

05-1032
Audit
Signed 03/08/2006

BEFORE THE UTAH STATE TAX COMMISSION

PETITIONER 1 & PETITIONER 2,)		
)	ORDER	
)		
Petitioners,)		
)	Appeal No.	05-1032
v.)		
)		
AUDITING DIVISION OF)	Tax Type:	Income
THE UTAH STATE TAX)	Tax Years:	2002 & 2003
COMMISSION,)	Judge:	Phan
)		
Respondent.)		

Presiding:
Jane Phan, Administrative Law Judge

Appearances:
For Petitioner: PETITIONER REPRESENTATIVE, CPA
For Respondent: RESPONDENT REPRESENTATIVE 1, Assistant Attorney General
RESPONDENT REPRESENTATIVE 2, Senior Auditor

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission for an Initial Hearing on February 21, 2006, pursuant to the provisions of Utah Code Sec. 59-1-502.5.

Petitioners are appealing the assessment of Utah individual income tax and interest for the years 2002 and 2003. Petitioners had not filed a Utah return for 2002, and for 2003, Petitioners filed a part year or non-resident Utah individual income tax return. The Statutory Notice of Estimated Income Tax for 2002 was issued on June 23, 2005. The Statutory Notice of Audit Change for 2003 was also issued on that date. The amount of the additional tax, penalties and interest as of the assessment date for each year are as follows:

	Tax	Penalties	Interest ¹
2002	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$
2003	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$

¹ Interest continues to accrue on the unpaid balance.

APPLICABLE LAW

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

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

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

(k) "Resident individual" means:

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

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

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

For 2003 and subsequent years “domicile” is defined at Utah Administrative Rule R865-9I-2(A) 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 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. . .

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

DISCUSSION

Respondent based its audit on the assertion that Petitioners were residents of Utah for tax purposes for 2002 and 2003. Petitioners had not filed a resident Utah Individual Income Tax Return for 2002. They had filed a part year or nonresident return for 2003. Petitioners represent that they were residents of COUNTRY during this period. The issue in this appeal is whether Petitioners were "resident individuals" in the State of Utah for the purposes of Utah Code Sec. 59-10-103 during the audit years. Petitioners represent that they did not spend in the aggregate more than 183 days per year in Utah during the period in question and

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this was not contested by Respondent. A resident individual, in the alternative, is one who is "domiciled" in the State of Utah. The parties focused on the issue of domicile at the hearing.

The question of whether one establishes or maintains a domicile in Utah is a question of fact. The Commission has considered this issue in numerous appeals and whether someone is a "resident individual" for state tax purposes has been addressed by the appellate courts in Utah.² As discussed by the courts in considering this issue, the factfinder may accord the party's activities greater weight than his or her declaration of intent.³

Prior to the years at issue PETITIONER 1 had been a resident of the state of STATE 1. He had lived and worked in STATE 1 and eventually retired. Sometime around 1989 he moved to STATE 2. Additionally he had started renting a trailer pad at an RV Park in CITY 1, COUNTRY, beginning in 1988 where he spent time in the winter. In 1995 he purchased property in CITY 2, Utah, upon which he constructed a cabin. In 2000 PETITIONER 1 and PETITIONER 2 were married. PETITIONER 2 had been a Utah resident and had been residing and working in CITY 3, Utah, prior to the marriage. Petitioners' representative indicates that PETITIONER 1 continued to maintain an apartment in CITY 4, STATE 2 after the marriage and through 2001. Petitioners acquired a rental property in CITY 3, Utah through a limited liability company, which they owned throughout the audit period at issue. PETITIONER 1 was the Utah registered agent for the limited liability company. PETITIONER 1 also owned rental property in STATE 1.

By 2002, PETITIONER 1 no longer maintained a residence in STATE 2. He did have a private post box at a COMPANY in CITY 5, STATE 2, which he used as an address for some documents including his federal return. Early in 2002, PETITIONER 1 surrendered his STATE 2 Divers License. He

2 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).

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

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obtained a Utah Drivers License, registered and did vote in Utah, although by absentee ballot, and he registered his vehicles in Utah. For both 2002 and 2003 PETITIONER 1 and PETITIONER 2 obtained Utah resident hunting and fishing licenses. PETITIONER 1 was the president of a rental organization in CITY 3, Utah.

During the audit period Petitioners continued to spend winters in the R.V. Park in COUNTRY. They provided a letter, dated June 6, 2006, from the park owner who indicated that PETITIONER 1 “maintains his trailer, boat and a vehicle here on a year round basis.” However, the information presented indicated that since 1988, when he started renting at the park, he had rented other spaces. Petitioners did provide evidence that in 2003 they started construction on an outdoor kitchen at their pad at the R.V. Park, which is clearly a permanent attachment to the land. They provide photographs of their travel trailer with the outdoor kitchen. The pictures indicate an outdoor kitchen and patio area attached to the land. Petitioners’ representative indicates that the living accommodations in COUNTRY were nice in comparison to their cabin property in Utah. The County Tax Notice provided for the Utah property did not contradict this statement, as the Utah property was valued at \$\$\$\$ for tax year 2002.

Petitioners’ representative states that Petitioners were in COUNTRY under tourist visas. They did not have permanent resident status. They did not obtain COUNTRY drivers licenses, pay income taxes in COUNTRY, or register vehicles in COUNTRY. No information was presented on whether they had acquired resident or non-resident fishing licenses in COUNTRY. They did not have any financial documents mailed to their address in COUNTRY. They argued that the mail system and the banking system were unreliable so these things were maintained in Utah. The information does indicate that, at least by 2003, they were maintaining a permanent place of residence in COUNTRY.

As Petitioner no longer maintained a residence in STATE 2 and his representative argued that they were domiciled in COUNTRY, the Commission considers the evidence supporting a Utah domicile and the evidence supporting a domicile in COUNTRY. The Commission considers what Petitioners were saying to

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

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the State of Utah during the audit period. During the audit period PETITIONER 1 indicated to the State of Utah that he was a Utah resident for the purpose of obtaining a drivers license. They indicated under penalty of perjury that they were residents of Utah for purpose of obtaining resident hunting and finishing licenses. They filled out the form as residents of Utah for the purposes of obtaining voter registrations. PETITIONER 1 claimed to be a resident of Utah for the purpose of acting as the registered agent for his limited liability company. The law requires the registered agent to be a resident of Utah. The weight of the evidence supports domicile in Utah, as Petitioners did not do any of these things in COUNTRY.

As was clarified in the 2003 revision to Utah Admin. Rule R865-9I-2 a person could establish a domicile outside the United States, but the factors would apply equally. It is not enough to say that it was too difficult to obtain a COUNTRY drivers license, for example. If Petitioners truly were going to make COUNTRY their permanent home, they would need permanent visa status and would need to take those steps that would establish a domicile as one would establish domicile in a different state, like obtaining COUNTRY drivers licenses, registering their vehicles there, having their mail delivered there and filing COUNTRY income tax returns.

Failure to file and failure to pay penalties had been assessed in this matter for tax year 2002. For PETITIONER 1 this appears to be the first year he would have been required to file a Utah Resident Individual Income Tax return. However, the factors in this matter support the penalty in that PETITIONER 1 was obtaining Utah licenses and registrations for various purposes throughout 2002, on which he was claiming to be a Utah resident.

DECISION AND ORDER

Based upon the information presented at the hearing, the Commission finds that Petitioners were domiciled in Utah for the tax years 2002 and 2003. Therefore, the audit is sustained as to the Utah income tax, penalties and interest accrued thereon. It is so ordered.

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This decision does not limit a party's right to a Formal Hearing. However, this Decision and Order will become the Final Decision and Order of the Commission unless any party to this case files a written request within thirty (30) days of the date of this decision to proceed to a Formal Hearing. Such a request shall be mailed to the address listed below and must include the Petitioner's name, address, and appeal number:

Utah State Tax Commission
Appeals Division
210 North 1950 West
Salt Lake City, Utah 84134

Failure to request a Formal Hearing will preclude any further appeal rights in this matter.

DATED this _____ day of _____, 2006.

Jane Phan
Administrative Law Judge

BY ORDER OF THE UTAH STATE TAX COMMISSION.

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

DATED this _____ day of _____, 2006.

Pam Hendrickson
Commission Chair

R. Bruce Johnson
Commissioner

Palmer DePaulis
Commissioner

Marc B. Johnson
Commissioner

NOTICE: If a Formal Hearing is not requested, failure to pay the balance due as determined by this order within thirty days of the date hereon may result in a late payment penalty.

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