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BEFORE THE UTAH STATE TAX COMMISSION

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PETITIONER 1 & PETITIONER 2,

Petitioners,

vs.

AUDITING DIVISION OF THE UTAH  
STATE TAX COMMISSION,

Respondent.

**FINDINGS OF FACT, CONCLUSIONS OF  
LAW AND FINAL DECISION**

Appeal No. 05-0917

Account No. #####

Tax Type: Individual Income Tax

Tax Years: 1998 - 2002

Judge: Phan

**Presiding:**

Marc Johnson, Commissioner

Jane Phan, Administrative Law Judge

**Appearances:**

For Petitioner: PETITIONER REPRESENTATIVE, CPA

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 June 18, 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 1998 through 2002. The Statutory Notices of Estimated Income Tax or Audit Change had all been issued on June 15, 2005.

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

Year	Tax	Penalty	Interest <sup>1</sup>
1998	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$
1999	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$
2000	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$
2001	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$
2002	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$

3. Petitioners had not filed Utah Individual Income Tax Returns for the years 1998 through 2001, as it was their position that they were not residents of Utah for tax purposes during those years. They had filed a Utah Individual Part-Year Income Tax Return for 2002, as it was their determination that they become residents of Utah during that year.

4. Respondent’s audits were on the basis that Petitioners were residents of Utah for income tax purposes during all the years at issue.

5. Petitioners had lived in Utah and been residents of Utah for many years. They had moved to Utah in the 1970’s and purchased a residence in Utah at ADDRESS in 1979. Petitioners do not contest that they were Utah residents and domiciled in Utah prior to 1998.

6. PETITIONER 1 had been working for the COMPANY A. In 1997 he accepted a position with COMPANY B, which required relocation to COUNTRY. Petitioners accepted the position because of the compensation package and retirement benefits. They stated that it was their intent that PETITIONER 1 would work in COUNTRY for about ten years and then he would be able to retire. Their stated intention was that they would not return to Utah upon retirement, but would likely retire in STATE 1. They intend to stay in COUNTRY only until PETITIONER 1 retired.

7. When Petitioners moved to COUNTRY they were issued a work visa, which allowed them to stay in the country only while PETITIONER 1 worked for COMPANY B. Petitioners could not stay in the

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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.

country if PETITIONER 1 no longer worked for COMPANY B. There was no indication that Petitioners could have obtained a permanent residency status in COUNTRY that was not tied to employment.

8. COMPANY B assigned a residence to Petitioners in a company-housing compound. Rent for the residence was withheld from PETITIONER 1's pay. However, there was no written lease agreement separate from employment and Petitioners could only reside there while PETITIONER 1 worked for COMPANY B. COMPANY B provided PETITIONER 1 a vehicle to use while he was employed with the company. PETITIONER 1 obtained a COUNTRY drivers license so he could drive in that country. He maintained his Utah drivers licenses throughout the period at issue as he indicated he needed a valid U.S. license to qualify for the COUNTRY license. Also he needed the Utah license for their visits to Utah or other locations in the United States. PETITIONER 2 could not obtain a driver license in COUNTRY, but she had a golf cart type vehicle that she could drive around the housing compound.

9. Petitioners maintained many of their ties with Utah. They did not sell their residence in Utah. Their youngest son lived in the residence while they were gone. Petitioners were hoping that he would eventually be able to buy the residence but he never did, nor did he rent the residence from them. He did perform the day-to-day maintenance and collect the mail. Petitioners continued to pay the utilities for the Utah residence. Utility bills and much of their mail, including a ( X ) card statement was mailed to the Utah residence. On their vacations from COMPANY B, Petitioners generally returned to Utah and stayed at their residence. In 2001 they did refinance the residence to pay for repairs. They indicated the repairs were necessary as the roof was leaking and collapsing. Occasionally during their vacations they traveled to STATE 1 to look for a place to purchase a residence when they retired, but generally their vacations were in Utah.

10. Petitioners maintained their Utah bank account and that is the account in which PETITIONER 1's wages from COMPANY B were deposited. Petitioners received medical treatment in Utah. However, on one occasion it was due to an injury PETITIONER 1 had sustained while vacationing in Utah.

11. Petitioners had originally traveled to COUNTRY thinking they would be there about ten years. However, after 9/11 they began to worry about safety issues and decided to return to the United States earlier than originally anticipated. In 2002 they returned to the United States and returned to their Utah residence.

12. Based on the evidence presented by the parties in this matter, Petitioners remained domiciled in Utah throughout the years at issue.

13. Once the audit process commenced, Petitioners were cooperative with the Division and there was no indication of intent on the part of Petitioners to evade their Utah tax responsibilities. Petitioners' federal tax returns were prepared by COMPANY C. It was Petitioners understanding from this accounting firm that they were not required to file Utah returns because they were residing in COUNTRY.

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

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<sup>2</sup> The rule defining "domicile" was revised in December 2002. The Commission concludes in this matter that it is appropriate to apply the rule that was in effect from 1998 through the end of 2002.

with the present intention of making a permanent home. After domicile has been established, two things are necessary to create a new domicile: first, an abandonment of the old domicile; and second, the intention and establishment of a new domicile. The mere intention to abandon a domicile once established is not of itself sufficient to create a new domicile; for before a person can be said to have changed his or her domicile, a new domicile must be shown.

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

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

Penalties and Interest may be waived as provided in Utah Code Sec. 59-1-401(11) as follows:

Upon making a record of its actions, and upon reasonable cause shown, the commission may waive, reduce, or compromise any of the penalties or interest imposed under this party.

#### ANALYSIS

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

"Domicile" is defined by Utah Admin. Rule R865-9I-2(D) and the rule provides that once a domicile has been established two things are necessary to create a new domicile: 1) an abandonment of the old domicile; and 2) the intention and establishment of a new domicile. The rule goes on to state that, "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.” Whether one maintains a domicile in Utah or has established a new domicile is a question of fact. The Commission has considered this issue in numerous appeals and whether someone is a "resident individual" for state tax purposes has been addressed by the appellate courts in Utah.<sup>3</sup> As discussed by the courts in considering this issue, the fact finder may accord the party’s activities greater weight than his or her declaration of intent.<sup>4</sup> Additionally Petitioners have the burden of proof to establish that the audit is incorrect.

As it reviews the facts presented in the matter and considers the applicable law, the Commission concludes that Petitioners had not abandoned their Utah domicile, nor had they established a new domicile. They maintained Utah ties, including their residence, bank account and drivers licenses. They generally returned to Utah for their vacations and after PETITIONER 1 terminated his employment in COUNTRY. Further, the Commission concludes that although their original intent was for PETITIONER 1 to work in COUNTRY for ten years, they were in COUNTRY for a temporary and special purpose only, not with the intent to make it their permanent home. Their immigration status in that country prohibited them from establishing a permanent residence. Their visas allowed them to remain only while PETITIONER 1 was employed by COMPANY B. Even their housing in that country was tied to PETITIONER 1’s employment with COMPANY B.

Regarding the penalties, Petitioners had relied on the advice of their taxpreparer that they were not required to file Utah returns during the period at issue. Clearly the concept of domicile is not an easy one to understand and it is apparent in this matter that Petitioners thought they were not required to file Utah resident individual income tax returns. The Commission finds basis for waiver of the penalties.

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3 The issue of domicile for Utah individual income tax purposes has been considered by the Utah Supreme Court and the Court of Appeals in the following cases: Lassche v. State Tax Comm’n, 866 P.2d 618 (Utah Ct. App. 1993); Clements v. State Tax Comm’n, 839 P.2d 1078 (Utah Ct. App. 1995), O’Rourke v. State Tax Comm’n, 830 P.2d 230 (Utah 1992), and Orton v. State Tax Comm’n, 864 P.2d 904 (Utah Ct. App. 1993).

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

CONCLUSION OF LAW

1. The Commission has made a finding of fact that Petitioners remained domiciled in Utah during the period at issue. Therefore, they were Utah resident individuals for tax purposes. For this reason the Commission concludes that Petitioners are liable for Utah individual income tax pursuant to Utah Code Sec. 59-10-104.

2. The Commission finds reasonable cause for waiver of the penalties that were assessed with the audit pursuant to Utah Code Sec. 59-1-401(11).

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 1998 through 2002. The Commission abates all penalties for the years at issue. It is so ordered.

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

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Jane Phan  
Administrative Law Judge

BY ORDER OF THE UTAH STATE TAX COMMISSION:

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

Appeal No. 05-0917

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*