

05-0212  
Audit  
Signed 08/02/2006

BEFORE THE UTAH STATE TAX COMMISSION

---

PETITIONER 1 & PETITIONER 2,	)		
	)	<b>ORDER</b>	
Petitioners,	)		
	)	Appeal No.	05-0212
v.	)		
	)		
AUDITING DIVISION OF	)	Tax Type:	Income
THE UTAH STATE TAX	)	Tax Years:	1995-2001
COMMISSION,	)	Judge:	Phan
	)		
Respondent.	)		

---

**Presiding:**

Jane Phan, Administrative Law Judge

**Appearances:**

For Petitioner:     PETITIONER REPRESENTATIVE, Attorney at Law  
For Respondent:    RESPONDENT REPRESENTATIVE, Assistant Attorney General

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission for an Initial Hearing pursuant to the provisions of Utah Code Sec. 59-1-502.5, on May 8, 2006. The parties both submitted post-hearing submissions on May 30, 2006, and Petitioner submitted a subsequent post hearing response on June 7, 2006.

Petitioner is appealing the assessment of Utah individual income tax, penalties and interest for the years 1995 through 2001. Petitioner had not filed Utah returns for any of the years at issue. The Statutory Notices of Estimated Income Tax for all the subject years were issued on January 13, 2005. The amount of the additional tax, penalties and interest as of the assessment date for each year are as follows:

	Tax	Penalties	Interest <sup>1</sup>
1995	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$
1996	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$
1997	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$
1998	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$

---

<sup>1</sup> Interest continues to accrue on the unpaid balance.

1999	\$\$\$\$	\$\$\$\$	\$\$\$\$
2000	\$\$\$\$	\$\$\$\$	\$\$\$\$
2001	\$\$\$\$	\$\$\$\$	\$\$\$\$
			<u>APPLICABLE LAW</u>

A tax is imposed on the state taxable income of every resident individual for each taxable year.

(Utah Code Sec. 59-10-104).

Resident individual is defined in Utah Code Sec. 59-10-103(1) as follows:

"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) (1995-2001)<sup>2</sup> as follows:

“Domicile” 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.

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. . .

<sup>2</sup> The rule defining “domicile” was revised in 2003. However, the Commission applies the version of the rule that was in affect during the audit period.

The Tax Commission is granted the authority to waive, reduce, or compromise penalties and interest upon showing of reasonable cause. (Utah Code Sec. 59-1-401(10).)

DISCUSSION

Respondent based its audit on the assertion that Petitioners were residents of Utah for tax purposes during all years at issue. Petitioners had not filed resident Utah Individual Income Tax Returns maintaining that PETITIONER 1 was not a resident of Utah during any of the years at issue, and that PETITIONER 2, although a Utah resident, did not earn sufficient income to require that she file a Utah income tax return. The issue in this appeal is whether PETITIONER 1 was a "resident individual" in the State of Utah for the purposes of Utah Code Sec. 59-10-103 during the audit years.

The law provides two separate alternatives under which a person would be considered a resident in Utah for income tax purposes. Resident individual is defined in Utah Code Sec. 59-10-103(1) as: 1) 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 2) 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.

From the information presented for two of the years PETITIONER 1 may have met the second test of residency for tax purposes. He indicates that he spent more than 183 days per year in Utah and traveling during 1995 and 2000, and he maintained with PETITIONER 2 a residence in Utah. Considering the burden of proof and that under the law the statute says any fraction of the day spent in Utah is considered a whole day, Petitioner has not provided sufficient evidence to establish that he was not in Utah for the 183 days during these two years.

For the other years at issue, the issue before the Commission is the alternative test for a "resident individual" as one who is "domiciled" in the State of 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.<sup>3</sup> As discussed by the courts in considering this issue, the factfinder may accord the party's activities greater weight than his or her declaration of intent.<sup>4</sup>

PETITIONER 1 claims that he was a resident of STATE 1 during the years at issue and that he had never been a resident of Utah. PETITIONER 1 was originally from STATE 2. He and PETITIONER 2 were married in STATE 2 in 1960. A few months later PETITIONER 1 joined the ( X ). PETITIONER 2 and then the children generally traveled with him to his duty stations, none of which were in Utah. He retired from the ( X ) in 1980. At that time PETITIONER 1 found employment as a fire protection specialist in the oil fields at CITY 1, STATE 1. The family moved to CITY 2 STATE 1, where they purchased a residence. When working PETITIONER 1 would have to stay at a company provided dormitory in CITY 1. The schedule that he worked was two weeks straight where he would have to remain at the job site 24 hours per day, then he would be off for two weeks at which time he would stay with his family at their residence in STATE 1. The family resided at the CITY 2, STATE 1 residence from 1981 through 1993. During this time PETITIONER 1 and PETITIONER 2 obtained STATE 1 drivers licenses and registered to vote in STATE 1. Their children attended school in STATE 1 and they clearly had established a domicile in STATE 1.

In 1993, PETITIONER 2's aging father had health issues and she determined that she would move to Utah to be closer to her father and grown children who resided in Utah, STATE 2 and STATE 3. She found a residence in Utah. She was unable to purchase it in her own name, not having income of her own.

---

3 The 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).

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

PETITIONER 1 co-signed the mortgage and his name was on the title. The couple's minor children moved with PETITIONER 2 to Utah and began attending school in Utah. PETITIONER 2 resided in Utah until August 2001 when she sold the Utah residence and moved back to STATE 1. At that time PETITIONER 1 And PETITIONER 2 purchased another residence in STATE 1.

During the time that PETITIONER 2 was residing in Utah. PETITIONER 1 continued to work at the CITY 1 ( X ) with the two-week on/two week off schedule. Petitioners sold their residence in CITY 2 STATE 1 in 1993. On his weeks off PETITIONER 1 would spend some of the time at the residence of his adult daughter in STATE 1 and would spend some time off in Utah with his wife and younger children. Bills and financial documents were mailed to the Utah address, as PETITIONER 2 was the one who managed the family's finances. PETITIONER 1 could not receive personal mail at the CITY 1 dormitory, but it appears he did maintain a mailing address in STATE 1. During this period of time PETITIONER 1 did not apply for the STATE 1 resident dividend that is paid to residents of STATE 1 and it was unclear if he and PETITIONER 2 had been receiving the STATE 1 resident dividend during the period from 1981 through 1993 when they owned a residence and both resided in STATE 1.

PETITIONER 1 indicates in the affidavit that he had no intent on moving to Utah and wanted to remain in STATE 1. His representative pointed to the fact that he never tried to find employment in Utah or STATE 4 where there are oil fields with similar job opportunities. PETITIONER 1 always remained employed in STATE 1. PETITIONER 1 did obtain a Utah Drivers License. He indicates the only reason he did this was that a police officer who had pulled him over in Utah told him he had to obtain a Utah license if he was going to be driving in Utah. PETITIONER 1 complied and indicates he had no idea that it would have a tax impact.

---

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

For the tax year 1993, PETITIONER 1 and PETITIONER 2 consulted with an accountant about how they should file their income tax returns. They relied on the advice given to them that they would not need to file a Utah income tax return.

As Petitioners had clearly established domicile in STATE 1 prior to the audit period, the Commission must analyze the facts considering the provision of the rule which indicates once a domicile has been established, two things are necessary to create a new domicile: 1) an abandonment of the old domicile; and 2) the intention and establishment of a new domicile. See Utah Admin. Rule R Rule R865-9I-2(D) (1995-2001).

This case presents a difficult set of facts to the Commission. The Commission has held on prior occasions that a husband and wife could have separate domiciles for income tax purposes. The question before the Commission is whether PETITIONER 1 abandoned his domicile in STATE 1 and both intended to establish and did, in fact, establish a new domicile in Utah. After selling the family residence in 1991, he continued to work in STATE 1 and never sought employment anywhere else. What makes this a difficult decision is the fact that he did not maintain a permanent place of abode there. When in STATE 1 he resided at a company provided dormitory housing or stayed at his adult daughter's residence. He did not rent an apartment or residence of his own in STATE 1. It was represented at the hearing that during his time off from work he was not allowed to stay at the work dormitory. He did not receive the STATE 1n resident dividend. He did not maintain his STATE 1n drivers license. His main tie with STATE 1 continued to be his employment.

However, under the rule, not only would PETITIONER 1 have to abandon STATE 1 as a domicile, he would have to intend to establish and actually establish a new domicile in Utah. The weight of the factors indicate that he did not have the intent. During the years at issue and even up through the time of

the hearing, PETITIONER 1 never changed his employment to a location in Utah or even closer to Utah. It was not argued that he would have been unable to find a job in oilfields in other states. In fact PETITIONER 1 had been working in the oil fields in STATE 1, with only a short interruption when he retired, since 1981. Additionally, PETITIONER 2 moved back to STATE 1 after her father passed away. These factors supports Petitioners' contention that PETITIONER 1 did not intend to establish a domicile in Utah. He did establish some ties to the state of Utah but they appear to be for a temporary purpose, to spend some time with his family while they were in Utah. As Petitioners' representative has pointed out, the Commission must consider this case from the point of view that PETITIONER 1 was a STATE 1n resident. In order to be considered domiciled in Utah he would have to abandon STATE 1, and intend to establish and establish a domicile in Utah. For this reason the Commission finds that he continued to remain domiciled in STATE 1.

However, regardless of domicile, PETITIONER 1 may be a resident of Utah for tax purposes under the second alternative, that of maintaining a permanent place of abode and spending more than 183 days per calendar year in the state for the years 1995 and 2000. The permanent abode for purposes of Utah Code Sec. 59-10-103(1)(s)(i)(B) is not the same as a domicile under subsection (1)(s)(i)(A). PETITIONER 1 was the joint owner of the house; it was maintained as a residence with the money that he received. When calculating the 183 days a fraction of a calendar day is counted as one whole day. The 183 day and permanent abode issue was not as much a focus at the Initial Hearing as domicile. The information before the Commission is that PETITIONER 1 was in Utah 183 days<sup>5</sup> of more for two of the years at issue and he has the burden of proving otherwise. Regarding penalties assessed in this matter, because the Commission is abating the tax assessed for the years 1996 through 1999 and 2001, the penalties and interest are also abated for those

---

<sup>5</sup> In his Affidavit, PETITIONER 1 indicates that for 2000 he spent 183 days "in Utah or traveling in other states." (Emphasis added.) Based on this representation if he had spent just one of those 183 days traveling outside of Utah the conclusion would be different. Although it is not unreasonable to assume he spent at least one of those days in another state, considering the burden of proof, it is Petitioner who needs to clarify the number of days in Utah.

years. For the tax years 1995 and 2000 the Commission is sustaining the tax amount but finds there is reasonable cause for waiver of the penalties. They would both fit under the first time in three years error category, in addition the other circumstances in this matter would make it difficult for a lay person to understand that the matter of a few days could obligate one to file and pay tax in Utah. Interest is waived only in the event of Tax Commission error and that was not shown in this matter.

DECISION AND ORDER

Based upon the information presented at the hearing, the Commission finds that Petitioner was not a Utah resident for individual income tax purposes for the tax years 1996 through 1999 and 2001. The audits for those years are abated in their entirety. However, the Commission finds that the Petitioner was a resident for tax purposes for tax years 1995 and 2000 and sustains the income tax and interest for those years. The Commission abates the penalties. 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 \_\_\_\_\_, 2006.

---

Jane Phan  
Administrative Law Judge



Appeal No. 05-0212

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 \_\_\_\_\_, 2006.

Pam Hendrickson  
Commission Chair

R. Bruce Johnson  
Commissioner

Marc B. Johnson  
Commissioner

D'Arcy Dixon Pignanelli  
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.

*JKP/05-0212.int.doc*