

04-1485
INCOME TAX
TAX YEARS: 2001 & 2002
SIGNED: 03-06-2007
COMMISSIONERS: P. HENDRICKSON, R. JOHNSON, M. JOHNSON, D. DIXON
GUIDING DECISION

BEFORE THE UTAH STATE TAX COMMISSION

PETITIONER,)	
)	FINDINGS OF FACT,
Petitioner,)	CONCLUSIONS OF LAW,
)	AND FINAL DECISION
)	
v.)	Appeal No. 04-1485
)	
AUDITING DIVISION OF)	Tax Type: Income Tax
THE UTAH STATE TAX)	Tax Period: 2001 & 2002
COMMISSION,)	
)	Judge: Phan
Respondent.)	

Presiding:

R. Bruce Johnson, Commissioner
D'Arcy Dixon Pignanelli, Commissioner
Jane Phan, Administrative Law Judge

Appearances:

For Petitioner: PETITIONER REP., Attorney at Law
PETITIONER

For Respondent: RESPONDENT REP. 1, Assistant Attorney General
RESPONDENT REP. 2, Manager, Income tax Auditing

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission for a Formal Hearing on December 6, 2006. Based upon the evidence and testimony presented at the hearing the Tax Commission hereby makes its:

FINDINGS OF FACT

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1. This matter is before the Tax Commission on Petitioner's appeal of income tax, penalty and interest deficiencies issued against him for tax years 2001 and 2002. The Statutory Notice of Estimated Income Tax at issue for tax year 2001 had been mailed on November 23, 2004. The Statutory Notice of Audit Change at issue for tax year 2002 had been mailed on December 27, 2004. Petitioner had timely appealed the deficiencies and the matter proceeded to the Formal Hearing.

2. The amount of the deficiency at issue is as follows:

Year	Tax	Penalty	Interest as of Notice Date
2001	\$\$\$\$	\$\$\$\$	\$\$\$\$
2002	\$\$\$\$	\$\$\$\$	\$\$\$\$

3. Interest continues to accrue on an unpaid balance. The penalties assessed for tax year 2001 were a 10% failure to file and a 10% failure to pay penalty pursuant to Utah Code Sec. 59-1-401. No penalties were assessed for 2002.

4. Petitioner had not filed a Utah individual income tax return for the year 2001. For 2002 he filed a Non or Part-Year Utah Resident return for tax year 2002.

5. Prior to the period at issue Petitioner had not been a resident of Utah. In reviewing the evidence the Tax Commission considers whether Petitioner had established a domicile in Utah by 2001 or even prior to October of 2002.

6. In 1987 Petitioner was working full time in STATE 1 at COMPANY A, but he commuted from STATE 2. In 1993 he indicated he had a two-bedroom apartment in STATE 1 and a small apartment in STATE 3 as he was working out of both offices of COMPANY A. He purchased as a residence in CITY 1, Utah, wanting a place where he and his children could gather for vacations. In 1994 he divorced.

7. Petitioner then remarried PETITIONER SPOUSE who was a citizen of the COUNTRY. Petitioner's term at COMPANY A as Managing Partner would be over in 1997 and there was the expectation that he could not be appointed for another term. PETITIONER SPOUSE moved to STATE 1 with the

understanding that any children the couple had would be educated in COUNTRY. In September 1997, while in Utah, Petitioner determined his driver's license was about to expire and he obtained a Utah drivers license using his CITY 1 residence as his address. Petitioner retired from COMPANY A at the end of 1997. During 1997 and through 1999 he sent out letters to international contacts inquiring about board of directors positions in COUNTRY or CONTINENT.

8. In March 1998 the couple's first child, CHILD 1, was born in STATE 1. In 1999 they began looking for a residence to purchase in COUNTRY. In February 2000 they had sold their apartment in STATE 1. They had made an offer on one residence in COUNTRY and that fell through. They moved their furniture from the STATE 1 apartment into storage with the expectation that it would be shipped directly to the new home in COUNTRY. The family moved to the CITY 1 Residence until they were able to find a residence in COUNTRY. Petitioner informed RURAL COUNTY that the CITY 1 residence was now their primary residence for purposes of obtaining the residential property tax exemption. Petitioner continued to receive the primary residential exemption for the CITY 1 residence for 2001 through 2004.

9. Petitioner and PETITIONER SPOUSE determined which school they wanted their son to attend in COUNTRY and then found a residence near the school. The purchase of the residence at SUBDIVISION, STREET, CITY 2 closed in June 2000. They also registered their son at the SCHOOL in June 2000 to start classes in September 2001. The SUBDIVISION property was purchased for approximately \$\$\$\$\$ dollars US, which was more than twice the value of their CITY 1 Residence as indicated in the RURAL COUNTY tax notices. The SUBDIVISION residence was in need of substantial repairs. Petitioner and PETITIONER SPOUSE spent another \$\$\$\$\$ to repair and renovate the property, which included replacing the roof, completely redoing the electrical and the heating systems, double glazing all windows, replacing fireplaces and repainting or papering the interior. The work started that summer and they expected to be able

to move into the residence in early 2001. In October 2000 they obtained membership in a golf club in COUNTRY. While the SUBDIVISION residence was under construction they resided at their CITY 1 residence, rather than finding someplace in COUNTRY to reside. PETITIONER had been appointed to two different boards of directors in COUNTRY by this time as well as two in the United States. When in COUNTRY he checked on the progress of construction. The construction took longer than originally anticipated. PETITIONER SPOUSE was still in CITY 1 when she gave birth to their second child, CHILD 2, in May 2001. Shortly after the birth of CHILD 2, the SUBDIVISION house was completed and the family moved into the residence in July 2001.

10. The family resided in the house in SUBDIVISION from July 2001 until October 2002. However, during that period Petitioner would travel from COUNTRY frequently as part of employment on various boards of directors. Petitioner could have applied for a more permanent residence status in the COUNTRY, as the spouse of a citizen, but he did not do so. By October 2002, he had been offered a position with COMPANY B, which was in the United States and Petitioner would be based out of Utah. The position was to be part time. Petitioner took the position and commuted between the residence in COUNTRY and his CITY 1 residence, while PETITIONER SPOUSE and the children continued to reside at their residence in COUNTRY. Petitioner conceded that beginning in October 2002 he was a resident of Utah for individual income tax purposes.

11. Petitioner did not consider himself to be domiciled in COUNTRY for the purposes of the tax laws of the COUNTRY during the two years at issue. He also indicated that he did not intend to remain in COUNTRY more than seventeen years to avoid COUNTRY inheritance tax laws.

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

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.

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. It is clear that Petitioner did not spend 183 days or more in this state during 2001 or 2002. 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.

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.

As Petitioner’s representative argued, this case is different from many of the ones that have come before the Tax Commission, in that it is not one where the taxpayer had clearly been a resident of Utah for a number of years and then argued that domicile had been changed to another state. In the case before the Commission Petitioner had not been a resident of Utah. He had been a resident of STATE 1. In order to show that he was domiciled in Utah there must have been an abandonment of the STATE 1 domicile as well as an

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,

intent to establish and the actual establishment of a new domicile in Utah. It is clear that the first step, abandonment of the old domicile, had occurred.

The Commission considers the second step of the rule, did Petitioner intend to establish and actually establish a domicile in Utah. In determining the intent of Petitioner the Commission considers Petitioner's actual activities and not merely his declaration of intent. Petitioner's testimony at the hearing was that he had no intent to establish a domicile in Utah. According to his testimony he and his family were only in Utah for special or a temporary purpose, that of needing a place to live until they could establish a permanent residence in COUNTRY. The Commission considers this testimony but gives more weight to Petitioner's activities. Although some activities point to establishment of a Utah domicile, when reviewed in total they support Petitioner's testimony.

Petitioner's ties to Utah began many years prior to the audit period when he clearly was not a resident of Utah. He purchased the vacation property in CITY 1 in 1993 and obtained a Utah driver's license in 1997. At the time these actions took place they did not result in domicile being changed from STATE 1 to Utah. These ties remained major ties to Utah during the audit period

When Petitioner and PETITIONER SPOUSE sold their STATE 1 apartment in February 2000 they were already searching for a residence to purchase in COUNTRY. Their first offer fell through; a second offer resulted in a successful purchase that closed only four months later. Major repairs were needed to the property acquired in COUNTRY and they determined not to live there while the work was proceeding, which they expected would take less time than it eventually did. During that summer they made commitments that indicated an intent, at the very least, to spend significant time in COUNTRY. They registered a child for school to begin the following year and joined a golf club. Rather than renting a place to stay in COUNTRY

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

and then moving a second time, they stayed at the CITY 1 residence during the construction. When construction was completed they moved to COUNTRY.

Being married to a citizen of the COUNTRY, Petitioner qualified for a permanent residency status. The fact that he had not yet applied during the audit period is not determinative. He traveled frequently for work and could enter and leave the COUNTRY as needed with his U.S. passport.

The fact that complicates the matter is that Petitioner had done some tax planning and organized his actions so that Petitioner concluded that he would not be considered a resident of the COUNTRY for tax purposes during the audit period. Additionally, Petitioner has done some long term planning and admits that he does not intend to be a resident of the COUNTRY for more than 17 years to avoid estate tax issues. There was some argument on whether or not Petitioner was correct in his position regarding the tax laws of the COUNTRY, but the issue is outside this Commission's expertise and this Commission makes no comment on Petitioner's position. Petitioner's tax treatment and tax filing raise the issue of 'nowhere income.' If Petitioner was neither a resident of Utah for tax purposes, nor a resident of the COUNTRY for tax purposes, it is contrary to the position that a person must have a tax domicile somewhere. However, it is clear from the facts that Petitioner's stay in Utah was no more than a special or temporary purpose and permanent domicile in Utah was not established according to the Utah Administrative Rule R865-9I-2. Pursuant to the Utah rule, Petitioner would have continued to be domiciled in STATE 1 until domicile was established in COUNTRY, or later in Utah in October 2002.

CONCLUSIONS OF LAW

Respondent raises a valid concern that everyone must have a domicile for income tax purposes. However, pursuant to Utah Admin. Rule R865-9I-2 that domicile was not Utah for most of the audit period. Under the Utah law the domicile would not have been established in Utah, regardless of whether

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STATE 1 would have the same law or position. For this reason the Commission concludes that Petitioner is not liable for Utah individual income tax on his taxable income pursuant to Utah Code Sec. 59-10-104, until October 2002.

DECISION AND ORDER

Based on the foregoing, the Tax Commission abates the audit in its entirety for the tax year 2001. Respondent is hereby ordered to adjust the audit for tax year 2002 to be based on domicile in Utah beginning October 1, 2002. It is so ordered.

DATED this ____ day of _____, 2007.

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 _____, 2007.

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.

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