

05-0121
Income Tax
Signed 05/18/2007

BEFORE THE UTAH STATE TAX COMMISSION

<p>PETITIONER, 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. 05-0121</p> <p>Tax Type: Income Tax Tax Period: 2001 - 2003</p> <p>Judge: Jensen</p>
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Presiding:

Marc Johnson, Commissioner
Clinton Jensen, Administrative Law Judge

Appearances:

For Petitioner: PETITIONER

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 a Formal Hearing on January 25, 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, penalty and interest deficiencies for tax years 2001, 2002, and 2003. The Division issued its Statutory Notice of Estimated Income Tax on January 13, 2005.

2. As of July 31, 2006, the amounts of the deficiencies at issue are as follows:

Year	Tax	Penalty	Interest	Credits	Balance
2001	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$		\$\$\$\$\$
2002	\$\$\$\$\$		\$\$\$\$\$		\$\$\$\$\$
2003	\$\$\$\$\$		\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$

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. Petitioner had not filed a Utah resident or Utah nonresident individual income tax return for tax year 2001. For 2002 and 2003, the Petitioner filed non-resident returns. The Petitioner has paid no Utah income tax for the years 2001 through 2003.

5. The Petitioner moved from STATE 1 to Utah in 1988 as part of his employment with COMPANY A.

6. From the time of the Petitioner's move to Utah in 1988 until January 1, 2001, the Petitioner was domiciled in Utah.

7. On January 1, 2001, the Petitioner went to work in CITY 1, STATE 2. He leased an apartment in CITY 1 because his employer required that he live within two hours of the airfield from which he was flying for his employment.

8. As of January 1, 2001, the Petitioner owned a home in CITY 2, Utah. He put the home on the market when he took the STATE 2 job. The Petitioner planned to have his wife remain in the home in CITY 2 until it sold. Although the Petitioner listed the CITY 2 home with a realtor, it did not sell. Eventually, the Petitioner's wife received a job offer in the CITY 2 area. At that time, the Petitioner and his wife decided that it made more sense for her to work in Utah and stay in the CITY 2 home.

9. The Petitioner maintained a Utah driver's license throughout the 2001 to 2003 tax years. The Petitioner explained that he was under a plea in abeyance agreement for a traffic ticket at that time. His understanding was that he had to maintain his Utah driver's license and that gaining licensure in another state

would violate the terms of his plea in abeyance.

10. The Petitioner did not vote in any state during the time period from the beginning of 2001 through the end of 2003.

11. During 2001 to 2003, the Petitioner had cars registered in both Utah and STATE 2.

12. In 2001 through 2003, the Petitioner's two children attended private schools in STATE 3.

13. From 2001 through 2003, the Petitioner spent less than 90 days per year in Utah. His wife spent about 300 days in Utah and his children spent approximately 100 days each in Utah.

14. The Petitioner plans to move to STATE 3 with his wife when both retire.

15. The Petitioner does his banking at BANK 1 and at BANK 2, both in STATE 2.

16. The Petitioner filed his federal tax returns from STATE 2 and considers STATE 2 his permanent place of abode.

17. The Petitioner has his taxes prepared by a STATE 1 CPA.

18. The Petitioner did not disclose where his doctors are located and does not claim membership in any clubs or organizations.

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). That rule was amended in December 2002 for the 2003 tax year and years thereafter. The rule applicable to the 2001 and 2002 tax year 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.

For the 2003 tax year and years thereafter, Utah Administrative Rule R865-9I-2(D) provides as follows:

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.

Rule R865-9I-2(D) refers to Utah Administrative Rule R884-24P-52, which provides seventeen factors to consider in making a determination regarding domicile:

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 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. 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.¹ As discussed by the courts, the fact finder may accord the party's activities greater weight than his or her declaration of intent.² Utah Admin Rule R865-9I-(D) provides that a domicile is a permanent home

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).

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

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.

Weighing the facts in this matter, the Petitioner may have abandoned his Utah domicile when he moved to STATE 2. But it is clear that he did not create a new domicile in STATE 2. Both the Petitioner and his children spend sufficient time in Utah to support a conclusion that the family still congregates in Utah when not involved in school in the case of the children and not involved in work in the case of the Petitioner. The Petitioner's move to STATE 2 is better described as a move to meet the conditions of employment rather than to establish a domicile. Thus, under both the rule applicable through 2002 and the rule applicable in 2003, the Petitioner did not establish a domicile outside of Utah during the 2001 through 2003 tax years.

CONCLUSIONS OF LAW

1. The Commission has made a finding of fact that Petitioner was domiciled in Utah during 2001 through 2003 and was a Utah resident individual on that basis. For this reason the Commission concludes that Petitioner is liable for Utah individual income tax on her state taxable income pursuant to Utah Code Sec. 59-10-104.

2. The Commission may waive penalties upon a showing of reasonable cause. Utah Code Sec. 59-10-401(10). In this matter the Commission finds reasonable cause for waiver of the penalties.

DECISION AND ORDER

Based on the foregoing, the Tax Commission sustains the audit of additional income tax, and interest but waives penalties at issue in this matter for tax years 2001 through 2003. It is so ordered.

DATED this _____ day of _____, 2007.

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

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Clinton Jensen
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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