

05-1245
Income
Signed 04/02/2007

BEFORE THE UTAH STATE TAX COMMISSION

PETITIONER 1 & PETITIONER 2,)		
)	ORDER	
Petitioners,)		
)	Appeal No.	05-1245
v.)		
)		
AUDITING DIVISION OF)	Tax Type:	Income
THE UTAH STATE TAX)	Tax Year:	2001
COMMISSION,)	Judge:	Phan
)		
Respondent.)		

Presiding:

Jane Phan, Administrative Law Judge

Appearances:

For Petitioner: PETITIONER 1
For Respondent: RESPONDENT REPRESENTATIVE 1, Assistant Attorney General
RESPONDENT REPRESENTATIVE 2, Manager, Income Tax Auditing
RESPONDENT REPRESENTATIVE 3, Senior Auditor

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission for an Initial Hearing pursuant to the provisions of Utah Code Sec. 59-1-502.5, on October 12, 2006.

Petitioners are appealing an audit deficiency of additional Utah individual income tax and interest for the tax year 2001. The Statutory Notice of Audit Change was issued on August 10, 2005. The additional tax indicated in the audit was \$\$\$\$\$. Interest has been accruing on the unpaid balance. At the time the Statutory Notice was issued, interest was \$\$\$\$\$ and the total due at that time was \$\$\$\$\$.

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.

State taxable income is defined in Utah Code Ann. §59-10-112 as follows:

"State taxable income" in the case of a resident individual means his federal taxable income (as defined by Section 59-10-111) with the modifications, subtractions, and adjustments provided in Section 59-10-114 . . .

Federal taxable income is defined in Utah Code Ann. §59-10-111 as follows:

"Federal taxable income" means taxable income as currently defined in Section 63, Internal Revenue Code of 1986.

Taxable income is defined in the Internal Revenue Code at 26 U.S.C. 63 as:

Except as provided in subsection (b), for purposes of this subtitle, the term "taxable income" means gross income minus the deductions allowed by this chapter (other than the standard deduction).

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. . .

DISCUSSION

Respondent based its audit on the assertion that Petitioners were residents of Utah throughout tax year 2001. Respondent's representative points out that Petitioners had filed a Utah Resident Individual Income Tax Return for that year. However, on the return they claimed only \$\$\$\$ in federal adjusted gross income and then calculated their Utah individual income tax from that amount. Respondent received information from the Internal Revenue Service (IRS) that Petitioners had actually received \$\$\$\$ in federal adjusted gross income in 2001. Respondent's audit deficiency is based on a recalculation of the Utah tax starting with the corrected amount of federal adjusted gross income.

The major difference between what Petitioners had claimed on their original Utah tax return and the new federal adjusted gross income appeared to be from 401K distributions that Petitioners received in the amount of \$\$\$\$\$. Petitioners indicate that they thought they could withdraw the money after PETITIONER 1 had retired and use it to purchase a residence. They explained that at the time they did not know the 401K withdrawal was subject to tax. An additional amount of the discrepancy may have been from wages that PETITIONER 2 earned in STATE and some other distributions that may relate to retirement income.

Petitioners did not contest that they had received the funds or withdrawn the funds from their 401K as determined by the IRS. It was Petitioners' argument that they were not domiciled in Utah during most of 2001 and that the distribution from the 401K had been made when they were already in STATE. Petitioners explained that in October 2000 PETITIONER 1 had been diagnosed with serious kidney problems. They were residents of Utah at that time. PETITIONER 1 worked through January 2001 in Utah and he retired effective February 1, 2001. They had decided to move to STATE after retirement. They listed their home for sale in Utah and it sold by the end of February. The house they acquired in STATE was a new construction and it was not quite finished. They state they moved to STATE in March and stayed with friends until the house was finished. They closed on the purchase of the STATE residence apparently on March 29, 2001. It was Petitioner's position that the distribution from the 401K had not been made until the time they closed on the residence in STATE. It was his recollection that the funds went directly from the 401K to the title company in STATE to pay for the new house. They did provide a document from the title company that indicated it had received a wire transfer in the amount of \$\$\$\$\$ paid by PETITIONER 1 on March 29, 2001. Whether this was part of the 401K funds, the funds from the sale of the Utah house or from another source there is no way to determine. Petitioner did not provide any kind of account statement from his 401K provider that evidenced the date of the withdrawal and information regarding the amount of the purchase price for the residence in STATE was not provided.

Respondent had been asking Petitioner to provide documentation of when the withdrawal from the 401K had been made. Respondent also points out that Petitioners had filed a Utah resident individual income tax return for 2001, which failed to include a significant amount of taxable income. Petitioners had not filed an STATE individual income tax return for 2001. Respondent points out that if Petitioners were residents of STATE when they received the distribution from the 401K, the distribution would be taxable to STATE as well as other income Petitioners received during that year. Respondent stated that it would consider amending its audit if Petitioners did the following: 1) provide documentation indicating when the 401K distribution was made during the year and where it was sent; 2) file an amended Utah return as part-year residents for the period of time Petitioners were residents of Utah; and 3) file an STATE part-year resident return for the period they were residents of that state. It is clear that state income tax is owed on the funds withdrawn from the 401K, the question is whether the proper state is Utah or STATE.

Petitioners explained the reason they had filed the Utah return was that they were in Utah visiting with their daughter and went to a taxpreparer. It was Petitioners' representation that the taxpreparer told them it would be "ok" to file in Utah for that year.

Upon review of the information before the State Tax Commission, Petitioners have provided little evidence in this matter in addition to the verbal representations. There is documentation that they purchased a residence in STATE at the end of March 2001 and there is nothing that refutes their position on this point. The Commission feels there is enough evidence to indicate that Petitioners had moved from Utah by April 1, 2001. Additionally it is clear that some of the income at issue is taxable to STATE. PETITIONER 2's wages earned in STATE after they moved would be taxable to STATE. Monthly Social Security payments or other monthly retirement payments made to Petitioners should be considered Utah income for income tax purposes only for that period of time that Petitioners were a resident of Utah. However, there is insufficient evidence or information to determine whether some of the items of income were distributions made to Petitioners while they were residing in Utah. Petitioners have the burden of proof in this matter.

Appeal No. 05-1245

The Tax Commission points out to Petitioners that it appears they should have filed an STATE tax return and that some portion of this income is taxable to STATE. Despite Utah's decision to tax much of the income to Utah based on Petitioner's failure to provide sufficient evidence to the contrary, Petitioners could be subject to STATE tax liability on this income. The best approach to resolving this tax year would be as Respondent suggests, filing a correct return for STATE as a part year resident, filing an amended part year resident return for Utah and establishing when and where the 401K distribution was received to determine in which state it would be subject to tax.

DECISION AND ORDER

Based upon the information presented at the hearing, the Commission orders Respondent to adjust the audit to a part-year resident liability to the extent it is able to determine income that is not Utah income on the basis that Petitioners became residents of STATE effective April 1, 2001. The 401K income or other distributions which Petitioners have failed to establish as being paid out in STATE should remain as Utah income in the calculation of the part year resident return. It is so ordered.

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

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

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

DATED this _____ day of _____, 2007.

Jane Phan
Administrative Law Judge

Appeal No. 05-1245

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: 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.

JKP/05-1245.int.doc