

05-0520

INDIVIDUAL INCOME - DOMICILE

TAX YEARS: 1997, 1998, 1999, 2000, 2001 & 2002

SIGNED: 04-16-2008

COMMISSIONERS: P. HENDRICKSON, B. JOHNSON, D. DIXON

ABSENT: M. JOHNSON

GUIDING DECISION

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BEFORE THE UTAH STATE TAX COMMISSION

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PETITIONER 1 (deceased) & PETITIONER 2,  Petitioners,  v.  AUDITING DIVISION OF THE UTAH STATE TAX COMMISSION,  Respondent.	<b>FINDINGS OF FACT, CONCLUSIONS OF LAW, AND FINAL DECISION</b>  Appeal No.    05-0520  Account No.    ##### Tax Type:    Individual Income Tax Years:    1997, 1998, 1999, 2000, 2001 & 2002  Judge:        Chapman
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**Presiding:**

Pam Hendrickson, Commission Chair

Kerry R. Chapman, Administrative Law Judge

**Appearances:**

For Petitioner:    PETITIONER REP., Attorney  
                          PETITIONER 2

For Respondent:    RESPONDENT REP. 1, Assistant Attorney General  
                          RESPONDENT REP. 2, from the Auditing Division

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission for a Formal Hearing on September 26, 2007. Subsequent to the hearing, both parties submitted a Post Hearing Brief, in which they set forth their respective legal arguments. The Division submitted its Post Hearing Brief on October 17, 2007, while the Petitioners submitted their Post Hearing Brief on December 17, 2007.

Based upon the evidence and testimony presented at the hearing and in the parties' Post Hearing Briefs, the Tax Commission hereby makes its:

FINDINGS OF FACT

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1. The tax at issue is individual income tax.
2. The tax years at issue are 1997, 1998, 1999, 2000, 2001 and 2002.

3. On March 24, 2005, Auditing Division (the "Division") issued Statutory Notices of Estimated Income Tax ("Statutory Notices") to PETITIONER 1, in which it imposed additional tax, penalties, and interest for the 1997, 1998 and 1999 tax years, as follows:

<u>Year</u>	<u>Tax</u>	<u>Penalties</u>	<u>Interest</u>	<u>Total</u>
1997	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$
1998	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$
1999	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$	<u>\$\$\$\$\$</u>
				\$\$\$\$\$

4. The Division's calculated its original assessments for the 1997, 1998 and 1999 tax years based on PETITIONER 1 filing "single individual" returns on which he could claim one exemption.

5. Also on March 24, 2005, the Division issued Statutory Notices to PETITIONER 1 and PETITIONER 2, in which it imposed additional tax, penalties, and interest for the 2000, 2001 and 2002 tax years, as follows:

<u>Year</u>	<u>Tax</u>	<u>Penalties</u>	<u>Interest</u>	<u>Total</u>
2000	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$
2001	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$
2002	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$	<u>\$\$\$\$\$</u>
				\$\$\$\$\$

6. The Division calculated its assessments for the 2000, 2001 and 2002 tax years based on PETITIONER 1 and PETITIONER 2 filing "married filing joint" returns on which they could claim two exemptions.

7. For all years at issue, the Petitioners filed joint federal tax returns. However, neither PETITIONER 1 nor PETITIONER 2 filed a single or joint Utah income tax return for any of the years at issue.

Preliminary Hearing - Effect of PETITIONER 1's Estate Being Probated on Assessments

8. On November 9, 2006, the Commission heard oral arguments concerning the Petitioners' Motion for Partial Summary Judgment, in which they moved for the Commission to rule that the Division was barred under STATE 1 Probate Code from issuing the assessments at issue to PETITIONER 1, who was deceased and whose estate had already been probated.

9. On March 2, 2007, the Commission issued an Order Denying the Petitioners' Motion for Partial Summary Judgment ("Partial Summary Judgment Order"), in which it ruled that neither Utah law nor STATE 1 law barred the Division from issuing its assessments to PETITIONER 1.<sup>1</sup> Among the facts the Commission found to exist and which were not contested at the Formal Hearing include:

- a. PETITIONER 1 died in STATE 2 on DATE.
- b. On July 2, 2003, the STATE 1 Fifth District Court issued an Order Admitting Will to Probate and Appointing Personal Representative in the matter of PETITIONER 1's estate.
- c. Notice of Probate in the matter of PETITIONER 1's estate was published ( X ) consecutive times in the *PUBLICATION*, a weekly STATE 1 newspaper. The first publication was made on July 7, 2003 and the last on July 21, 2003. The notice stated, in part, that "[c]reditors having claims against the decedent or the estate are required to file them . . . on or before three months (3) after the date of the first publication of this notice, and if such claims are not so filed, unless otherwise allowed or paid, they will be forever barred."

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<sup>1</sup> Because the Petitioners moved for partial summary judgment, the Commission viewed the facts before it in the light most favorable to the Division. As a result, for purposes of its summary judgment ruling, the Commission assumed that the Petitioners were Utah resident individuals for all years at issue and that the Division was a creditor that was reasonably ascertainable when PETITIONER 1's estate was probated. Now that a factual hearing has been held, the Commission will address these assumptions in its final decision.

- d. The Notice of Probate concerning PETITIONER 1's estate that was published in the *PUBLICATION* was not mailed to the Division or the Commission.
- e. The Division first attempted to contact the Petitioners concerning the assessments at issue in November 2004.

Domicile of Petitioners

10. The Division contends that both of the Petitioners were domiciled in Utah for all six of the tax years at issue. The Petitioners concede that they were Utah domiciliaries until 1989, but contend that they abandoned their Utah domicile and established a new domicile in CITY 1, STATE, COUNTRY ("STATE, COUNTRY") in 1989. Furthermore, subsequent to 1989, the Petitioners contend that they have also established domiciles in ( PORTION REMOVED ) (hereinafter "ISLAND") and CITY 2, STATE 1, but have intentionally ordered their affairs so as not to reestablish domicile in Utah.

11. PETITIONER 1 was the founder of COMPANY A ("COMPANY A"), a transportation company headquartered in Utah, with terminals and offices throughout the United States. Until 1989, PETITIONER 1 served as President of COMPANY A. Due to health reasons,<sup>2</sup> PETITIONER 1 decided to "step back" from the day-to-day operations of his business and allow his son to handle these functions. As a result, PETITIONER 1 resigned as President of COMPANY A in 1989. PETITIONER 1, however, continued to serve as Chairman of COMPANY A's Board of Directors throughout the audit period. Testimony of PETITIONER 2; Exhibit R-1 at p. 165.

12. Both prior to 1989 and continuing throughout the audit period, the Petitioners owned a condominium on STREET in CITY 3, Utah and a home in STATE, COUNTRY.

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<sup>2</sup> PETITIONER 1 had open-heart bypass surgery in 1978 and experienced heart attacks in 1986 and 1989.

13. The Petitioners purchased the STATE, COUNTRY property in 1969. The home is approximately 6,000 square feet in size and consists of four bedrooms, four baths, a pool, a patio, and numerous other rooms. The current fair market value of this property is approximately \$\$\$\$\$. Exhibit R-1 at pp. 166-167.

14. The Petitioners purchased the CITY 3 condominium in 1981. This property is approximately 2,800 square feet in size and has one bedroom and two baths. The most recent tax assessment on the property shows it to have a fair market value of \$\$\$\$\$. The condominium is located in the same complex where PETITIONER 1's parents lived until the mid-1990s when they passed away. The Petitioners often stayed at the condominium when PETITIONER 1 was present in CITY 3 to attend COMPANY A board meetings, during the Christmas and Thanksgiving holidays to visit family members, and in connection with PETITIONER 2's work for COMPANY B. Exhibit R-1 at p.167.

15. The 2002 notice of property valuation issued for the Petitioners' CITY 3 condominium shows that the Petitioners received the primary residential exemption on this property. Exhibit R-1 at p. 215; Exhibit P-1 at tab 17. However, there is no evidence to show that the Petitioners applied for the exemption or affirmatively claimed the property to be their primary residence for the 2002 tax year.

16. Prior to 1989, the Petitioners spent six to eight weeks a year at the STATE, COUNTRY property. PETITIONER 2 testified that once PETITIONER 1 resigned as President of COMPANY A, the Petitioners began spending more time in COUNTRY. PETITIONER 2 testified that both she and PETITIONER 1 obtained COUNTRY driver's licenses in 1989, were listed in a COUNTRY telephone book, and used their COUNTRY address for purposes of filing their U. S. federal income tax returns. In addition, the Petitioners used a COUNTRY bank and participated in clubs and other organizations in COUNTRY. Exhibit P-1 at tab 12. The Petitioners also employed "full-time help" at the home in COUNTRY and owned a vehicle in COUNTRY. Although the vehicle was insured through a COUNTRY agency,

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PETITIONER 1 used a post office box address in CITY 3 for purposes of his insurance policy dated December 1, 2000. Exhibit R-1 at p. 221.

17. For the Division, RESPONDENT REP. 2 testified that the Petitioners filed either a 1989 Utah part-year or nonresident return. The Petitioners submitted letters that were exchanged concerning the 1989 Utah return. A July 18, 1990 letter from the Tax Commission to the Petitioners shows that a Commission auditor acknowledged receipt of the Petitioners' 1989 return "in which you show that you are a none (sic) resident and that you [are] no longer living in Utah." In the letter, the auditor did not question the Petitioner's claim to be nonresidents, but did question whether any of the Petitioners' income would be Utah source income due to the Petitioners owning a Utah "S" corporation. The Petitioners' long-time Utah attorney and tax preparer, WITNESS A, replied in a letter dated August 6, 1990 and informed the Commission that PETITIONER 1 did not own stock in an "S" corporation. WITNESS A further indicated that the Petitioners owned "stock in a regular corporation but its revenues and operation are primarily out of the State of Utah." Exhibit P-1 at tab 1. The Petitioners contend that they thought this exchange settled the issue of their domicile as they filed no Utah returns after 1990 and did not hear from the Commission until November 2004, when the matters at issue in this appeal arose.

18. PETITIONER 2 testified that the Petitioners decided to leave COUNTRY and establish their primary residence elsewhere after PETITIONER 1 had ( WORDS REMOVED ). Because PETITIONER 2 was more comfortable speaking LANGUAGE A and the Petitioners had visited the ISLAND, which was the home of PETITIONER 1's ancestors, the Petitioners decided to move there.

19. In 1991, the Petitioners began the process of purchasing a home on the ISLAND. In order to purchase the home here, the Petitioners had to apply to become residents. This process was completed in September 1992, whereupon the Petitioners purchased the "( X )" estate on the ISLAND. The Petitioners contend that they changed their domicile from COUNTRY to the ISLAND at this time.

20. In order to purchase a home on the ISLAND, the Petitioners assert that they were required to: 1) interview with a member of the ISLAND consulate in CITY 4; 2) verify a substantial minimum net worth; 3) become residents of the ISLAND; 4) pay income taxes to the ISLAND as residents; and 5) purchase a residence costing a minimum of \$\$\$\$\$. Exhibit R-1 at pp. 166, 170; Exhibit P-1 at tab 5. PETITIONER 2 also testified that in order to purchase their ISLAND home, the Petitioners went through vigorous interviews and had to agree to become residents and pay a tax of %%% on all of their worldwide income.

21. After remodeling and restoration work, the ISLAND home cost in excess of \$\$\$\$\$. Exhibit P-1 at tabs 3, 10; Exhibit R-1 at p. 166. The home, which was originally built in YEAR, consisted of ( WORDS REMOVED ). The home had 7,500 square feet of living space and was valued at approximately \$\$\$\$\$ when the Petitioners sold it in YEAR. Exhibit R-1 at p. 166.

22. PETITIONER 2 also testified that the Petitioners employed a full-time housekeeper and gardener for the property, but did not own a vehicle on the island because ( WORDS REMOVED ). For this reason and because ( WORDS REMOVED ), PETITIONER 2 stated that the Petitioner used a local cab company for their transportation needs on the island. PETITIONER 2 also stated that the Petitioners were listed in the local telephone directory and were involved in a history organization and a club on the island.

23. In both of the Petitioners' passports and their "Certificates of Registration" issued by the ISLAND, the final stamp, dated August 20, 1997, states that the Petitioners were "given leave to remain in ISLAND for an indefinite period." The prior stamps were all for one-year periods because, according to PETITIONER 2, the Petitioners had not renounced their United States citizenship. PETITIONER 2 testified that under ISLAND law, the Petitioners were, nevertheless, eligible for permanent status after five years, which they were granted as indicated on their passports and the ISLAND Certificates of Registration. Exhibit P-1 at

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tab 29; Exhibit R-1 at p. 15. PETITIONER 2 also stated that she and her husband were finally afforded the opportunity to vote and did vote in elections on the ISLAND.

24. PETITIONER 2 stated that when the Petitioners moved to the ISLAND, they intended to remain there indefinitely. However, in 1997, PETITIONER 1 took COMPANY A public and beginning in 1997, the stock of COMPANY A was traded publicly on the STOCK EXCHANGE. During that period, PETITIONER 1 sold a large quantity of stock and invested heavily in tax-exempt municipal bonds. In 1997 or 1998, the ISLAND changed its income tax laws to tax interest earned on previously tax-exempt municipal bonds. The Petitioners submitted a letter PETITIONER 1 wrote to a chartered accountant in ISLAND explaining that he could no longer be a resident of ISLAND because of the law change. For this and other reasons stated by PETITIONER 2, the Petitioners began taking steps to move from ISLAND in early 1998. Exhibit R-1 at pp. 164, 165, 182.

25. In April 1998, the Petitioners purchased the RANCH in CITY 2, STATE 1 for a price in excess of \$\$\$\$\$. The Petitioners placed their home on the ISLAND on the market in June 1998, and it sold in May 1999. Exhibit R-1 at p.167. In May 1998, the Petitioners purchased a Chevrolet Silverado in STATE 1 for use at the ranch, which they insured through a STATE 1 insurance agency. Exhibit P-1 at tab 21.

26. The Petitioners shipped their personal property from the home on the ISLAND directly to the RANCH in STATE 1. Shipping information shows that furniture and other household items that weighed in excess of ##### tons were shipped by sea in May 1999 and delivered to the RANCH in July 1999. Exhibit P-1 at tab 9. PETITIONER 2 testified that the Petitioners did not have to pay any “duty” on these items because the U.S. Government considered them to have been residents of ISLAND.

27. Because ( WORDS REMOVED ) Petitioners spent a significant amount of time refurbishing and remodeling the property. ( SENTENCES REMOVED ). Until the remodeling and restoration was complete, the Petitioners also visited their home in COUNTRY, and when in Utah, their



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condominium in CITY 3. The Petitioners spent approximately \$\$\$\$ to remodel and refurbish the property. Exhibit R-1 at pp. 16, 167. PETITIONER 2 testified that the Petitioners intended the RANCH to be their residence, except for spending winters in COUNTRY.

28. The Petitioners began attending social and civic events in STATE 1 as early as August 1998, as evidenced by notes received by PETITIONER 2. Exhibit R-1 at p.213.

29. COMPANY A provided PETITIONER 1 a computer and other office equipment in COUNTRY, the ISLAND, and STATE 1 to monitor COMPANY A's activities from afar. However, PETITIONER 1 also traveled periodically to Utah for board and other corporate meetings. Exhibit R-1 at p. 165. PETITIONER 2 testified that her husband received faxes almost daily concerning the business, which he would review.

30. PETITIONER 2 is, by trade, a ( X ) and, during the audit period, was associated with COMPANY B. Exhibit R-1 at p. 165. PETITIONER 2 testified that she would take orders from friends throughout the year, and during the Christmas season, have the orders filled at COMPANY B when the Petitioners were in CITY 3 for the holidays.

31. The Petitioners have employed persons in all locations where they owned homes to assist them in handling their business affairs and running their various properties. The Petitioners employed EMPLOYEE 1 in COUNTRY for a number of years to handle their affairs there, such as the overseeing the payment of the staff and maintenance of the property. In CITY 2, STATE 1, the PETITIONERS retained to oversee the management of the RANCH. When the Petitioners lived on the ISLAND, they retained EMPLOYEE 2 of the firm COMPANY P to handle the payment of the Petitioners' personal expenses using a bank account at FINANCIAL INSTITUTION B in CITY 6 , COUNTRY 2. Exhibit R-1 at p. 162.

32. The Petitioners also had CITY 3-based employees of COMPANY A receive and collect mail for the Petitioners and pay various bills related to the CITY 3 real property, as well as other

personal expenses. Many items of the Petitioners' mail, including some that concerned financial and tax matters, were mailed to a post office box owned by COMPANY A. Exhibit R-1 at p. 162. PETITIONER 2 testified that her husband would sign checks and leave them for the employees of COMPANY A to pay certain of their bills.

33. The Petitioners' U.S. federal tax returns for the tax years at issue were prepared by PERSON A. The Petitioners' 1997 return, which was signed by the Petitioners in April 1998, shows the Petitioners' address to be on the ISLAND. Exhibit R-1 at pp. 18-35. In a letter to the Internal Revenue Service ("IRS") dated October 6, 1998, PERSON A provided the IRS with a Power of Attorney and indicated that the Petitioners were U.S. citizens who maintain their principal residence in COUNTRY where mail service is unreliable. Exhibit R-1 at p. 65. Also in October 1998, the Petitioners submitted a change of address form to the IRS in which they indicated that their old address was on the ISLAND and that their new address was in STATE, COUNTRY. Exhibit R-1 at p. 63. The Petitioners' 1998 and 1999 federal returns show the Petitioners' address to be at their home in STATE, COUNTRY. Exhibit R-1 at pp. 36 - 62. In addition, the IRS used the Petitioners' ISLAND address to mail a notice informing the Petitioners that the agency had made a change to their 1995 federal tax return. Exhibit P-1 at tab 6.

34. During the audit period, the Petitioners had several bank accounts with FINANCIAL INSTITUTION, where they had the services of a personal banker. The accounts used either the Petitioners' CITY 2, STATE 1 address or their CITY 3 post office box address. Exhibit R-1 at p.173. PETITIONER 2 also stated that some account information was sent to both locations. The Petitioners also had two joint checking accounts at FINANCIAL INSTITUTION C in CITY 2, STATE 1, at least one of which was opened prior to May 1998. Exhibit R-1 at p. 279. They also maintained a brokerage account with FINANCIAL INSTITUTION E that contained assets of approximately \$\$\$\$\$, which appears to have been opened in 1998. Exhibit R-1 at pp. 366, 370 - 372.

35. PETITIONER 1 was originally issued a Utah driver's license in 1942 and had it renewed for the last time in 1998, when he updated his Utah address to the STREET condominium in CITY 3. Exhibit R-1 at pp. 70, 224. PETITIONER 2 was originally issued a Utah driver's license in 1967 and renewed it until it expired in 2002, at which time she obtained a STATE 1 driver's license. Exhibit R-1 at pp. 71, 225. PETITIONER 2 testified that PETITIONER 1 had not obtained a STATE 1 driver's license because his Utah driver's license was still valid when he passed away in 2003.

36. PETITIONER 1 held a COUNTRY driver's license continuously from 1989 until shortly before his death in 2003. PETITIONER 2 was also issued a COUNTRY driver's license, which she also allowed to expire. PETITIONER 2 stated that the Petitioners retained a Utah driver's license while living outside of the United States because rental car agencies would not accept a COUNTRY driver's license and because they needed them to drive when visiting in Utah.

37. During the audit period, PETITIONER 1 saw a number of doctors in a number of States. In 2000, PETITIONER 1 had ( SURGERY ) in CITY 3. PETITIONER 1 was diagnosed with HEALTH CONDITION and was treated by: 1) DOCTOR 1, an internist at the HOSPITAL in CITY 5, STATE 2; 2) DOCTOR 2, a HEALTH CONDITION specialist at the HOSPITAL 2 Institute in CITY 6, STATE 3, who performed surgery in 2001; 3) doctors at the HOSPITAL 3 in CITY 3; and 4) DOCTOR 3 in STATE, COUNTRY to remove stitches, dressings and bandages from the 2001 surgery. In 2002, PETITIONER 1 also had SURGERY in CITY 3, after DOCTOR 4, his physician in CITY 2, STATE 1, declined to perform the surgery due to possible complications arising from PETITIONER 1's HEALTH CONDITION. Exhibit R-1 at pp. 169-170. A medical report, dated DATE and dictated by DOCTOR 5 at HOSPITAL 4 in CITY 3, Utah, includes a statement indicating that PETITIONER 1 "currently resides in CITY 2, STATE 1 with his wife ( WORDS REMOVED )." Exhibit P-1 at tab 18.

38. During the audit period, the Petitioners owned a YEAR CAR that was garaged at their CITY 3 condominium. This vehicle was insured through the same company that provided homeowner's insurance for the condominium. It appears that this vehicle's registration may have been lapsed during some portion of the audit period, as the Petitioners were provided a vehicle by COMPANY A or one of its affiliates whenever the Petitioners were in CITY 3. Exhibit R-1 at pp. 171-172.

39. For many years, the Petitioners have been involved in the activities of the HISTORICAL CENTER ("Historical Center"), which is located in CITY 2, STATE 1. PETITIONER 1 began his association with the Historical Center in YEAR and served on its Board of Directors for many years prior to his death. PETITIONER 2 was and continues to be actively involved with the Historical Center. The Petitioners have donated in excess of \$\$\$\$\$ to support the Historical Center, most of it coming in the last few years of PETITIONER 1's life. Testimony of PETITIONER 2; Exhibit R-1 at p. 172; Exhibit P-1 at tab 15. In 1999 or 2000, the Petitioners also contributed \$\$\$\$\$ to the POLITICAL CAMPAIGN of CANDIDATE, who ran for Congress in STATE 1. Exhibit R-1 at p. 175.

40. The Petitioners claim that they were not members of any club in Utah during the audit period.

41. Salt Lake County election records show that PETITIONER 1 voted in the 1992, 1994, 1996, 1998 and 2000 general elections held in Utah, sometimes by absentee ballot. Exhibit R-1 at p. 83. Records also show that PETITIONER 2 voted in a 1996 primary election and in the 1992, 1994, 1995, 1996, 1997, 1998 and 2000 general elections held in Utah. Exhibit R-1 at p.86. The Petitioners claim that they continued to vote in Utah elections because their primary residence was outside of the United States from 1989 through 2001.

42. PETITIONER 2 testified that CITY 3 was the hub of their air travel during the audit period.

43. The entities that reported the Petitioners' income to the IRS during the audit period mailed the forms (such as W-2's, 1099's) to the Petitioners at a variety of addresses. For example, in 1997, there is evidence of eight forms, with three sent to the Petitioner's post office box in CITY 3, four to their STREET condominium in CITY 3, and two to their ISLAND address. Exhibit R-1 at pp. 92-93, 113. In 1998, four were sent to the post office box, three to the condominium, and one to COUNTRY. Exhibit R-1 at pp. 94-95, 114. In 1999, four were sent to the post office address, three to the condominium, and two to COUNTRY. Exhibit R-1 at pp. 96-97. In 2000, eight were sent to the post office box, four to the condominium, and two to COUNTRY. Exhibit R-1 at pp. 98-100, 116. In 2001, twelve were sent to the post office box, two to the condominium, four to COUNTRY, and one to STATE 1. Exhibit R-1 at pp. 101-105, 117. In 2002, seventeen were sent to the post office box, two to COMPANY A in care of the Petitioners, three to COUNTRY, four to STATE 1, and two to the condominium. Exhibit R-1 at pp. 106-112, 118.

44. PETITIONER 1 passed away in STATE 2 on May 6, 2003. On May 8, 2003, PETITIONER 1's son filled out his father's STATE 2 death certificate and indicated that PETITIONER 1's "usual residence" was in CITY 2, STATE 1 and that his "previous state of residence" was the ISLAND. Exhibit P-1 at tab 30.

#### Number of Days Present in Utah

45. The Division also contends that the Petitioners have not shown that they were present in Utah for less than 183 each year and, as a result, should be found to be Utah resident individuals for tax purposes for all six years at issue. The Petitioners claim otherwise.

46. PETITIONER 2 testified that neither she nor PETITIONER 1 was in Utah for 183 or more days in any of the years at issue. She testified that PETITIONER 1 was cognizant of the 183-day period that is set forth in Utah law concerning residency for tax purposes and that he consciously ensured that neither of them was present in Utah for this number of days in any year at issue. She stated that PETITIONER 1 kept

records of the days they were present in Utah, but does not know where these records are because PETITIONER 1's office at COMPANY A was cleared out when the company was sold to COMPANY in late YEAR. PETITIONER 2 stated that she never thought to keep her husband's records because she had no idea they would ever be needed.

47. Once the Division issued its assessments, PETITIONER 2 stated that she spent many hours researching her personal records to try to calculate the number of days the Petitioners were present in Utah each year. For the years at issue, PETITIONER 2 testified that she consulted her journals and other records, including airline tickets, bills, and charge accounts, and determined the number of days these records showed the Petitioners to be outside of Utah each year. In each case, she determined that the Petitioners were outside of Utah more than 183 days per year.

48. Using this methodology, PETITIONER 2 calculated that at a maximum, she or her husband was present in Utah for a maximum of 142 days in 1997, 164 days in 1998, 129 days in 1999, 110 days in 2000, 120 days in 2001, and 161 days in 2002. Exhibit R-2. PETITIONER 2 also stated that she believes these numbers are overestimations because she attributed any day for which she could not ascertain the Petitioners' location to Utah and because she believes they were outside of Utah for a portion of the periods for which she could not find records.

49. The Division asks the Commission to find that the Petitioners' evidence is inadequate to show that they were not in Utah for 183 or more days each year at issue. However, there is little, if any, evidence to disprove or call into question PETITIONER 2's assertions and calculations. As a result, the Commission finds that neither of the Petitioners was present in Utah for 183 or more days for any of the years at issue.

Source Income Information

50. In its Statutory Notices for the 1997, 1998 and 1999 tax years, the Division only assessed additional income tax to PETITIONER 1. These Statutory Notices show that the Division calculated its assessments for these three years based on PETITIONER 1 having a “single” filing status and being entitled to one exemption. Exhibit R-1 at pp. 1, 3, 5.

51. When the Division issued its Statutory Notices for the 1997, 1998 and 1999 tax years, it did not have access to the Petitioners’ federal tax returns to determine the total amount of the Petitioners’ federal adjusted gross income (“FAGI”) for these years. When “estimating” the additional tax due in its Statutory Notices for these years, the Division estimated FAGI by totaling those items of income reported to the IRS and to which it had access. Exhibit R-1 at pp. 92-97. The Division obtained access to the Petitioners’ federal tax returns for these three years during the hearing process. For each of these three years, the amount of FAGI the Division estimated on its Statutory Notices was less than the actual amount of FAGI shown on the Petitioners’ federal return. Exhibit R-1 at pp. 1, 3, 5, 18, 36, 52, 121, 123, 125.

52. The Petitioners’ federal returns for the 1997, 1998 and 1999 tax years also show that the Petitioners’ filing status was “married filing joint” and that they were entitled to three exemptions for the 1997 tax year and two exemptions for both the 1998 and 1999 tax years. Exhibit R-1 at pp. 18, 36, 52, 121, 123, 125.

53. RESPONDENT REP. 2 testified that the Division had access to the information on the Petitioners’ “married filing joint” federal returns for the 2000, 2001 and 2002 tax years when the Division issued its Statutory Notices for these years. Exhibit R-1 at pp. 119-120. Accordingly, the amount of FAGI shown on the Petitioners’ federal returns for 2000, 2001 and 2002 is the same FAGI that the Division used to estimate the Petitioners’ tax liability on its Statutory Notices for these years. Exhibit R-1 at pp. 7, 9, 11, 119-120, 127, 129, 131.

54. Although the Division's Statutory Notice for the 2001 tax year is based on a filing status of "married filing joint," the Division determined that the Petitioners were entitled to only one exemption. Exhibit R-1 at p. 9. Information received from the IRS concerning the Petitioners' 2001 federal return shows that the Petitioners were entitled to two exemptions for this year. Exhibit R-1 at p. 129.

55. At the Formal Hearing, the Division asserted that its assessments for the 1997, 1998 and 1999 tax years were incorrect and should be revised to reflect the information shown on the Petitioners' federal tax returns. The Division stated that adjusting its Statutory Notices to reflect this information would result in a much higher tax liability for one of the three years (1997) and a lower assessment for the other two years (1998 and 1999).<sup>3</sup>

56. The Division sought the revisions for the 1997, 1998 and 1999 tax years subsequent to issuing its Statutory Notices for each of these years. There is no evidence to show that any of these revisions is the result of a change or correction of federal taxable income that was required to be reported and of which the Division had no notice at the time it issued its Statutory Notices.

57. For the 1997 tax year, the Division originally estimated PETITIONER 1's FAGI to be \$\$\$\$\$, while the Petitioners' joint federal return shows their FAGI to be \$\$\$\$\$. Exhibit R-1 at pp. 1, 18, 121.

58. The Division estimated an FAGI of \$\$\$\$\$ for 1997 by adding a number of items of income that were reported to the IRS in either PETITIONER 1's name alone or in PETITIONER 1 and PETITIONER 2's names together. Exhibit R-1 at pp. 92-93. The Petitioners' FAGI of \$\$\$\$\$, as shown on

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<sup>3</sup> At the Formal Hearing, the Division asserted that it had preliminarily calculated the new tax liability for each of the three years, but was not ready to commit to exact amounts due until Division directors approved the calculations. In its Post Hearing Brief, the Division showed the effect of revising its original assessments to reflect the FAGI shown on the Petitioners' 1997, 1998 and 1999 federal returns. For the 1997 tax year, the revisions would increase the Petitioner's additional tax liability (not including penalties and interest) from \$\$\$\$\$, as shown on the Statutory Notice, to \$\$\$\$\$. For the 1998 tax year, the revisions would reduce the tax liability from \$\$\$\$\$ to \$\$\$\$\$. For the 1999 tax year, the revisions would reduce the tax liability from \$\$\$\$\$ to \$\$\$\$\$.



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their 1997 federal return, is based not only on the items of income that comprise the Division’s original estimate of FAGI, but also on additional items of income. Exhibit R-1 at pp. 18-35. On the following chart, the items of income that the Division used to estimate an FAGI of \$\$\$\$ are compared to the items of income that comprise the FAGI of \$\$\$\$ as reported on the Petitioners’ 1997 federal tax return (the additional items of income not originally assessed by the Division but which the Division asks the Commission to include in a revised assessment are highlighted):

<b>1997 Items of Income</b>	<b>Items Originally Included in Division’s Estimate of FAGI on Statutory Notice</b>	<b>Items That Comprise FAGI on 1997 Federal Return  (“new” items highlighted)</b>
<b>Wages:</b>		
PETITIONER 1 (COMPANY A)	\$\$\$\$	\$\$\$\$
PETITIONER 2 (COMPANY B) <sup>4</sup>		\$\$\$\$
<b>Schedule B Taxable Interest:</b>		
FINANCIAL INSTITUTION (PETITIONER 1)		\$\$\$\$
		\$\$\$\$
FINANCIAL INSTITUTION (PETITIONER 1)		\$\$\$\$
		\$\$\$\$
FINANCIAL INSTITUTION (PETITIONER 2)		\$\$\$\$
<b>Schedule B Taxable Dividends:</b>		
COMPANY D	\$\$\$\$	
COMPANY E		\$\$\$\$
COMPANY F	\$\$\$\$	\$\$\$\$
COMPANY G	\$\$\$\$	\$\$\$\$
Capital Gain Distributions		(\$\$\$\$\$)
<b>Schedule D Capital Gains and Losses:</b>		
( # ) Shares COMPANY H		\$\$\$\$
( # ) Shares COMPANY A		\$\$\$\$
Losses from Partnerships, “S” Corps, (from Schedules K-1)		(\$\$\$\$\$)
Capital Gain Distributions:		\$\$\$\$
COMPANY F Fund		\$\$\$\$
COMPANY G		\$\$\$\$

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4 Items of income earned by PETITIONER 2 that were reported to the IRS for each year at issue include wages income reported by COMPANY B and interest income reported by FINANCIAL INSTITUTION. Exhibit R-1 at pp. 113-118.

**Form 4797 Sale of Business Property:**

COMPANY I \$\$\$\$\$

**Pensions / Annuities:**

Gross Dist. from FINANCIAL INSTITUTION B \$\$\$\$\$ \$\$\$\$\$

**Schedule E Passive Income or Loss**

**From Partnerships and "S" Corps**

COMPANY I (P) \$\$\$\$\$

COMPANY I (P) \$\$\$\$\$

COMPANY J (P) (\$\$\$\$\$)

**Other Income:**

COMPANY I  
(guaranteed payment) \$\$\$\$\$ \$\$\$\$\$

**TOTAL 1997 FAGI** \$\$\$\$\$ \$\$\$\$\$

59. For the 1998 tax year, the Division originally estimated PETITIONER 1's FAGI to be \$\$\$\$\$, while the Petitioners' joint federal return shows their FAGI to be \$\$\$\$\$. Exhibit R-1 at pp. 3, 36, 123.

60. Again, the Division estimated an FAGI of \$\$\$\$\$ for 1998 by adding a number of items of income that were reported to the IRS. Exhibit R-1 at pp. 94-95. The Petitioners' FAGI of \$\$\$\$\$, as shown on their federal return, is based on the items the Division originally assessed plus several other items. Exhibit R-1 at pp. 36-51. As before, the following chart is a comparison of the items the Division used to estimate an FAGI of \$\$\$\$\$ and the items that comprise the FAGI of \$\$\$\$\$ as reported on the Petitioners' 1998 federal tax return. (Again, the additional items of income not originally assessed by the Division but which the Division asks the Commission to include in a revised assessment are highlighted):

1998 Items of Income	Items Originally Included in Division's Estimate of FAGI on Statutory Notice	Items That Comprise FAGI on 1998 Federal Return ("new" items highlighted)
<b>Wages:</b>		
PETITIONER 1 (COMPANY A)	\$\$\$\$\$	\$\$\$\$\$
PETITIONER 2 (COMPANY B)		\$\$\$\$\$
<b>Schedule B Taxable Interest:</b>		
FINANCIAL INSTITUTION	\$\$\$\$\$	\$\$\$\$\$
FINANCIAL INSTITUTION C	\$\$\$\$\$	\$\$\$\$\$
FINANCIAL INSTITUTION D	\$\$\$\$\$	\$\$\$\$\$
<b>Schedule B Taxable Dividends:</b>		
COMPANY G		\$\$\$\$\$

**Schedule D Capital Gains and Losses:**

COMPANY K Shares			\$\$\$\$\$
Capital Gain Distributions:			
COMPANY G	\$\$\$\$\$	\$\$\$\$\$	

**Pensions / Annuities:**

Gross Dist. from FINANCIAL INSTITUTION B	\$\$\$\$\$		\$\$\$\$\$
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**Schedule E Passive Income or Loss**

**From Partnerships and "S" Corps**

COMPANY J	_____	_____	(\$\$\$\$)
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<b>TOTAL 1998 FAGI</b>	<u>\$\$\$\$\$</u>	<u>\$\$\$\$\$</u>	
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61. For the 1999 tax year, the Division originally estimated PETITIONER 1's FAGI to be \$\$\$\$\$, while the Petitioners' federal return shows FAGI to be \$\$\$\$\$. Exhibit R-1 at pp. 5, 52, 125.

62. Again, the Division added a number of items of income reported to the IRS to estimate an FAGI of \$\$\$\$\$ for 1999. Exhibit R-1 at pp. 96-97. The Petitioners' FAGI of \$\$\$\$\$, as shown on their federal return, is based on the items the Division originally assessed plus several other items. Exhibit R-1 at pp. 52-69. The following chart is a comparison of the items the Division used to estimate an FAGI of \$\$\$\$\$ and the items that comprise the FAGI of \$\$\$\$\$ as reported on the Petitioners' 1999 federal return. (Again, the additional items of income not originally assessed by the Division but which the Division asks the Commission to include in a revised assessment are highlighted):

<b>1999 Items of Income</b>	<b>Items Originally Included in Division's Estimate of FAGI on Statutory Notice</b>	<b>Items That Comprise FAGI on 1999 Federal Return ("new" items highlighted)</b>
<b>Wages:</b>		
PETITIONER 1 (COMPANY A)	\$\$\$\$\$	\$\$\$\$\$
PETITIONER 2 (COMPANY B)		\$\$\$\$\$
<b>Schedule B Taxable Interest:</b>		
FINANCIAL INSTITUTION	\$\$\$\$\$	\$\$\$\$\$
FINANCIAL INSTITUTION (PETITIONER 2)		\$\$\$\$\$
FINANCIAL INSTITUTION C	\$\$\$\$\$	\$\$\$\$\$
FINANCIAL INSTITUTION D	\$\$\$\$\$	\$\$\$\$\$
U.S. Treasury Department	\$\$\$\$\$	

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<b>Schedule B Taxable Dividends:</b>		
COMPANY G		\$\$\$\$\$
<b>Schedule D Capital Gains and Losses:</b>		
Gains and Losses from Various Stocks and Investment Funds		\$\$\$\$\$
Capital Gain Distributions:		
COMPANY G	\$\$\$\$\$	\$\$\$\$\$
<b>Pensions / Annuities:</b>		
Gross Dist. from FINANCIAL INSTITUTION B	\$\$\$\$\$	\$\$\$\$\$
<b>Schedule E Passive Income or Loss From Partnerships and "S" Corps</b>		
COMPANY J		(\$\$\$\$\$)
COMPANY L		(\$\$\$\$\$)
<b>TOTAL 1999 FAGI</b>	<u>\$\$\$\$\$</u>	<u>\$\$\$\$\$</u>

63. For the 2000 tax year, the Division's estimate of FAGI at \$\$\$\$\$ is identical to the Petitioners' FAGI as reported to the IRS and shown on account transcripts the Division received from the IRS. Exhibit R-1 at pp. 7, 119, 127. Some of the separate items of 2000 FAGI can be determined from the 2000 federal transcripts, while others can be determined from the income reported directly to the IRS. Exhibit R-1 at pp. 98-100, 116, 119, 127-128. Neither party submitted a copy of the Petitioners' 2000 federal tax return, which might have provided a more explicit itemization of income. Based on the available information, the Commission determines that the Petitioners' 2000 FAGI of \$\$\$\$\$ can be segregated as follows:

<b>2000 Items of Income</b>	<b>Items that Comprise FAGI on 2000 Federal Return</b>
<b>Total Wages:</b> Shown on federal transcript:	\$\$\$\$\$
PETITIONER 1 (COMPANY A):	\$\$\$\$\$
PETITIONER 2 (COMPANY B):	\$\$\$\$\$
<b>Schedule B Taxable Interest:</b>	
FINANCIAL INSTITUTION	\$\$\$\$\$
FINANCIAL INSTITUTION	
\$\$\$\$\$	
FINANCIAL INSTITUTION (PETITIONER 2)	\$\$\$\$\$
FINANCIAL INSTITUTION C	\$\$\$\$\$
FINANCIAL INSTITUTION D	\$\$\$\$\$
<b>Schedule D Capital Gains and Losses:</b>	
Loss shown on federal transcript	(\$\$\$\$\$)

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COMPANY M:	\$\$\$\$\$
Unknown Losses:	(\$\$\$\$\$)
<b>Pensions / Annuities:</b>	
Gross Dist. from FINANCIAL INSTITUTION B	\$\$\$\$\$
<b>Social Security:</b>	
Taxable Benefits:	\$\$\$\$\$
<b>Schedule E Passive Income or Loss From Partnerships and "S" Corps</b>	
Unknown Loss	(\$\$\$\$\$)
Income: COMPANY J (P)	<u>\$\$\$\$\$</u>
<b>Total of Items Shown on Documents Submitted</b>	\$\$\$\$\$
Minus: Excess FAGI (presumed to be unknown loss)	<u>(\$\$\$\$\$)</u>
<b>TOTAL 2000 FAGI</b>	<u>\$\$\$\$\$</u>

64. For the 2001 tax year, the Division's estimate of FAGI at \$\$\$\$\$ is identical to the Petitioners' FAGI as reported to the IRS and shown on account transcripts received from the IRS. Exhibit R-1 at pp. 9, 120, 129. Some of the separate items of 2001 FAGI can be determined from the 2001 federal transcripts, while others can be determined from the income reported directly to the IRS. Exhibit R-1 at pp. 101-105, 117, 120, 129-130, 133-140. Neither party submitted a copy of the Petitioners' 2001 federal return, which might have provided a more explicit itemization of income. Based on the available information, the Commission determines that the Petitioners' 2001 FAGI of \$\$\$\$\$ can be segregated as follows:

<b>2001 Items of Income</b>	<b>Items that Comprise FAGI on 2001 Federal Return</b>
<b>Total Wages:</b> Shown on federal transcript	\$\$\$\$\$
PETITIONER 1 (COMPANY A):	\$\$\$\$\$
PETITIONER 2 (COMPANY B):	\$\$\$\$\$
<b>Schedule B Taxable Interest:</b>	
Shown on federal transcript	\$\$\$\$\$
Three FINANCIAL INSTITUTION 1099 Int. Forms:	\$\$\$\$\$
Three non-Utah 1099 Int. Forms:	\$\$\$\$\$
<b>Schedule B Taxable Dividends:</b>	
Shown on federal transcript	\$\$\$\$\$
(Two 1099 Div. Forms total \$\$\$\$\$)	
<b>Schedule D Capital Gains and Losses:</b>	

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Loss shown on federal transcript	(\$\$\$\$\$)
COMPANY M:	(\$\$\$\$\$)
Unknown Losses:	(\$\$\$\$\$)
<b>Pensions / Annuities:</b>	
Gross Dist. from FINANCIAL INSTITUTION B	(\$\$\$\$\$)
<b>Social Security:</b>	
Taxable Benefits:	(\$\$\$\$\$)
<b>Schedule E Passive Income or Loss</b>	
<b>From Partnerships and "S" Corps</b>	
Nonpassive Loss shown on federal transcript	(\$\$\$\$\$)
COMPANY N:	(\$\$\$\$\$)
COMPANY L:	(\$\$\$\$\$)
Unknown Losses:	(\$\$\$\$\$)
<b>TOTAL 2001 FAGI</b>	<u>(\$\$\$\$\$)</u>

65. For the 2002 tax year, the Division's estimate of FAGI at \$\$\$\$\$ is identical to the Petitioners' FAGI as reported to the IRS and shown on account transcripts received from the IRS. Exhibit R-1 at pp. 11, 131. Some of the separate items of 2002 FAGI can be determined from the 2002 federal transcripts, while others can be determined from the income reported directly to the IRS. Exhibit R-1 at pp. 106-112, 118, 131-132, 141-148. Neither party submitted a copy of the Petitioners' 2002 federal return, which might have provided a more explicit itemization of income. Based on the available information, the Commission determines that the Petitioners' 2002 FAGI of \$\$\$\$\$ can be segregated as follows:

<b>2002 Items of Income</b>	<b>Items that Comprise FAGI on 2002 Federal Return</b>
<b>Total Wages:</b> Shown on federal transcript	(\$\$\$\$\$)
PETITIONER 1 (COMPANY A):	(\$\$\$\$\$)
PETITIONER 2 (COMPANY B)	(\$\$\$\$\$)
<b>Schedule B Taxable Interest:</b>	
Shown on federal transcript	(\$\$\$\$\$)
Four FINANCIAL INSTITUTION 1099 Int. Forms:	(\$\$\$\$\$)
Two non-Utah 1099 Int. Forms:	(\$\$\$\$\$)
<b>Schedule B Taxable Dividends:</b>	
Shown on federal transcript	(\$\$\$\$\$)
(Seven 1099 Div. Forms total \$\$\$\$\$)	

**Schedule D Capital Gains and Losses:**

Loss shown on federal transcript	(\$\$\$\$\$)
Nat'l Financial Data Servs:	\$\$\$\$\$
Unknown Losses:	(\$\$\$\$\$)

**Pensions / Annuities:**

Gross Dist. from FINANCIAL INSTITUTION B	\$\$\$\$\$
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**Social Security:**

Taxable Benefits:	\$\$\$\$\$
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**Schedule E Passive Income or Loss**

**From Partnerships and "S" Corps**

Nonpassive Loss shown on federal transcript	(\$\$\$\$\$)
COMPANY N:	(\$\$\$\$\$)
COMPANY L:	(\$\$\$\$\$)
Unknown Losses:	(\$\$\$\$\$)

**TOTAL 2002 FAGI**

\$\$\$\$\$

66. In order for the Commission to determine whether or not each item of income identified above is Utah source income, the Commission asked both parties to address the sourcing issue in their respective post-hearing briefs.

67. On page 7 of the Division's brief, the Division stated that it "cannot determine what portion of the audit is Utah source income if the PETITIONERS are found not to have a domicile in Utah. However, the potential Utah source income was identified by RESPONDENT REP. 2 at the hearing." Furthermore, on page 12 of its brief, the Division stated that "[i]f no finding of domicile is made, the Division should work with the Petitioners to determine what portions of their income constitutes Utah source income."

68. On pages 15 through 17 of the Petitioners' brief, the Petitioners discussed whether or not several items of their income were Utah source income. However, there are other items of income, as explained below, that the Petitioners, as well, did not address.

69. PETITIONER 1's Wages from COMPANY A. The Petitioners contend that this income is not Utah source income, arguing that PETITIONER 1 worked as a consultant for COMPANY A

while he was outside of Utah and that he did not work in Utah. At the Formal Hearing, RESPONDENT REP. 2 testified that PETITIONER 1's wages from COMPANY A should be considered Utah source income.

a. PETITIONER 2 testified that after the Petitioners moved from Utah in 1989, PETITIONER 1 did most of his work for COMPANY A wherever they were living. She testified that PETITIONER 1 would receive daily faxes from the company's various terminals showing the "daily numbers," which he would check. PETITIONER 2 also testified that PETITIONER 1 was present in Utah in YEAR for more time than usual because this was the year COMPANY A was taken public and he was needed in Utah to work out many of the details and to attend conferences with investors. Otherwise, PETITIONER 2 testified that PETITIONER 1 only needed to be in Utah three or four times a year for board meetings. In Exhibit R-1 at p. 165, the Petitioners also indicate that PETITIONER 1 attended COMPANY A board and other corporate meetings in Utah during the years at issue.

b. When COMPANY A completed the IRS W-2 Forms to report PETITIONER 1's wages for the 1998 and 1999 tax years, it left Box 17, which shows the amount of "state wages," blank. Exhibit R-1 at pp. 49, 62. The Petitioners claim that this proves that PETITIONER 1's wages from COMPANY A are not Utah source income.

c. Notwithstanding the manner in which COMPANY A completed PETITIONER 1's W-2 Forms, RESPONDENT REP. 2 testified that the wages should be considered Utah source income because COMPANY A reported the wages to the Utah Department of Workforce Services. Exhibit R-1 at p. 73.

70. PETITIONER 2's Wages from COMPANY B. The Petitioners contend that this income is not Utah source income, arguing that PETITIONER 2 worked as an independent contractor for COMPANY B while outside of Utah. RESPONDENT REP. 2 testified that PETITIONER 2's wages from COMPANY B should be considered Utah source income.



a. PETITIONER 2 testified that she began working at COMPANY B as AN EMPLOYEE in 1976. PETITIONER 2 stated that during the years at issue, the manager of COMPANY B allowed her to “come and go as she pleased” and gave her the option to work at Christmas if the Petitioners were in CITY 3 for the holidays. PETITIONER 2 also testified that she sold ( X ) to customers outside of Utah and when she was in CITY 3, she would bring the list of items she had sold to COMPANY B so the items could be sent out to her customers.

b. RESPONDENT REP. 2 testified that PETITIONER 2’s income should be considered Utah source income because COMPANY B reported the income to the Utah Department of Workforce Services and because COMPANY B, when completing PETITIONER 2’s W-2 Forms, reported the income as “Utah wages” in Boxes 15 and 17. Exhibit R-1 at pp. 50, 69, 74.

71. Interest Income. The Petitioners argue that the interest income they earned for all years at issue is derived from “intangible personal property” and not derived from property employed in a trade, business, profession or occupation carried on in Utah. For these reasons, the Petitioners assert that none of their interest income should be considered Utah source income. RESPONDENT REP. 2, on the other hand, testified that those items of interest income reported by a Utah bank, such as FINANCIAL INSTITUTION, could be Utah source income.

a. 1099 Int. Form information shows that the interest income at issue was earned either by PETITIONER 1 alone, by PETITIONER 2 alone, or jointly by PETITION 1 and PETITIONER 2. Exhibit R-1 at pp. 98-112, 116-118, 134, 143.

b. There is no evidence to suggest that any of the interest at issue was earned from property employed in a trade, business, profession or occupation carried on in Utah.

72. Dividends Income. The Petitioners assert that the dividend income the Petitioners earned during all six years is not Utah source income. At the hearing, RESPONDENT REP. 2 did not identify any of the Petitioners' dividend income as potential Utah source income.

73. Stock and Investment Fund Income and Capital Gain Distributions (as reported on Schedule D of federal returns). The Petitioners assert that gains realized from the sale of stock are derived from intangible personal property and, as a result, are not sources of Utah income for taxpayers domiciled in a location other than Utah. At the hearing, RESPONDENT REP. 2 did not identify any income earned from the sale of stock as being potential Utah source income.

a. For the 1997 tax year, the Petitioners included in FAGI gains from the sale of ( # ) shares of COMPANY M and ( # ) shares of COMPANY A. Exhibit R-1 at p. 22. For the 1998 tax year, the Petitioners included a gain from the sale of COMPANY K shares. Exhibit R-1 at p. 40. For the 1999 tax year, the Petitioners included gains and losses from sales of various stocks and shares of investment funds. Exhibit R-1 at pp. 57, 60.

b. It appears that the Petitioners' FAGI for the 2000, 2001 and 2002 tax years included gains or losses resulting from the sale of stock, as well. However, because neither party submitted the Petitioners' federal returns for these years, the details of the sales and the amounts of the gains or losses are indeterminable from the available information. Exhibit R-1 at pp. 98-112, 139, 147.

74. Net Long-Term Loss from Partnerships, S Corporations, etc. (as reported on Schedule D of federal returns). This type of loss is evident only on the Petitioners' 1997 federal return, on which the Petitioners included a net long-term loss of \$\$\$\$\$ in their FAGI. Exhibit R-1 at p. 22. Neither party explained what the loss related to and whether or not the loss is Utah source income (or a Utah source loss).

75. Capital Gain Distributions (as reported on Schedule D of federal returns). Neither party addressed whether the Petitioners' capital gain distributions were Utah source again.

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a. The Petitioners appear to have included this type of income in their FAGI for each year at issue. Exhibit R-1 at pp. 22, 40, 57, 92-112.

b. For the years at issue, the 1099 Div. Forms on which capital gains distributions were reported were issued by COMPANY H, COMPANY G and COMPANY F

76. Form 4797 Sale of Business Property for COMPANY I (“COMPANY I”). On the Petitioners’ 1997 return, they included \$\$\$\$ in income realized from “the transfer of assets and liabilities of COMPANY I by PETITIONER 1 to, COMPANY A solely in exchange for the company’s voting stock in August, 1998.” Exhibit R-1 at pp. 28-29, 34-35.

a. RESPONDENT REP. 2 testified that COMPANY I had a Utah identification number, but stated that there was insufficient information to know whether or not this income was Utah source income.

b. PETITIONER 2 testified that she had heard of COMPANY I, but did not know what the Petitioners’ involvement was in that entity. Nevertheless, the Petitioners did not discuss whether or not this income was Utah source income.

c. 1099 Misc. Form information shows that COMPANY I’s address was in CITY 3, Utah. Exhibit R-1 at p. 93.

d. No party provided evidence concerning the assets and liabilities of COMPANY I that were transferred to COMPANY A and resulted in the \$\$\$\$ of income from the sale of business property.

77. Pension or Annuity. For the six years at issue, PETITIONER 1 received and reported pension or annuity income as part of the Petitioners’ FAGI for each year. Exhibit R-1 at pp. 18, 36, 52, 135, 143.

a. RESPONDENT REP. 2 stated that the pension or annuity income could be Utah source income because copies of the 1099-R Forms reporting this income for 1998 and 1999 show that the

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income is related to COMPANY A. Exhibit R-1 at pp. 51, 68. The Petitioners did not address whether this income was Utah source income.

b. Information on the 1099-R Forms that reported PETITIONER 1's pension or annuity income for the years at issue shows the "payer" of the income to be:

COMPANY A  
FINANCIAL INSTITUTION B. As Payor  
ADDRESS  
CITY, STATE ZIP

Exhibit R-1 at pp. 51, 68, 93-94, 96, 99, 103, 110.

78. Passive Income or Loss from Partnerships reported on Schedule E. RESPONDENT REP. 2 testified that the partnerships identified on the Petitioners' Schedules E had Utah identification numbers and that, as a result, any income from the partnerships could possibly be Utah source income. The Petitioners did not discuss whether the income and losses from these partnerships were Utah source income or losses. In addition, the Petitioners did not dispute that the partnerships had Utah identification numbers.

a. Sufficient information is available to identify all Schedule E items of income and loss for 1997, 1998 and 1999, but only some of the items for 2000, 2001 and 2002 tax years.

b. From the information available, it appears that the Schedule E income and losses concern three partnerships and specific years, as follows: 1) COMPANY I for the 1997 tax year; 2) COMPANY J ("COMPANY J") for all years at issue; and COMPANY L for tax years 1999, 2001 and 2002. Exhibit R-1 at pp. 18, 25, 36, 42, 52, 61, 100-102.

c. Records from the Utah Department of Commerce show COMPANY J's address to be in CITY 7, Utah. They also show that PETITIONER 1 was not only a member, but also a manager of the partnership. Exhibit R-1 at pp.159-160.

d. PETITIONER 2 testified that COMPANY L, which was formerly known as COMPANY O, was created in case PETITIONER 1 wanted their ( X ) to be a ( WORDS REMOVED ). She further stated that she did not know if the entity was treated as a business investment. Exhibit R-1 at p. 61. Documents were submitted in which expenses incurred by COMPANY O for periods in 2000 and 2001 are itemized. Exhibit R-1 at pp. 193-210.

79. Guaranteed Payment from COMPANY I. For the 1997 tax year only, PETITIONER 1 received “guaranteed payment” income from COMPANY I. RESPONDENT REP. 2 stated that because the guaranteed payment came from an entity with Utah ties, specifically COMPANY I, it could be Utah source income. The Petitioners did not discuss whether this specific income was Utah source income.

80. Social Security Benefits. PETITIONER 1 received taxable social security income for tax years 2000, 2001 and 2002, and the Petitioners included the amounts in their FAGI for each of these years. Exhibit R-1 at 99, 102, 110, 119-120, 135, 143. Neither party discussed whether PETITIONER 1’s social security income was Utah source income.

#### APPLICABLE LAW

##### **I. Utah Resident Individual.**

1. Under Utah Code Ann. §59-10-104(1)<sup>5</sup>, “a tax is imposed on the state taxable income . . . of every resident individual[.]”

2. For purposes of Utah income taxation, a “resident individual” is defined in UCA §59-10-103(1)(k) to mean:

- (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. . . .

3. Utah Admin. Rule R865-9I-2 (“Rule 2”) further explains when a person is “domiciled” in Utah for income tax purposes. For the 1997, 1998, 1999, 2000, 2001 and almost all of the 2002 tax year (i.e., until the Commission amended the rule on December 9, 2002), 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.

4. Beginning on December 9, 2002 and effective for the last several weeks at issue in this matter, Rule 2 provided as follows in pertinent part:

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

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<sup>5</sup> All citations to the Utah Code and the Utah Administrative Code contained herein are to the 1999 version of the Code and Administrative Code, unless otherwise indicated.

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.

5. Utah Admin. Rule R884-24P-52 ("Rule 52") sets forth a non-exhaustive list of factors

or objective evidence that is determinative of domicile, as follows:

E. Factors or objective evidence determinative of domicile include:

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.

**II. Utah Source Income of Nonresident Individuals.**

6. For purposes of determining a nonresident individual's state taxable income, UCA

§59-10-117 provides, as follows in pertinent part:

- (1) For the purpose of Section 59-10-116, federal adjusted gross income derived from Utah sources shall include those items includable in federal "adjusted gross income" (as defined by Section 62 of the Internal Revenue Code) attributable to or resulting from:
  - (a) the ownership in this state of any interest in real or tangible personal property (including real property or property rights from which "gross income from mining" as defined by Section 613(c) of the Internal Revenue Code is derived);
  - or
  - (b) the carrying on of a business, trade, profession, or occupation in this state.
- (2) For the purposes of Subsection (1):
  - (a) Income from intangible personal property, including annuities, dividends, interest, and gains from the disposition of intangible personal property shall constitute income derived from Utah sources only to the extent that such income is from property employed in a trade, business, profession, or occupation carried on in this state.



(b) Deductions with respect to capital losses, net long-term capital gains, and net operating losses shall be based solely on income, gain, loss, and deduction connected with Utah sources, under rules prescribed by the commission, but otherwise shall be determined in the same manner as the corresponding federal deductions.

(c) Salaries, wages, commissions, and compensation for personal services rendered outside this state shall not be considered to be derived from Utah sources.

(d) A nonresident shareholder's distributive share of ordinary income, gain, loss, and deduction derived from or connected with Utah sources shall be determined under Section 59-10-118.

(e) A nonresident, other than a dealer holding property primarily for sale to customers in the ordinary course of his trade or business, shall not be considered to carry on a trade, business, profession, or occupation in this state solely by reason of the purchase or sale of property for his own account.

(f) If a trade, business, profession, or occupation is carried on partly within and partly without this state, items of income, gain, loss, and deductions derived from or connected with Utah sources shall be determined in accordance with the provisions of Section 59-10-118.

(g) A nonresident partner's distributive share of partnership income, gain, loss, and deduction derived from or connected with Utah sources shall be determined under Section 59-10-303.

(h) The share of a nonresident estate or trust and nonresident beneficiaries of any estate or trust in income, gain, loss, and deduction derived from or connected with Utah sources shall be determined under Section 59-10-207.

(i) Any dividend, interest, or distributive share of income, gain, or loss from a real estate investment trust, as defined in Section 59-7-116.5, distributed or allocated to a nonresident investor in the trust, including any shareholder, beneficiary, or owner of a beneficial interest in the trust, shall be income from intangible personal property under Subsection (2)(a), and shall constitute income derived from Utah sources only to the extent the nonresident investor is employing its beneficial interest in the trust in a trade, business, profession, or occupation carried on by the investor in this state.

7. Utah Code Ann. §59-10-303 addresses a nonresident's share of partnership income for purposes of Section 59-10-117(2)(g), as follows in pertinent part:

(1) In determining the adjusted gross income of a nonresident partner of any partnership, there shall be included only that part derived from or connected with sources in this state of the partner's distributive share of items of partnership income, gain, loss, and deduction entering into the partner's adjusted gross income, as such part is determined under rules prescribed by the commission in accordance with the general rules in Section 59-10-116.

8. Utah Admin. Rule R865-9I-13(A) provides that “[n]onresident partners and nonresident members shall keep adequate records to substantiate their determination or to permit a determination by the Tax Commission of the part of their adjusted gross income that was derived from or connected with sources in this state.”

9. Utah Admin. Rule R865-9I-14 requires employers to withhold income taxes for nonresidents who work in Utah, as follows:

A. Except as otherwise provided in statute or this rule, every employer shall withhold Utah income taxes from all wages paid:

1. to a nonresident employee for services performed within Utah,

....

C. If the duties of a nonresident employee involve work both within and without the state, tax is withheld from that portion of the total wages that is properly allocable to Utah. The method of allocation is subject to review by the Tax Commission and may be subject to change if it is determined to be improper.

### **III. Statutes of Limitations and Probate Code.**

#### **A. Utah Law.**

10. UCA §59-10-536(3)(a) provides that the Tax Commission may assess and collect individual income tax “at any time if . . . no return is filed[.]”

11. In the Utah Uniform Probate Code, UCA §75-3-202 addresses a conflicting claim of domicile in another state, as follows:

If conflicting claims as to the domicile of a decedent are made in a formal testacy or appointment proceeding commenced in this state, and in a testacy or appointment proceeding after notice pending at the same time in another state, the court of this state must stay, dismiss, or permit suitable amendment in, the proceeding here unless it is determined that the local proceeding was commenced before the proceeding elsewhere. The determination of domicile in the proceeding first commenced must be accepted as determinative in the formal testacy or appointment proceeding in this state.

12. UCA §75-3-803 provides for limitations on the presentation of claims against a decedent's estate, as follows in pertinent part:

(1) All claims against a decedent's estate which arose before the death of the decedent, including claims of the state and any subdivision of it, whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract, tort, or other legal basis, if not barred earlier by other statute of limitations, are barred against the estate, the personal representative, and the heirs and devisees of the decedent, unless presented within the earlier of the following dates:

(a) one year after the decedent's death; or

(b) within the time provided by Subsection 75-3-801(2) for creditors who are given actual notice, and where notice is published, within the time provided in Subsection 75-3-801(1) for all claims barred by publication.

(2) In all events, claims barred by the nonclaim statute at the decedent's domicile are also barred in this state.

....

**B. STATE 1 Law.**

13. STATE 1 Statutes §2-7-205(a) provides that a notice of probate should be sent to the following parties, as follows:

(a) A true copy of the notice required in W.S. 2-7-201 shall be mailed by ordinary United States mail, first class, to:

(i) The surviving spouse, if any, and to all of the heirs at law of the decedent and to all of the beneficiaries named in the will of the decedent.

The mailings shall be made not later than one (1) week after the first publication of the notice in the newspaper;

(ii) Each creditor of the decedent whose identity is reasonably ascertainable by the personal representative within the time limited in the notice to creditors. The mailing shall be made not later than thirty (30) days prior to the expiration of three (3) months after the first publication of the notice in the newspaper; and

(iii) The state department of health if the decedent received medical assistance pursuant to W.S. 42-4-101 through 42-4-114.

14. W.S. §2-7-703 requires that claims against a decedent's estate be filed, as follows:

(a) Except as otherwise provided in this section, all claims whether due, not due or contingent, shall be filed in duplicate with the clerk within the time limited in the notice to creditors and any claim not so filed is barred forever. Any claimant to whom the personal representative has mailed a notice pursuant to W.S. 2-7-

205(a)(ii) shall file his claim within three (3) months after the date of first publication of the notice in the newspaper, or before the expiration of thirty (30) days after the mailing, whichever date is later, and any claim not so filed is barred forever. . . .

. . . .

(c) This section shall not bar:

(i) Claimants entitled to equitable relief due to peculiar circumstances, if so found by the court in adversary proceedings; or

(ii) A claimant to whom no notice was mailed pursuant to W.S. 2-7-205(a)(ii), if the court in adversary proceedings finds that the identity of the claimant was reasonably ascertainable by the personal representative within the time limited in the notice to creditors published pursuant to W.S. 2-7-201.

. . . .

#### **IV. Burden of Proof.**

15. In proceedings involving individual income tax before the Tax Commission, UCA

§59-10-543 provides, as follows:

In any proceeding before the commission under this chapter, the burden of proof shall be upon the petitioner except for the following issues, as to which the burden of proof shall be upon the commission:

- (1) whether the petitioner has been guilty of fraud with intent to evade tax;
- (2) whether the petitioner is liable as the transferee of property of a taxpayer, but not to show that the taxpayer was liable for the tax; and
- (3) whether the petitioner is liable for any increase in a deficiency where such increase is asserted initially after a notice of deficiency was mailed and a petition under Title 59, Chapter 1, Part 5 is filed, unless such increase in deficiency is the result of a change or correction of federal taxable income required to be reported, and of which change or correction the commission had no notice at the time it mailed the notice of deficiency.

#### DISCUSSION

First, the Commission will determine whether the Petitioners were Utah resident individuals for the years at issue pursuant to Section 59-10-103(1)(k), which provides that the Petitioners are Utah resident individuals if they are either: 1) domiciled in Utah; or 2) present in Utah for 183 or more days in any one year. If the Commission finds that the Petitioners were Utah resident individuals for any year at issue, all of their income for that year is subject to Utah taxation. If, on the other hand, the Commission finds that the

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Petitioners were not Utah resident individuals for any year at issue, only that income that is considered Utah source income pursuant to Section 59-10-117 is subject to Utah income taxation. In this latter circumstance, the Commission will determine whether or not each item of the Petitioners' income is Utah source income. Lastly, after the Commission has addressed these issues, it will determine whether the Division was authorized to assess additional Utah income tax to PETITIONER 1 more than a year after he passed away and his estate was probated.

**I. Utah Resident Individual.**

In Finding of Fact #49, the Commission has already found that the Petitioners have shown that neither of them was present in Utah for 183 or more days in any of the six years at issue. Accordingly, the Petitioners will be deemed Utah resident individuals only if they were domiciled in Utah during the audit period.

For all but the last month at issue,<sup>6</sup> "domicile" was defined in Rule 2(D) to mean the place where a person has established his or her "true, fixed, permanent home and principal establishment . . . not for a mere special or temporary purpose, but with the present intention of making a permanent home. . . ." Furthermore, the rule provides that once domicile is established, that domicile is not changed until there is: 1) an abandonment of the old domicile; and 2) the intention and establishment of a new domicile.

During the audit period, the Petitioners retained a number of Utah privileges, such as holding Utah driver's licenses and voting in Utah elections. In addition, the Petitioners received the primary residential property tax exemption on their CITY 3 condominium. Generally, these privileges are provided to persons who are domiciled in and maintain their primary residence in Utah. Moreover, for each of the years at issue,

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<sup>6</sup> Although Rule 2 was amended on December 9, 2002, the Commission finds that the changes do not impact the Commission's decision concerning the Petitioners' domicile during the six tax years at issue.

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the Petitioners maintained significant contacts with Utah and were present in Utah for significant portions of each year.

However, many of these Utah contacts were associated with the Petitioners owning a company in Utah and having family and other long-term professional contacts in Utah. Beginning in 1998, when the Petitioners purchased their ranch in CITY 2, STATE 1, the Utah contacts were also associated with CITY 3 being the nearest metropolitan area to CITY 2 that could provide certain medical and transportation services. Furthermore, it is evident that the Petitioners took steps to change their Utah domicile for tax purposes when PETITIONER 1 resigned as President of COMPANY A in 1989 and took a lesser role in running his company.

Although the Petitioners filed their 1989 Utah income tax return as nonresidents, there is insufficient evidence for the Commission to determine whether or not the Petitioners changed their domicile in 1989 from Utah to COUNTRY, where they resided in a home they already owned and had previously visited on a regular basis. Nevertheless, the Commission finds that sufficient evidence exists to show that the Petitioners changed their domicile to the ISLAND in 1991 or 1992 when they took the steps necessary to purchase a home on the island. Not only did the Petitioners become ISLAND residents, but they also paid tax to ISLAND on their worldwide income and eventually were allowed to remain in ISLAND for an indefinite period and vote in ISLAND elections. Furthermore, the Petitioners began to use their ISLAND address for purposes of filing their U.S. federal returns and continued to do so through 1998. Lastly, the evidence shows that an unforeseen circumstance (i.e., a change of ISLAND tax law) resulted, in part, in the Petitioners selling their ISLAND home and moving. Based on these circumstances, the Commission concludes that in 1991 or 1992, the Petitioners abandoned their prior domicile, whether it was Utah or COUNTRY, and established their domicile on the ISLAND until the spring of 1998, when they put their ISLAND home up for sale.

Remaining at issue is whether the Petitioners reestablished a domicile in Utah or some other location when they abandoned their domicile in ISLAND in 1998. The Commission notes that throughout the audit period, the Petitioners continued to maintain the same contacts with Utah that they had while they were domiciled in ISLAND. Although the Petitioners assert that they reestablished their domicile in COUNTRY after leaving ISLAND, the Commission is more convinced that the Petitioners changed their domicile from ISLAND to STATE 1. Not only did the Petitioners purchase and begin a significant restoration of a large property in STATE 1 in 1998, they purchased a vehicle in STATE 1 and opened bank accounts and a brokerage account in STATE 1 in 1998. They also had their household furnishings from the home on the ISLAND shipped directly to the ranch in STATE 1. The Petitioners were also present at the ranch for significant periods overseeing its restoration until it was complete in 2001. In addition, the Petitioners began to participate in social events and continued their involvement with the Historical Center in CITY 2, STATE 1. Furthermore, there is evidence to show that the Petitioners intended their STATE 1 home to be their permanent residence, as PETITIONER 2 received a STATE 1 driver's license in 2002 once her Utah driver's license expired. Given these circumstances and the evidence and testimony submitted, the Commission finds that the Petitioners established a new domicile in STATE 1, not Utah, in 1998 when they abandoned their ISLAND domicile. As a result, the Commission finds that the Petitioners were not domiciled in Utah for any of the six years at issue. Accordingly, the Commission finds that the Petitioners were not Utah resident individuals for tax purposes from 1997 through 2002, the six tax years at issue.

**II. Utah Source Income.**

The Commission has found that the Petitioners were not Utah resident individuals for the tax years at issue. Nevertheless, any of the Petitioners' income earned during those years is subject to Utah taxation if that income is Utah source income, as set forth in Section 59-10-117. The Division States in its post-hearing brief that "if no finding of domicile is made, the Division should work with the Petitioners to

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determine what portions of their income constitutes Utah source income.” The Commission encourages parties to work together to resolve issues that are before the Commission. However, the Commission has already held the Formal Hearing in this matter at which the parties were given an opportunity to submit evidence concerning the Petitioners’ Utah source income. Furthermore, the parties were given the opportunity to address the sourcing issue in their post-hearing briefs. As a result, the Commission will issue its decision based on the information already before it.

Before addressing whether or not each item of the Petitioners’ income is Utah source income, the Commission will first address whether the Division’s request at the hearing to revise its original assessments for the 1997, 1998 and 1999 tax years is permissible. If yes, the Commission will next address how the Division’s request to revise these tax years affects the burden of proof in showing whether or not an item of income is Utah source income.

A. Revising an Assessment. At the hearing, the Division stated that the assessments it imposed on PETITIONER 1 for the 1997, 1998 and 1999 tax years were based on incomplete information. The Division asked the Commission to revise its original assessments to reflect: 1) a joint married filing status for the Petitioners; 2) an increase in the Petitioners’ exemptions; and 3) the FAGI shown on the Petitioners’ federal return for each year. For each of these years, the Division asks the Commission to include additional items of income and losses not reflected on the original assessments. Because the Division also asked the Commission to change the Petitioners’ filing status and number of exemptions, the changes resulted in an increased liability for 1997 and a lower liability for 1998 and 1999.

The Petitioners assert that the Division’s request to revise its original assessments is procedurally barred because the Statutory Notices that were issued for 1997, 1998 and 1999 did not put the Petitioners on notice of the taxes that the Division now seeks to enforce. The Commission disagrees. Section 59-10-543 specifically provides for the burden of proof to shift from the taxpayer to the Division when the



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Division asserts an increase in liability after the Statutory Notice is mailed and an appeal is filed. As a result, the Commission believes that the Utah Individual Income Tax Act provides for the Division to assert an increase in liability after it has issued a Statutory Notice without issuing another notice. Accordingly, the Commission rejects the Petitioners' argument and finds that the Division was authorized at the hearing to request revisions to the Petitioners' tax liability for the 1997, 1998 and 1999 tax years.<sup>7</sup>

B. Burden of Proof. Although the burden of proof is generally upon the petitioner in matters before the Tax Commission, Section 59-10-543(3) provides that the burden of proof in an individual income tax case shifts to the Division as to:

whether the petitioner is liable for any increase in a deficiency where such increase is asserted initially after a notice of deficiency was mailed and a petition under Title 59, Chapter 1, Part 5 is filed, unless such increase in deficiency is the result of a change or correction of federal taxable income required to be reported, and of which change or correction the commission had no notice at the time it mailed the notice of deficiency.

There is no evidence to show that the revisions sought by the Division resulted from a "change or correction of federal taxable income required to be reported," or, if so, the Division "had no notice at the time it mailed" its Statutory Notices for 1997, 1998 and 1999. Accordingly, if the Division's requested revisions result in the Petitioners being liable for any increase in the deficiencies originally imposed, the burden of proof concerning those items that comprise the revisions is upon the Division.

The Commission notes that the Division's requested revisions would result in a total increase in liability for the 1997 tax year and a total decrease in liability for the 1998 and 1999 tax years. Because Section 59-10-543(3) shifts the burden in cases with "any increase in a deficiency," one could argue that the

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<sup>7</sup> The Commission also notes that the parties not only elected to waive their right to an Initial Hearing, but also declined to submit pre-hearing briefs in which each could have disclosed its arguments and positions and become aware of and responded to the other party's arguments and positions.

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burden of proof remains entirely with the Petitioners for the 1998 and 1999 tax years because the Division's requested revisions do not "increase" liability.

Nevertheless, for the 1998 and 1999 tax years, the Division's requested revisions would increase the Petitioners' FAGI for each year, thereby imposing tax on more income than originally taxed in the Division's Statutory Notices. Under these circumstances, the Commission finds that the Division's requested revisions for 1997, 1998 and 1999 all qualify as "any increase of liability" for the Petitioners. Accordingly, the Commission finds that the Division has the burden of proof to show that the "new" items of income that were not originally assessed in its 1997, 1998 and 1999 Statutory Notices (i.e., those items of income not included in the Division's original amounts of FAGI) are Utah source income. The Petitioners retain the burden of proof concerning any items of income originally assessed by the Division.

C. Sourcing Each Item of Income. For the 1997, 1998 and 1999 tax years, the Division submitted copies of the Petitioners' federal returns, which extensively detail each item of income the Petitioners earned for these years. For the 2000, 2001 and 2002 tax years, there is less information in the hearing record to detail each item of income, especially for the 2000 tax year. However, based on the evidence presented at the Formal Hearing and those arguments that the parties made, the Commission will address the Petitioners' different items of income (and losses) and determine whether or not they are Utah source income (or losses).

1. PETITIONER 1's Wages Income from COMPANY A. Section 59-10-117(1)(b) provides that Utah source income includes items in FAGI that are "attributable to or resulting from . . . the carrying on of a business, trade, profession, or occupation in this state." PETITIONER 1 was Chairman of the Board and performed services for COMPANY A during the tax years at issue. The Petitioners admitted that PETITIONER 1 attended board and other meeting in Utah concerning COMPANY A and that he was present in Utah for a significant amount of time in 1997 attending meetings in regards to the company's public

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offering. Furthermore, PETITIONER 2 stated that PETITIONER 1 reviewed the company's "daily numbers," which were faxed to him each day. The evidence shows that PETITIONER 1 was present in Utah for a significant number of days each year, which according to PETITIONER 2's estimates could possibly have been more than 100 days each year. As a result, it is reasonable to assume that PETITIONER 1 reviewed the faxed "daily numbers" in Utah for a portion of each year as well. For these reasons, the Commission finds that PETITIONER 1's duties with COMPANY A involved work both in Utah and outside of Utah.

The Petitioners argue that COMPANY A's decision to exclude any state income from line 17 of PETITIONER 1's W-2 Forms shows that none of his COMPANY A income is Utah source income. The Commission does not find this argument persuasive. Based on the work that PETITIONER 1 performed in Utah for COMPANY A, as described above, the Commission believes that at least a portion of PETITIONER 1's wages are attributable to carrying on an occupation in Utah.

The Commission recognizes that "the most common rule for attributing a nonresident's compensation to the state is based on the proportion of the time that the nonresident spends working in the state." Jerome R. Hellerstein & Walter Hellerstein, *State Taxation*, P 20.05(4)(a) (3<sup>rd</sup> ed. 2000). In fact, the Commission has adopted a rule specifically to allocate the income of nonresident professional athletes based on the number of days spent in Utah rendering services. Utah Admin. Rule R865-9I-44. Furthermore, Rule R865-9I-14(C) requires an employer to withhold tax representing that portion of the total wages allocable to Utah for an employee whose duties involve work both in Utah and outside of Utah.

Based on the foregoing and because the Petitioners have not set forth a method to accurately allocate PETITIONER 1's wages from COMPANY A to Utah for the days he worked in Utah, the Commission finds that the entirety of PETITIONER 1's wages from COMPANY A is Utah source income for all years at issue.

2. PETITIONER 2's Wages from COMPANY B. PETITIONER 2 testified that COMPANY B let her "come and go as she pleased" and that she filled orders taken from customers out-of-state when she was in Utah. From this information, it appears that PETITIONER 2's wages relate to duties that occurred both in Utah and outside of Utah. For the same reasons stated above in regards to PETITIONER 1's wages, the Commission finds that at least a portion of PETITIONER 2's wages from COMPANY B are attributable to carrying on an occupation in Utah and is Utah source income for all years at issue.

For the 1997, 1998 and 1999 tax years, the Division has the burden to prove that the PETITIONER 2's wages are Utah source income because her wages were not originally assessed in the Division's Statutory Notices. Neither party has set forth a method to allocate PETITIONER 2's wages between income earned in Utah and income earned out-of-state. Furthermore, the W-2 Forms completed by COMPANY B shows all of the income to be Utah source income. Given this information, the Commission finds that sufficient evidence exists to shift the burden to the Petitioners to show what portion of PETITIONER 2's income is not Utah source income. The Petitioners have not set forth a method to accurately allocate PETITIONER 2's wages from COMPANY B to Utah for the days she worked in Utah. Accordingly, the Commission finds that the entirety of PETITIONER 2's wages from COMPANY B is Utah source income for the 1997, 1998 and 1999 tax years.

For the 2000, 2001 and 2002 tax years, the Division included PETITIONER 2's wages in its original assessments, which results in the Petitioners having the burden of proof to show that the assessments are incorrect. Because the Petitioners have not provided a method to allocate PETITIONER 2's wages, the Commission finds that the entirety of PETITIONER 2's wages from COMPANY B is Utah source income for the 2000, 2001 and 2002 tax years, as well.

3. Interest Income. For the years at issue, the Petitioners earned interest income from accounts at a number of banks and entities. The 1099 Int. Forms submitted to the IRS show that all of the

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interest income was earned from accounts that appear to be in PETITIONER 1's name alone, PETITIONER 2's name alone, or in their names jointly. None of the interest appears to be related to accounts associated with a business entity.

The Petitioners argue that all of the interest was earned from "personal" accounts held by the Petitioners and did not involve any business. The Division States that it believes the interest earned from accounts at FINANCIAL INSTITUTION could possibly be Utah source income because FINANCIAL INSTITUTION is located in Utah.

Section 59-10-117(2)(a) provides that "[i]ncome from intangible personal property, including annuities, dividends, interest, and gains from the disposition of intangible personal property shall constitute income derived from Utah sources only to the extent that such income is from property employed in a trade, business, profession, or occupation carried on in this state." The evidence submitted suggests that the interest earned by the Petitioners for all years at issue is from personal accounts and is not associated with a trade, business, profession, or occupation carried on in this state. As a result, the Commission finds that the interest income that comprises the Petitioners' FAGI for all years at issue is not Utah source income.

4. Dividend Income. At the hearing, RESPONDENT REP. 2 did not identify any of the Petitioners' dividend income as possibly being Utah source income. Furthermore, the Petitioners argue that their dividend income is not Utah source income because it is income earned from intangibles not associated with a trade, business, profession, or occupation carried on in this state. There is no evidence to suggest that the intangibles from which the dividends were earned were used to carry on a business in Utah. Based on the

parties' respective arguments and pursuant to Section 59-10-117(2)(a), the Commission finds that the dividend income that comprises the Petitioners FAGI for all years at issue is not Utah source income.

5. Stock and Investment Fund Income and Capital Gain Distributions (as reported on Schedule D of federal returns). The Petitioners' federal returns for the 1997, 1998 and 1999 tax years show specific amounts of income earned from the sale of stocks and from capital gain distributions. No returns were submitted for the 2000, 2001 and 2002 tax years, and although evidence suggests that the Petitioners sold stocks during these years as well, there is insufficient information to determine what portion of the Petitioners' FAGI was related to any gains or losses from such sales for these years.

At the hearing, RESPONDENT REP. 2 did not identify any of the income earned from stock sales or capital gain distributions as potential Utah source income. Again, the Petitioners argue that the income earned from stock sales is not Utah source income because it is earned from intangibles not associated with a trade, business, profession, or occupation carried on in this state. There is no evidence to suggest that the stocks and investment funds at issue were used to carry on a trade or business in Utah. Based on the parties' respective arguments and pursuant to Section 59-10-117(2)(a), the Commission finds that all income and losses associated with capital gains and sales of stock for the 1997, 1998 and 1999 tax years are not Utah source income or losses.

In addition, for the 1997 tax year only, the Petitioners reported a loss of \$\$\$\$ from a partnership or "S" corporation on Schedule D of their federal return. The Division did not originally assess this loss and has the burden of proof to show that it is a Utah source loss. It has not shown that loss was derived from or associated with sources located in Utah. Accordingly, the Commission finds that this loss is not a Utah source loss. In conclusion, the Commission finds that all amounts of income or losses reported on Schedule D of the Petitioners' federal returns for the 1997, 1998 and 1999 tax years is not Utah source income or losses.

For the 2000, 2001 and 2002 tax years, the Petitioners have the burden to prove whether or not the Schedule D losses are Utah source losses. The Petitioner has not shown that the \$\$\$\$ in carryover losses for each of these years was derived from Utah sources. Accordingly, the Commission finds that the Schedule D losses that comprise the Division's original assessments for the 2000, 2001 and 2002 tax years are not Utah source losses.

6. Sale of Business Property. For the 1997 tax year, the Petitioners reported income from the sale of business assets, specifically income of \$\$\$\$ from the sale of assets and liabilities of COMPANY I to COMPANY A. Because this income was not included in the Division's original assessment, the Division has the burden to show that the income is Utah source income.

Although both COMPANY I and COMPANY A are Utah entities, neither party has shown whether the assets and liabilities that were sold were located in or associated with Utah. Without such information, the Commission is unable to determine whether the income is Utah source income pursuant to Section 59-10-117, Section 59-10-303, and Rule R865-9I-13(A). Because the Division carries the burden of proof as to this item of income, the Commission finds that the Petitioners' 1997 income from the sale of COMPANY I's business property is not Utah source income.

7. Pension or Annuity Income. For each year at issue, PETITIONER 1 received pension or annuity income that was paid by a STATE entity. Because the 1099-R Form reporting this income shows "COMPANY A" above the payor's name and address, the Division asserted that this income could possibly be Utah source income. The Petitioners did not address whether PETITIONER 1's pension income is Utah source income.

Pursuant to 4 U.S. § 114(a), federal law provides that “[n]o State may impose an income tax on any retirement income of an individual who is not a resident or domiciliary of such State.” The Commission has determined that PETITIONER 1 was not a resident or domiciliary of Utah for the years at issue. Furthermore, this income appears to be retirement income because it was reported to the IRS on a 1099-R Form for each year and because the payor shown on the form was a financial institution in STATE, not COMPANY A. For these reasons, the Commission finds that the pension or annuity income included in the Petitioners’ FAGI for each year at issue is not Utah source income.

8. Income or Losses from Partnerships (as reported on Schedule E of the federal returns).

For the 1997, 1998 and 1999 tax years, sufficient information was available to show that the Petitioners’ Schedule E income and losses came from three partnerships, specifically: 1) COMPANY I; 2) COMPANY J; and 3) COMPANY L. For these three years, the Division did not include these items of income or losses in its original assessments and, as a result, has the burden to prove that these items are Utah source income or losses.

PETITIONER 2 testified that the COMPANY L was created for the purpose of establishing a cattle operation on the Petitioners’ RANCH in STATE 1. Furthermore, the Petitioners provided invoices of purchases concerning the ranch operation in the name of COMPANY O, which later became COMPANY L. Based on this information, the Commission concludes that any income or losses relating to COMPANY L concerns property outside of Utah and is not Utah source income.

Neither party provided any information to show whether the income and losses for COMPANY I and COMPANY J were associated with property located inside or outside of Utah. Without such information, the Commission is unable to determine whether the income and losses were derived from property located in or associated with Utah. As a result, the Commission is unable to determine whether the income and losses reported on Schedule E of the Petitioners’ federal returns for these two entities are Utah



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source income and losses pursuant to Section 59-10-117, Section 59-10-303 and Rule R865-9I-13(A). Because the Division has the burden of proof concerning these items for the 1997, 1998 and 1999 tax years, the Commission finds that the income and losses attributable to COMPANY I and COMPANY J for these three years is not Utah source income.

For each of the 2000, 2001 and 2002 tax years, the information provided to the Commission is insufficient to determine every item of income and loss reported on Schedule E. Nevertheless, for the 2000 tax year, the information shows that the Petitioners reported income earned from COMPANY J. Again, however, there is insufficient information to determine whether income from COMPANY J is Utah source income. Because the Division originally assessed this item of income in its 2000 Statutory Notice, the Petitioners bear the burden of proof concerning this item of COMPANY J income. As a result, the Commission finds that the \$\$\$\$ in COMPANY J income is Utah source income for the 2000 tax year. The Petitioner has not proven that the \$\$\$\$ in unidentified losses reported on Schedule E for the 2000 tax year are associated with Utah sources. Accordingly, the Commission finds that these losses are not Utah source losses.

For the 2001 and 2002 tax years, the federal transcripts show that the Petitioners reported Schedule E losses for each year, specifically losses of \$\$\$\$ for 2001 and \$\$\$\$ for 2002. The Petitioners bear the burden of proof for these years because the Division originally included the losses in its assessments. For the 2001 tax year, the Division submitted information from 1065-K1 Forms showing that the total losses of \$\$\$\$ included a loss of \$\$\$\$ for COMPANY J and a loss of \$\$\$\$ for COMPANY L. For reasons stated above, the Commission concludes that the COMPANY L loss is not Utah source loss. Because the Petitioners have not proven that the COMPANY J loss or the remaining unidentified losses are related to Utah sources, the Commission finds that these losses are not Utah source losses, as well.

For the 2002 tax year, information from 1065-K1 Forms show that the total losses of \$\$\$\$ includes a loss of \$\$\$\$ for COMPANY J and a loss of \$\$\$\$ for COMPANY L. Again for reasons stated above, the Commission concludes that the COMPANY L loss is not a Utah source loss. Because the Petitioners have not proven that the COMPANY J loss or the remaining unidentified losses are related to Utah sources, the Commission finds that these losses are not Utah source losses, as well.

To summarize, the Commission finds: 1) that none of the income and losses reported on Schedule E of the Petitioners' federal returns for the 1997, 1998, 1999, 2001 and 2002 tax years are Utah source income or losses; and 2) for the 2000 tax year, the \$\$\$\$ in income associated with COMPANY J is Utah source income, and the \$\$\$\$ in unidentified losses are not Utah source losses.

9. Guaranteed Payment from COMPANY I. For the 1997 tax year only, the Petitioners reported \$\$\$\$ in income that it identified on its federal return as a guaranteed payment from COMPANY I. Because the Division assessed this item of income in its original assessment, the Petitioners bear the burden to show that the payment is not Utah source income. At the hearing, RESPONDENT REP. 2 stated that the guaranteed payment could be Utah source income because the payment came from COMPANY I, an entity with Utah ties. The Petitioners did not address whether or not this item of income was Utah source income.

COMPANY I is identified on the Petitioners' federal returns as a partnership. Guaranteed payments made to a partner may be considered a distributive share of partnership income. See 26 US §736; *Utah State Private Letter Ruling 93-006DJ* (March 22, 1993). The Petitioners have failed to show that the partnership income of COMPANY I, including the guaranteed payment, was not derived from property located in Utah. Nor have they shown that the guaranteed payment should not be considered a distributive share of partnership income. For these reasons, the Commission finds that PETITIONER 1's 1997 guaranteed payment income from COMPANY I is Utah source income.

10. Social Security Income. PETITIONER 1 received taxable social security benefits for the 2000, 2001 and 2002 tax years. At the hearing, RESPONDENT REP. 2 did not identify taxable social security income as possible source income for a Utah nonresident. Although the Petitioners have the burden of proof concerning this item of income, the Commission finds that the Division's determination that this income was not a possible source of Utah income is sufficient for the Commission to find that PETITIONER 1's social security income is not Utah source income.

D. Revisions to Division's Statutory Notices for Each year.

1. *1997 Tax Year*. For this tax year, the Division has shown that the Petitioners' total FAGI is \$\$\$\$\$ and that the Petitioners were entitled to three exemptions on their married joint federal return. Based on the Commission's conclusions concerning Utah source income, the Commission finds that PETITIONER 1's COMPANY A wages of \$\$\$\$\$, PETITIONER 2's COMPANY B wages of \$\$\$\$\$, and PETITIONER 1's guaranteed payment of \$\$\$\$\$ from COMPANY I are Utah source income, which results in a total Utah source income of \$\$\$\$\$. Based on this information, the Commission orders the Division to revise the Petitioners' Utah tax liability to reflect that they are Utah nonresidents with \$\$\$\$\$ in Utah source income and that they are entitled to claim three exemptions on a married filing joint return.

2. *1998 Tax Year*. For this tax year, the Division has shown that the Petitioners' total FAGI is \$\$\$\$\$ and that the Petitioners were entitled to two exemptions on their married joint federal return. Based on the Commission's conclusions concerning Utah source income, the Commission finds that PETITIONER 1's COMPANY A wages of \$\$\$\$\$ and PETITIONER 2's COMPANY B wages of \$\$\$\$\$ are Utah source income, which results in a total Utah source income of \$\$\$\$\$. Based on this information, the Commission orders the Division to revise the Petitioners' Utah tax liability to reflect that they are Utah nonresidents with \$\$\$\$\$ in Utah source income and that they are entitled to claim two exemptions on a married filing joint return.

3. *1999 Tax Year.* For this tax year, the Division has shown that the Petitioners' total FAGI is \$\$\$\$ and that the Petitioners were entitled to two exemptions on their married joint federal return. Based on the Commission's conclusions concerning Utah source income, the Commission finds that PETITIONER 1's COMPANY A wages of \$\$\$\$ and PETITIONER 2's COMPANY B wages of \$\$\$\$ are Utah source income, which results in a total Utah source income of \$\$\$\$\$. Based on this information, the Commission orders the Division to revise the Petitioners' Utah tax liability to reflect that they are Utah nonresidents with \$\$\$\$ in Utah source income and that they are entitled to claim two exemptions on a married filing joint return.

4. *2000 Tax Year.* For this tax year, the Division has shown that the Petitioners' total FAGI is \$\$\$\$ and that the Petitioners were entitled to two exemptions on their married joint federal return. Based on the Commission's conclusions concerning Utah source income, the Commission finds that PETITIONER 1's COMPANY A wages and PETITIONER 2's COMPANY B wages, which are shown on the Petitioners' federal return to total \$\$\$\$\$, are Utah source income. The Commission also finds that the \$\$\$\$ of COMPANY J income reported on Schedule E is Utah source income. These amounts of Utah source income total \$\$\$\$\$. Based on this information, the Commission orders the Division to revise the Petitioners' Utah tax liability to reflect that they are Utah nonresidents with \$\$\$\$ in Utah source income and that they are entitled to claim two exemptions on a married filing joint return.

5. *2001 Tax Year.* For this tax year, the Division has shown that the Petitioners' total FAGI is \$\$\$\$ and that the Petitioners were entitled to two exemptions on their married joint federal return. Based on the Commission's conclusions concerning Utah source income, the Commission finds that PETITIONER 1's COMPANY A wages and PETITIONER 2's COMPANY B wages, which are shown on the Petitioners' federal return to total \$\$\$\$\$, are Utah source income. Based on this information, the Commission orders the Division to revise the Petitioners' Utah tax liability to reflect that they are Utah nonresidents with

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\$\$\$\$\$ in Utah source income and that they are entitled to claim two exemptions on a married filing joint return.

6. *2002 Tax Year.* For this tax year, the Division has shown that the Petitioners' total FAGI is \$\$\$\$\$ and that the Petitioners were entitled to two exemptions on their married joint federal return. Based on the Commission's conclusions concerning Utah source income, the Commission finds that PETITIONER 1's COMPANY A wages and PETITIONER 2's COMPANY B wages, which are shown on the Petitioners' federal return to total \$\$\$\$\$, are Utah source income. Based on this information, the Commission orders the Division to revise the Petitioners' Utah tax liability to reflect that they are Utah nonresidents with \$\$\$\$\$ in Utah source income and that they are entitled to claim two exemptions on a married filing joint return.

**III. Are the Division's Assessments Barred Due to PETITIONER 1's Estate Being Probated?**

PETITIONER 1 passed away on May 6, 2003. Notice of probate in the matter of PETITIONER 1's estate was published in a STATE 1 newspaper in July 2003 pursuant to STATE 1 law, which is more than one year prior to the Division issuing its Statutory Notices in March 2005. The Petitioners asserts that the Division is barred under both STATE 1 law and Utah law from issuing its assessments because PETITIONER 1's estate was probated more than a year prior to the date the Division issued its Statutory Notices.

In its Partial Summary Judgment Order in this matter, the Commission concluded that neither STATE 1 law nor Utah law would bar the Division's assessments if the Utah State Tax Commission was a "creditor of [PETITIONER 1] that was reasonably ascertainable." W.S. §2-7-205(a)(ii) provides that a copy of the notice of probate should be mailed to creditors that are reasonably ascertainable. W.S. §2-7-703(c)(i) provides that claimants are not barred from filing claims under several circumstances, including "[c]laimants

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entitled to equitable relief due to peculiar circumstances.” No copy of notice of PETITIONER 1’s probate was mailed to the Utah State Tax Commission.

The Petitioner argues that the Utah State Tax Commission was not a reasonably ascertainable creditor because the Commission had determined in a prior 1989 audit that the Petitioners were no longer Utah domiciliaries. The Commission is not convinced that the letters exchanged between the Division and the Petitioners’ attorney in 1990 (Exhibit P-1 at tab 1) necessarily show that a decision was made concerning the Petitioners’ domicile. The letter from a Division auditor States that “[w]e are in the process of reviewing your 1989 return” and there evidence to show that the Division ever affirmatively asserted that the Petitioners were no longer Utah domiciliaries.

Regardless of the letters that were exchanged in 1990, the Commission has determined from the evidence and testimony submitted at the Formal Hearing that PETITIONER 1 earned wages that are Utah source income for all years at issue. Because PETITIONER 1 had Utah source income for all tax years at issue, the Commission finds that the Utah State Tax Commission was a reasonably ascertainable creditor of his estate and that a copy of the notice of probate should have been mailed to the Commission. For these reasons, the Commission finds that the Division is not barred under STATE 1 law from issuing its Statutory Notices to PETITIONER 1.

Furthermore, UCA §59-10-536(3)(a) authorizes the Division to impose additional tax at any time to a taxpayer who owes Utah income tax and who fails to file a Utah return. The Commission has concluded that PETITIONER 1 earned Utah source income on which Utah income tax was due for the tax years at issue and that he failed to file a Utah tax return for each year at issue. Accordingly, authority exists under Utah law for the Division to issue its assessments.

The Petitioners, however, argue that Utah probate law bars the Division’s assessments, regardless of the authority that exists in Utah income tax law. UCA §75-3-803(1)(a) specifically provides that

all claims against a decedent's estate are barred unless presented within one year after the decedent's death. Because the Division's Statutory Notices were issued more than one year after PETITIONER 1's death, the Petitioners assert that the Division is barred from issuing its Statutory Notices under this statute. However, in the Commission's Partial Summary Judgment Order, the Commission ruled that it was not convinced that Section 75-3-803(1) applies to an estate probated in a state other than Utah, especially when Section 75-3-803(2) and Section 75-3-202 address an estate probated in a state other Utah. Without new evidence or precedent to convince it otherwise, the Commission again finds that Utah law does not bar the Division from issuing its assessments to PETITIONER 1. In conclusion, the Commission finds that the Division had authority to issue and was not barred under STATE 1 or Utah law from issuing its Statutory Notices to PETITIONER 1.

#### CONCLUSIONS OF LAW

1. For the six years at issue, the Commission finds that the Petitioners were first domiciled on the ISLAND and later in STATE 1. However, the Commission finds that the Petitioners were not domiciled in Utah for any of the six years at issue.
2. Furthermore, the Commission finds that neither of the Petitioners was present in Utah for 183 or more days in any of the six years at issue. As a result, the Commission finds that neither of the Petitioners was a Utah resident individual for any of the six years at issue.
3. The Commission finds that the Division was authorized to request a revision of its original assessments for the 1997, 1998 and 1999 tax years at the Formal Hearing.
4. For those items of the Petitioners' income that the Division did not originally assess in its Statutory Notices, the Commission finds that the Division has the burden of proof as to whether the items are Utah source income.

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5. For those items of the Petitioners' income that the Division originally assessed in its Statutory Notices, the Commission finds that the Petitioners have the burden of proof as to whether the items are Utah source income.

6. Based on the available information and the burden of proof that is applicable to each item of income or loss, the Commission finds that the Petitioners' total Utah source income, as Utah nonresidents, is: 1) \$\$\$\$\$ for the 1997 tax year; 2) \$\$\$\$\$ for the 1998 tax year; 3) \$\$\$\$\$ for the 1999 tax year; 4) \$\$\$\$\$ for the 2000 tax year; 5) \$\$\$\$\$ for the 2001 tax year; and 6) \$\$\$\$\$ for the 2002 tax year.

7. In calculating the Petitioners' nonresident Utah income tax liability, the Commission finds that the Petitioners are entitled to three exemptions for the 1997 tax year, two exemptions for the remaining years and a married filing joint status.

8. The Commission finds that the Utah State Tax Commission was a "reasonably ascertainable" creditor of PETITIONER 1 because he earned Utah source income for each year at issue and, yet, failed to file and pay Utah taxes for these years. Accordingly, the Commission finds that STATE 1 law does not bar the Division from issuing its Statutory Notices to PETITIONER 1.

9. The Commission finds that Utah income tax law specifically authorizes the Division to issue its Statutory Notices to PETITIONER 1. Furthermore, the Commission is not convinced that UCA §75-3-803(1) applies to an estate probated in a state other than Utah. Accordingly, the Commission finds that Utah law authorizes and does not bar the Division from issuing its Statutory Notices to PETITIONER 1.

DECISION AND ORDER



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Based upon the foregoing, the Commission finds that the Petitioners were neither domiciled in Utah nor present in Utah for 183 or more days for any of the years at issue. Accordingly, the Commission finds that the Petitioners were not Utah resident individuals for any portion of the six tax years at issue.

The Commission orders the Division to recalculate the Petitioners' Utah tax liability to reflect: 1) the Petitioners' Utah nonresident status; 2) a married filing joint status; 3) three exemptions for the 1997 tax year and two exemptions for the remaining five years; and 4) Utah source income in the amount of \$\$\$\$ for the 1997 tax year, \$\$\$\$ for the 1998 tax year, \$\$\$\$ for the 1999 tax year, \$\$\$\$ for the 2000 tax year, \$\$\$\$ for the 2001 tax year, and \$\$\$\$ for the 2002 tax year.

Finally, the Commission finds that even though PETITIONER 1's estate was probated more than one year prior to the Division imposing its assessments, the Division was not barred under STATE 1 or Utah law from issuing its Statutory Notices to PETITIONER 1 for the years at issue. It is so ordered.

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 2008.

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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 \_\_\_\_\_, 2008.

Pam Hendrickson

R. Bruce Johnson

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Commission Chair

Commissioner

Marc B. Johnson  
Commissioner

D'Arcy Dixon Pignanelli  
Commissioner

**NOTICE OF APPEAL RIGHTS:** 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 Ann. §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 Ann. §§59-1-601 and 63-46b-13 et. seq. Failure to pay any remaining balance resulting from this order within thirty (30) days from the date of this order may result in a late payment penalty.

*KRC/05-0520.fof*