

05-0718  
Income Tax  
Signed 06/04/2007

BEFORE THE UTAH STATE TAX COMMISSION

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PETITIONER 1 & PETITIONER 2,	)	
	)	<b>FINDINGS OF FACT,</b>
Petitioners,	)	<b>CONCLUSIONS OF LAW,</b>
	)	<b>AND FINAL DECISION</b>
v.	)	
	)	Appeal No.    05-0718
AUDITING DIVISION OF	)	
THE UTAH STATE TAX	)	Tax Type:    Income Tax
COMMISSION,	)	Tax Period:   2002-2003
	)	Account No:  #####
Respondent.	)	
	)	Judge:       Phan

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**Presiding:**

Marc Johnson, Commissioner  
Jane Phan, Administrative Law Judge

**Appearances:**

For Petitioner:    PETITIONER 1,  
                    PETITIONER 2,  
For Respondent:   RESPONDENT REPRESENTATIVE 1, Assistant Attorney General  
                    RESPONDENT REPRESENTATIVE 2, Manager, Income tax Auditing

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission for a Formal Hearing on March 14, 2007. Based upon the evidence and testimony presented at the hearing the Tax Commission hereby makes its:

FINDINGS OF FACT

1. This matter is before the Commission on Petitioners' appeal of income tax, penalty and interest deficiencies issued against them for tax years 2002 and 2003. The Statutory Notices of Audit Change had been issued on May 4, 2005.

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

Year	Tax	Penalty	Interest <sup>1</sup>	Total
2002	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$
2003	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$

3. Petitioners had filed Utah Individual Income Tax Returns for both tax years at issue. However, the Utah returns did not include the income PETITIONER 1 received from his commercial fishing activities, which took place off the coasts of STATE 1 and STATE 2. It was Petitioners' position that PETITIONER 1 was not a resident of Utah during this period, so they did not include this non-Utah source income on the Utah income returns.

4. Respondent's audits were on the basis that both Petitioners were residents of Utah for income tax purposes and as Utah residents, Petitioners' non-Utah source income was also subject to Utah individual income tax.

5. Petitioners owned a residence in Utah, which they purchased prior to the audit period and continue to own as of the present time. The residence was located at ADDRESS, CITY 1, Utah. During the audit period, PETITIONER 2 resided at the residence with the couple's daughter. Petitioners do not contest that PETITIONER 2 was a Utah resident for all periods at issue.

6. PETITIONER 1 is a commercial fisherman and it was his position that during the audit period and for many years prior his domicile was the fishing boat. In 1985, when PETITIONER 1 was in the 11<sup>th</sup> grade, he moved to STATE 1 where he resided with relatives and finished high school. Upon graduation in

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<sup>1</sup> Interest as calculated to the date of the Statutory Notices. Interest continues to accrue on the unpaid balance.

1986 he returned to Utah for the summer. He had a Utah drivers license at this time and has had a Utah licenses ever since. He also has registered to vote in Utah. He has never obtained a drivers license or voter registration in any other state.

7. In 1987 PETITIONER 1 started working as a commercial fisherman and he has continued this employment through the audit period. The ship that he began working from was based out of STATE 1 and has continued to be so to the present time. PETITIONER 1 has a Non Resident Commercial Fishing License from STATE 2 and is a member of the Deep Sea Fisherman's Union in STATE 3.

8. PETITIONER 1's living arrangements were established in the 1980's after he started fishing and have continued in the same manner through the audit period. While fishing the ship is at sea a week or more at a time. The ship is sixty feet long. PETITIONER 1 has his own cabin on the ship and there is a kitchen. Even while in port, PETITIONER 1 sleeps on the ship. He has not maintained an apartment in either STATE 1 or STATE 2 at any of the ports where they frequently stop. The fishing season is typically from April to November. However, PETITIONER 1 generally will spend additional time before or after the season has ended doing maintenance work on the ship when it is docked in STATE 1, during which time he resides on the ship. When finished with the fishing work for the season, PETITIONER 1 travels to Utah and resides with his wife and daughter at their residence in CITY 1.

9. PETITIONER 1 and PETITIONER 2 were married in the late 1980's. PETITIONER 2 is from Utah and her family was living in Utah at that time. Due to the fact that while working PETITIONER 1 would be at sea and traveling to different ports during the fishing season, PETITIONER 2 remained in Utah. They had purchased the CITY 1 residence prior to the audit period. Petitioners' mail is sent to the CITY 1 residence. PETITIONER 2 is there to receive the mail on a regular basis and pays the bills. The couple has a Utah bank account from which they pay their living expenses. PETITIONER 1 does also have an account in STATE 1 for business expenses. PETITIONER 2 will send or forward some mail to PETITIONER 1. This is

basically accomplished by forwarding the mail to the next port where he would be stopping.

10. The couple had a total of four different vehicles that were registered at various times in Utah during the audit period.

11. PETITIONER 1 also had registered a car in his name in STATE 2 during the audit period, but indicated the car was primarily for his sister who was living in STATE 2 at that time.

12. During the audit period PETITIONER 1 was registered to vote in Utah, but did not vote in any election.

13. During the audit period PETITIONER 1 received Unemployment Compensation from the State of STATE 1. The 1099-G issued based on this compensation was mailed to the Utah address. Petitioner's federal returns were filed with the Utah address. All W-2's, 1099's, 1098's and other tax information indicated the Utah address.

14. PETITIONER 1 remained domiciled in Utah during the audit period at issue. His actions do not indicate that he intended to abandon his Utah domicile, nor an intent to remain in the new domicile permanently. His presence on a fishing vessel that was out to sea most of the time off the coasts of STATE 1 and STATE 2 alone, is insufficient to establish a domicile in another state.

#### APPLICABLE LAW

Utah imposes income tax on individuals who are residents of the state, in Utah Code Sec. 59-10-104 as follows:

...a tax is imposed on the state taxable income, as defined in Section 59-10-112, of every resident individual...

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

(i) an individual who is domiciled in this state for any period of time during the taxable year, but only for the duration of such period; or (ii) an individual who is not domiciled in this state but maintains a permanent place of abode in this state and spends in the aggregate 183 or more days of the taxable year in this state. For purposes of this Subsection (1)(k)(ii), a

fraction of a calendar day shall be counted as a whole day.

For purposes of determining whether an individual is domiciled in this state the Commission had defined "domicile" in Utah Administrative Rule R865-9I-2(D)(2002)<sup>2</sup> as follows:

the place where an individual has a true, fixed, permanent home and principal establishment, and to which place he has (whenever he is absent) the intention of returning. It is the place in which a person has voluntarily fixed the habitation of himself or herself and family, not for a mere special or temporary purpose, but with the present intention of making a permanent home. After domicile has been established, two things are necessary to create a new domicile: first, an abandonment of the old domicile; and second, the intention and establishment of a new domicile. The mere intention to abandon a domicile once established is not of itself sufficient to create a new domicile; for before a person can be said to have changed his or her domicile, a new domicile must be shown.

The "domicile" rule was revised at the end of 2002. The new rule at Utah Administrative Rule R865-9I-2 (2003) provides as follows:

A. Domicile.

1. Domicile is the place where an individual has a permanent home and to which he intends to return after being absent. It is the place at which an individual has voluntarily fixed his habitation, not for a special or temporary purpose, but with the intent of making a permanent home.
2. For purposes of establishing domicile, an individual's intent will not be determined by the individual's statement, or the occurrence of any one fact or circumstance, but rather on the totality of the facts and circumstances surrounding the situation.
  - a) Tax Commission rule R884-24P-52, Criteria for Determining Primary Residence, provides a non-exhaustive list of factors or objective evidence determinative of domicile.
  - b) Domicile applies equally to a permanent home within and without the United States.
3. A domicile, once established, is not lost until there is a concurrence of the following three elements: a) a specific intent to abandon the former domicile; b) the actual physical presence in a new domicile; and c) the intent to remain in the new domicile permanently.
4. An individual who has not severed all ties with the previous place of residence may nonetheless satisfy the requirement of abandoning the previous domicile if the facts and circumstances surrounding the situation, including the actions of the individual, demonstrate that the individual no longer intends the

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<sup>2</sup> The rule defining "domicile" was revised in December 2002. The Commission, therefore, considers both versions of the rule.

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.

The Utah Legislature has specifically provided that the taxpayer bears the burden of proof in proceedings before the Tax Commission. Utah Code Sec. 59-10-543 provides the following:

In any proceeding before the commission under this chapter, the burden of proof shall be upon the petitioner . . .

#### ANALYSIS

Utah Code Sec. 59-10-104 imposes a tax on every "resident individual." "Resident individual" is defined at Utah Code Sec. 59-10-103(1)(k), which states, "'Resident individual' means: (i) an individual who is domiciled in this state for any period of time during the taxable year, . . . or (ii) an individual who is not domiciled in this state but maintains a permanent place of abode in this state and spends in the aggregate 183 or more days of the taxable year in this state." It is clear that PETITIONER 1 did not spend 183 days or more in this state. The issue before the Commission is the separate and independent alternative basis for residency, whether PETITIONER 1 was "domiciled" in Utah during the audit period.

"Domicile" is defined by Utah Admin. Rule R865-9I-23 and the rule provides that once a domicile has been established three elements must be shown before a new domicile is indicated: 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. The question of whether one maintains a domicile in Utah is a question of fact. The Commission has considered this issue in numerous appeals and whether someone is a "resident individual" for state tax purposes has been addressed by the appellate courts in Utah.<sup>4</sup> As discussed

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3 The Commission concludes its determination would be the same under either the revised version of the rule or the prior rule.

4 The issue of domicile for Utah individual income tax purposes has been considered by the Utah Supreme Court and the Court of Appeals in the following cases: Lassche v. State Tax Comm'n, 866 P.2d 618 (Utah Ct. App. 1993); Clements v. State Tax Comm'n, 839 P.2d 1078 (Utah Ct. App. 1995), O'Rourke v. State Tax Comm'n, 830

by the courts in considering this issue, the fact finder may accord the party's activities greater weight than his or her declaration of intent.<sup>5</sup> Additionally Petitioner has the burden of proof to establish that the audit is incorrect.

It is clear from the facts that PETITIONER 1 had been a resident of Utah at one point. Although he spends most of his time working out of state, his actions do not indicate that he intended to abandon the Utah domicile, nor that he intended to remain in a new domicile in STATE 1 or STATE 2 permanently. Pursuant to the statute and the rule a physical presence in the other state alone is not sufficient to indicate a change of domicile. In this matter the only residence that PETITIONER 1 owns is in Utah. He returns to Utah when he is finished with fishing for the season. Thus, Utah appears to be the state to which he intends to return after being absent, within the meaning of the rule. He has always maintained his Utah drivers' license and Utah voter registration. His automobiles were generally registered in Utah. All mail is sent to Utah. He uses the Utah address for his federal income tax returns. Petitioners argue that PETITIONER 1 could have easily changed these factors. However, the Commission must weigh this in consideration with all the facts and concludes that had PETITIONER 1 actually intended to abandon the Utah domicile and establish and remain in STATE 1 or STATE 2 permanently, PETITIONER 1 would have changed these things.

Domicile is based on a number of different factors and a determination by the Commission of one's domicile may vary depending on all the circumstances. The Tax Commission has found in situations where the facts and circumstances indicate such, that a husband and wife had domiciles in separate states for income tax purposes. Certainly factors that would have weighed more favorably for PETITIONER 1, in addition to spending more than 183 days in STATE 1 or fishing from the STATE 1 based ship, would have been if he had obtained a STATE 1 Drivers license, registered to vote in STATE 1 and had an address in

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P.2d 230 (Utah 1992), and Orton v. State Tax Comm'n, 864 P.2d 904 (Utah Ct. App. 1993).

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

STATE 1 where his mail, including the financial information, was actually sent and received. Additionally, maintaining a permanent residence in that state would have helped to show intent to remain in STATE 1 permanently.

CONCLUSION OF LAW

The Commission has made a finding of fact that PETITIONER 1 was domiciled in Utah during 2002 and 2003 and, therefore, he was a Utah resident individual for tax purposes on that basis. For this reason the Commission concludes that Petitioner is liable for Utah individual income tax pursuant to Utah Code Sec. 59-10-104.

DECISION AND ORDER

Based on the foregoing, the Tax Commission sustains the audit of additional income tax and interest at issue in this matter for tax years 2002 and 2003. It is so ordered.

DATED this \_\_\_\_ day of \_\_\_\_\_, 2007.

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Jane Phan  
Administrative Law Judge

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



Appeal No. 05-0718

BY ORDER OF THE UTAH STATE TAX COMMISSION:

The Commission has reviewed this case and the undersigned concur in this decision.

DATED this \_\_\_\_ day of \_\_\_\_\_, 2007.

Pam Hendrickson  
Commission Chair

R. Bruce Johnson  
Commissioner

Marc B. Johnson  
Commissioner

D'Arcy Dixon Pignanelli  
Commissioner

**Notice:** Failure to pay within thirty days the balance that results from this order may result in additional penalties and interest. You have twenty (20) days after the date of this order to file a Request for Reconsideration with the Tax Commission Appeals Unit pursuant to Utah Code Sec. 63-46b-13. A Request for Reconsideration must allege newly discovered evidence or a mistake of law or fact. If you do not file a Request for Reconsideration with the Commission, this order constitutes final agency action. You have thirty (30) days after the date of this order to pursue judicial review of this order in accordance with Utah Code Sec. 59-1-601 et seq. & 63-46b-13 et seq.

*JKP/05-0718.fof*