.S. Code Section 574.

1 Interest continues to accrue on the unpaid balance.

1. It is possible for an individual in active military service to change his domicile by definite intent supported by actions. He may be required to prove any change by disclosing actions taken. 2. A nonresident serviceman is tax exempt only on his active service pay; all other income is taxable as provided by the nonresident provisions of Utah law. 3. The spouse of a person in active military service generally is considered to have that person's domicile and is subject to income tax laws and rules that apply to the service person.

DISCUSSION

Respondent based its audit on the assertion that PETITIONER 2 was a resident of Utah for tax purposes during the two years at issue. She maintains that she was a resident of STATE 1 through all of 2001 and that she did not move back to Utah until February of 2002. PETITIONER 1 had active military status with his home of record as Utah during the entire period at issue, although he was stationed in STATE 1 during 2001 and the first part of 2002. The issue in this appeal is whether PETITIONER 2 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 PETITIONER 2 did not spend in the aggregate more than 183 days per year in Utah during 2001. A resident individual, in the alternative, is one who is "domiciled" in Utah.

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.² As discussed by the courts in

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).

considering this issue, the factfinder may accord the party's activities greater weight than his or her declaration of intent.³

It is clear that sometime prior to the audit period both PETITIONER 2 and PETITIONER 1 had been residents and domiciled in Utah. In 1997 they had purchased a trailer home in Utah and PETITIONER 1 had claimed Utah as his home of record on his military papers. In 1999 PETITIONER 1 was transferred to a duty station in STATE 1. PETITIONER 2 moved with him. They rented an apartment in STATE 1 and she began to work full time in February 2000 in a hospital in STATE 1. She indicates that she registered to vote in STATE 1 and did vote in one election. They tried to sell their trailer home in Utah, in fact they tried to sell it for five years but were unable to do so, which was a reason they did not purchase a residence in STATE 1. The car remained registered in Utah and they indicate it was in PETITIONER 1 name.

They indicate that in the military they expect to be relocated every two to three years. Early in 2002, PETITIONER 1 was transferred to COUNTRY. Rather than stay in STATE 1 by herself, PETITIONER 2 returned to Utah. However, she rented an apartment as a tenant was living in the trailer home. She indicates it was her thought that she would go back to college in Utah, but she did not qualify for resident tuition and determined that she could not afford to attend school as planned for that reason. She continued to work and reside in Utah until PETITIONER 1 was transferred back to the United States. He was however, sent to STATE 2 and PETITIONER 2 moved to STATE 2 with him.

³ 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);

Domicile is defined by Utah Admin. Rule R865-9I-2(D) (2001 & 2002)⁴ 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. Respondent points additionally to Utah Admin. Rule R865-9I-2(E) which indicates that, “The spouse of a person in active military service generally is considered to have that person’s domicile and is subject to income tax laws and rules that apply to the service person.”

The Commission would note that the rule indicates “generally” a spouse of a person in active military service has the same domicile of the person in the military. The Commission has interpreted this provision to indicate a presumption that the spouse may contest by providing information or evidence showing otherwise. See Tax Commission Findings of Fact, Conclusions of Law and Final Decision, Appeal No. 02-0790, pg.8. In that case the Commission determined that it must consider the information offered by the parties as it related to the “domicile” criteria set forth in Section D. of Utah Admin. Rule R865-9I-2. This means the Commission must consider whether PETITIONER 2 abandoned her Utah domicile and that she intended to, and did in fact, establish a new domicile in STATE 1.

PETITIONER 2 did take several steps in abandoning the Utah domicile. The question becomes whether she established new domicile in STATE 1. To establish a new domicile it must be demonstrated that she had the intent to establish and that she did establish a true, fixed, permanent home and principal established in STATE 1, not that she was in STATE 1 for a special or temporary purpose, but with the present intention of making STATE 1 her permanent home. Petitioners did not

⁴ Utah Admin. Rule R865-9I-4 was revised in 2003. However, the Commission applies the prior rule

Appeal No. 04-1482

demonstrate this at the hearing. From the information PETITIONER 2 was in STATE 1 temporarily and for a special purpose. She was there because PETITIONER 1 was stationed there and she left as soon as his duty station changed. In fact she returned to Utah when this happened.

DECISION AND ORDER

Based upon the information presented at the hearing, the Commission finds that Petitioner PETITIONER 2 remained domiciled in Utah for the tax years 2001 and 2002. Therefore, the audit is sustained as to the Utah income tax and interest accrued thereon. 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.

concerning domicile that was in affect during the audit period.

Appeal No. 04-1482

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. Petitioners may contact Taxpayer Services Division about a monthly payment plan or an Offer in Compromise based on financial hardship at (801) 297-6300

JKP/04-1482int.doc