05-0242
Audit
Signed 04/21/2006

BEFORE THE UTAH STATE TAX COMMISSION

PETITIONER,	**ORDER**	
Petitioner,	Appeal No.	05-0242
v.	Acct. No.	#####
	Tax Years:	1998, 1999, 2000 & 2001
AUDITING DIVISION OF THE UTAH STATE TAX COMMISSION,	Tax Type:	Individual Income Tax
	Judge:	Chapman
Respondent.		

Presiding:
Kerry R. Chapman, Administrative Law Judge

Appearances:
For Petitioner: PETITIONER (by telephone)
For Respondent: RESPONDENT REPRESENTATIVE 1, Assistant Attorney General
RESPONDENT REPRESENTATIVE 2, from the Auditing Division

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 April 13, 2006.

At issue is the Division's February 17, 2005 assessment of additional Utah income tax to the Petitioner for the 1998, 1999, 2000, and 2001 tax years. The Division has determined that the Petitioner was "domiciled" in Utah and assessed taxes in accordance with him being a Utah "resident individual" for all four years. The taxpayer agrees that after he left the military in 2001, he was domiciled in Utah in 2001 for tax purposes and does not contest the Division's assessment for this one year. However, the Petitioner asserts that he was not domiciled in Utah and a Utah resident individual for the other three years at issue.

For the 1998, 1999, and 2000 tax years, the Petitioner was a servicemember in the (X) and was stationed outside of Utah. The Petitioner had Utah source income from renting out his Utah home and filed Utah non-resident tax returns, claiming to be a "resident" of STATE 1. For these three tax years, the

Division changed the Petitioner's filing status from non-resident to resident, which had the effect of imposing additional Utah income tax on the income he received as a military serviceperson.

For the 1998 tax year, the Petitioner reported $$$$$ of federal adjusted gross income for federal purposes and $$$$$ of this amount as Utah income on his Utah non-resident return. For the 1999 tax year, the Petitioner reported $$$$$ of federal adjusted gross income for federal purposes and $$$$$ of this amount as Utah income on his Utah non-resident return. For the 2000 tax year, the Petitioner reported $$$$$ of federal adjusted gross income for federal purposes and $$$$$ of this amount as Utah income on his Utah non-resident return. Although the Division made its assessments more than three years after the Petitioner filed his Utah returns for these three tax years, the Division asserts that a six-year statute of limitation is applicable, pursuant to Utah Code Ann. §59-10-536(9). Because the amount of the Petitioner's Utah taxable income for each of these years, as determined and assessed by the Division, is in excess of 25% of the amount reported by the Petitioner, the Division asserts that the Petitioner underreported his income by more than 25%, thereby invoking the six-year statute of limitation authorized in Section 59-10-536(9).

The Petitioner asserts that he was not "domiciled" in Utah during these three tax years because, upon entering the military in 1986, he was given the opportunity to claim STATE 1 as his "legal residence" for tax purposes in accordance with the Soldiers and Sailors Relief Act the and that he intended to return to and work in STATE 1 after discharge or retirement from the military. For these reasons, the Petitioner asserts that he was not domiciled in Utah during these three tax years and, as a result, was not a Utah resident individual for income tax purposes.

Prior to and including the audit period, the Petitioner had connections with Utah, but he has also lived in other locations, including STATE 1. The Petitioner was raised and went to school in Utah. In 1978 or 1979, the Petitioner moved to STATE 1, where he bought a home and worked as an (X) until he lost

his job during the "(X)" (X) of 1981. In 1982, the Petitioner sold his STATE 1 home and moved back to Utah, where he took a job, bought a home, and reestablished his Utah domicile. While in Utah, the Petitioner entered the (X) in 1986 and was stationed at (X) in Utah from 1986 through 1996.

The Petitioner and his family lived in Utah until December 1996, when he was assigned to duty in CITY 1, COUNTRY, where he remained until December 1999. From December 1999 to February 2001, the Petitioner was stationed at (X) in STATE 2. The Petitioner retained ownership of his Utah home during the years he spent in COUNTRY and STATE 2 and, upon leaving the military in 2001, he and his wife moved back to their home in Utah. In 2001, the Petitioner accepted a job in STATE 3, but his wife remained in Utah. While working in STATE 3, the Petitioner retained his Utah driver's license and returned to his Utah home regularly, as his work schedule allowed. In 2002, the Petitioner has hired to be a (X) in STATE 4, where he moved. His wife subsequently joined him in STATE 4.

Although the Petitioner claimed STATE 1 as his "legal residence" in 1986 when he joined the military, he continued to maintain a home in Utah where he and his family lived. He registered his vehicles in Utah and maintained a Utah driver's license, Utah voter registration and other indices of Utah domicile during the years he resided and worked in Utah. The Petitioner states that he joined the (X) in 1986 with the intention to work as an (X) and, upon retirement, hopefully return to his former (X) job in STATE 1. However, the Petitioner had no contacts with STATE 1 after moving and establishing his domicile in Utah in 1982.

APPLICABLE LAW

Under UCA §59-10-104(1), "a tax is imposed on the state taxable income . . . of every **resident individual**" (emphasis added). For purposes of Section 104(1), a "resident individual" is defined

in Utah Code Ann. §59-10-103(1)(k) to include "an individual who is domiciled in this state for any period of time during the taxable year[.]"

To administer these statutes, the Commission has enacted Utah Admin. Rule R865-9I-2 ("Rule 2") to further explain when a person is domiciled in Utah for income tax purposes. For the years in question, Section D. of Rule 2 provided 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 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 domicile, a new domicile must be shown.

In addition, for the years at issue, Section E. of Rule 2 provided guidance concerning the domicile of servicepersons, as follows in pertinent part:

> 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.
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> 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.
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> . . . .

Title 50, U.S. Code Section 574 of the Soldier's and Sailor's Relief Act provides as follows in pertinent part:

> (1) For the purposes of taxation in respect of any person, or of his personal property, income, or gross income, by any State, . . . such person shall not be deemed to have lost a residence or domicile in any State . . . solely by reason of being absent therefrom in compliance with military or naval orders, or to have acquired a residence or domicile in, or to have become resident in or a resident of,

> any other State . . . while, and solely by reason of being, so absent. For the purposes of taxation in respect of the personal property, income, or gross income of any such person by any State . . . of which such person is not a resident or in which he is not domiciled, compensation for military or naval service shall not be deemed income for services performed within, or from sources within, such State . . . .

The statute of limitations to assess additional tax where a return has been filed is provided in UCA §59-10-536, as follows in pertinent part:

> (1) Except as otherwise provided in this section, the amount of any tax imposed by this chapter shall be assessed three years after the return was filed (whether or not such return was filed on or after the date prescribed) . . . .
> . . . .
> (9) The amount of any tax imposed by this chapter may be assessed at any time within six years after the time the return was filed if:
> (a) a resident individual, estate, or trust omits from gross income as reported for federal income tax purposes an amount properly includable therein which is in excess of 25% of the amount of gross income stated in the return; or
> (b) a nonresident individual, estate, or trust omits from gross income as reported for federal income tax purposes an amount of adjusted gross income derived from Utah sources as defined by Section 59-10-117, properly includable therein, which is in excess of 25% of the amount of adjusted gross income derived from Utah sources which is reflected in such return. For the purposes of this Subsection (b) there may not be taken into account any amount which is omitted in the return if such amount is disclosed in the return, or in a statement attached to the return, in a manner adequate to apprise the commission of the nature and amount of such item.

DISCUSSION

The Division assessed additional Utah income tax to the Petitioner for the 1998, 1999, 2000 and 2001 tax years, on the basis that the Petitioner was domiciled in Utah during these years and, pursuant to Section 59-10-103(1)(k), was a Utah resident individual for income tax purposes. The Petitioner does not disagree that he was domiciled in Utah for the 2001 tax year and that the Division's assessment for this year is correct. However, he contests the Division's assessment for the other three years, i.e., 1998, 1999, and 2000, asserting that he should be considered a STATE 1, not a Utah, resident for tax purposes for these years.

Domicile. The Petitioner was a Utah domiciliary when he entered the military in 1986.

Domicile is defined in Section D. of Rule 2 and provides 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. The Petitioner asserts that he abandoned his Utah domicile and established a STATE 1 domicile in 1986 when he entered the military to pursue his long-term goal to return to his pre-(X) job in STATE 1 after his future retirement from the military and claimed STATE 1 as his legal residence for tax purposes.

The Commission is not persuaded that a Utah domiciliary who joins the military and claims another state as his legal residence automatically loses his Utah domicile for state tax purposes. Subsection E.1. of Rule 2 provides that "[i]t is possible for an individual in active military service to change his domicile by definite intent supported by actions." Furthermore, Title 50, Section 574 of the Soldier's and Sailor's Relief Act provides that a servicemember does not lose his or her domicile in one state or establish it in another solely by reason of being absent or present in a state because of military orders. Although a declaration of a particular state as one's legal residence may be a factor in determining whether one has abandoned an old domicile and established a new one, the totality of the person's intent and actions must be examined to reach a decision.

The Petitioner states that he has shown that he had intent to move to STATE 1 at a future date upon joining the military in 1986. Whether the Petitioner established a new domicile in STATE 1 in 1986 upon joining the military or maintained his Utah domicile is not only a question of intent, but also a question of fact. Whether someone is a "resident individual" for state tax purposes has been addressed by the appellate courts in Utah,[1] which have found that a taxpayer's activities may be accorded greater weight in determining his or her domicile than a declaration of intent.[2]

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1 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),

Although it appears that the Petitioner may have intended for STATE 1 to be considered his state of residence for tax purposes and may have hoped to move there upon retiring from the military, the Commission does not find that the Petitioner's actions support such a conclusion. Not only did the Petitioner maintain ties to Utah throughout the years he served in the military, including the 1998, 1999, and 2000 tax years, he never established any ties with STATE 1 after 1982 and did not return there upon retiring from the military. In addition, a December 15, 1997 email sent by the Petitioner to the FAA shows that he was interested in applying for a job in STATE 4 as of that date. Based on the evidence and testimony proffered at the Initial Hearing, the Commission finds that not only did the Petitioner not abandon his Utah domicile in 1986, but that he also did not establish a new domicile in a state other than Utah until he moved to STATE 4 after the audit periods at issue in this appeal. Accordingly, pursuant to Section 59-10-103(1)(k) and Rule 2, the Commission finds that the Petitioner was domiciled in Utah for the tax years at issue and, as a result, was a Utah resident individual for income tax purposes.

Statute of Limitations. For the 1998, 1999, and 2000 tax years, the three years that remain at issue in this matter, the Petitioner filed Utah non-resident returns. Section 59-10-536(1) provides that "[e]xcept as otherwise provided in this section, the amount of any tax imposed by this chapter shall be assessed three years after the return was filed." The Petitioner's returns for these years were statutorily due by April 15, 1999 for the 1998 tax year, April 15, 2000 for the 1999 tax year, and April 15, 2001 for the 2000 tax year. The Division imposed its assessment for these tax years on February 17, 2005, which is more than three years after the statutory due dates for these three tax years. The Division did not assert that its assessments were made within the three-year statutory period, which would only have been possible had the Petitioner filed his

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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*

returns for these years untimely and no earlier than February 17, 2002. Instead, the Division argued that a six-year statute of limitation authorized under Section 59-10-536(9) applied to its assessment for these tax years.

The Division argues that the Petitioner underreported his taxable income by more than 25% for all three of these tax years, thus invoking the six-year statutory period. The Commission has determined that the Petitioner was domiciled in Utah for these three tax years, and, as a result, his Utah taxable income would be based on the entirety of his gross income as shown for federal purposes. Accordingly, the Division is correct that the correct amount of the Petitioner's Utah taxable income for each of these years is in excess of 25% of the amount of Utah taxable income that the Petitioner reported and paid taxes on for each of these years.

However, the invocation of the six-year statute of limitation is not dependent on whether the taxpayer underreports his Utah taxable income by more than 25%. The statute imposes the six-year statutory period only if the taxpayer "omits from gross income as reported for federal purposes an amount" properly included therein. For the three years at issue, the Division did not assert that the Petitioner omitted any gross income as reported for federal purposes from either his federal returns or his Utah returns. The Division's assessments appear not to increase the amount of the Petitioner's gross income as reported for federal purposes, but to reclassify its various components for state tax purposes. Thus, it appears that the Petitioner included all amounts of his gross income as reported for federal purposes on his Utah returns, reporting it in a manner adequate to apprise the Commission of the nature and amounts of the income. Furthermore, the last sentence of Subsection 59-10-536(9)(b) indicates that the statute is not intended to extend the three-year statute of limitation where a taxpayer files a return and discloses and apprises the Commission of all amounts of gross income.

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

For these reasons, the Commission finds that the six-year statute of limitation authorized in Section 59-12-536(9) is not applicable to the Petitioner's 1998, 1999, and 2000 tax returns under the circumstances present in this matter. As a result, the three-year statute of limitations authorized under Section 59-10-536(1) is applicable. Because the Division's February 17, 2005 assessments were issued beyond the three-year statutory period for each of these three tax years, the Commission overturns the Division's assessments for the 1998, 1999, and 2000 tax years.

DECISION AND ORDER

Based upon the foregoing, the Commission hereby sustains the Division assessment of additional income tax and interest for the 2001 tax year. However, the Commission overturns the Division's assessment of additional income tax and interest for the 1998, 1999, and 2000 tax years on the basis that the assessments were imposed beyond the three-year statute of limitation applicable to these years. 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.

_____
Kerry R. Chapman
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 _____, 2006.

Pam Hendrickson
Commission Chair

R. Bruce Johnson
Commissioner

Palmer DePaulis
Commissioner

Marc B. Johnson
Commissioner

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