

05-1429  
Income  
Signed 05/03/2007

BEFORE THE UTAH STATE TAX COMMISSION

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PETITIONER 1 & PETITIONER 2,	)		
	)	<b>INITIAL HEARING ORDER</b>	
Petitioners,	)		
	)	Appeal No.	05-1429
v.	)		
	)		
AUDITING DIVISION OF	)	Tax Type:	Income
THE UTAH STATE TAX	)	Tax Years:	1998-2002
COMMISSION,	)	Judge:	Phan
	)		
Respondent.	)		

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**Presiding:**  
Jane Phan, Administrative Law Judge

**Appearances:**  
For Petitioner: PETITIONER REPRESENTATIVE, Attorney at Law  
PETITIONER 1  
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 an Initial Hearing pursuant to the provisions of Utah Code Sec. 59-1-502.5, on February 5, 2007.

Petitioners had originally filed appeals of audit deficiencies of Utah individual income tax and interest for tax years 1998 through 2002. However, at the Initial Hearing Respondent's representative indicated that it now conceded tax years 1998 through 2001. Therefore, the audit deficiencies for those years should be abated. The only tax year that remained at issue at the Initial Hearing was tax year 2002. The Statutory Notice of Audit Change for tax year 2002 was issued on September 6, 2005. The amount of the additional tax, penalties and interest as of the assessment date are as follows:

	Tax	Penalty	Interest	Total Due on Notice <sup>1</sup>
2002	\$\$\$\$	\$\$\$\$	\$\$\$\$	\$\$\$\$

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)<sup>2</sup> (2003) 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 Untied 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;

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1 Interest continues to accrue on the unpaid balance.

2 This version of the Utah Admin. Rule R865-9I-2(D) became effective as of December 9, 2002 and was a revision from the prior rule. It was this new revision that both parties relied on the presentation of their respective cases.

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. . .

Utah Administrative Rule R884-24P-52 provides seventeen factors to consider as follows:

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.

### DISCUSSION

The issue in this appeal is whether PETITIONER 1 became a "resident individual" in the State of Utah for the purposes of Utah Code Sec. 59-10-103(1)(k) at any point in time during 2002. The parties agree that PETITIONER 2 was a Utah resident for the entire year. A person may be a resident of Utah for income tax purposes if they spend in the aggregate more than 183 days per year in Utah, or, in the alternative, a "resident individual" is one who is "domiciled" in the State of Utah. There was no indication that PETITIONER 1 was in Utah for more than 183 days. Respondent's position was based on the alternative criteria for "resident individual." It was Respondent's position that PETITIONER 1 was "domiciled" in Utah.

"Domicile" is defined by Utah Admin. Rule R865-9I-2 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>3</sup> As discussed

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<sup>3</sup> 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.

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 Petitioner has the burden of proof to establish that the audit is incorrect.

Upon reviewing the evidence submitted by the parties, and the facts as proffered by PETITIONER 1 which were generally unrefuted by Respondent, the Commission concludes that PETITIONER 1 had established domicile in STATE 1. At no point in 2002 did he have a specific intent to abandon STATE 1 as a domicile, and although there was a physical presence in Utah during the last three months of 2002, there was not the requisite intent during that point in time for him to remain permanently in Utah.

In approximately 1997, PETITIONER 1 and PETITIONER 2 had moved to STATE 1 and established a domicile there. In 1997 PETITIONER 1 had accepted the position of Human Resources Director of Latin America with COMPANY A, based out of the CITY 1, STATE 1 headquarters. His employment contract required that he become a resident of STATE 1. During the year PETITIONER 1 and PETITIONER 2 purchased a residence and moved with their minor children from Utah to STATE 1. They obtained STATE 1 drivers' licenses, registered to vote, enrolled their children in school and took the steps to establish a domicile there.

PETITIONER 1's position with COMPANY A required that he spend substantial amounts of time traveling in COUNTRY 1. This ended up being approximately six out of every seven weeks that he was out of the country. At the end of 1999, as he was gone so much anyway, PETITIONER 2 decided that she and the children would move back to Utah. This was the beginning of an informal separation between them as a

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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,

couple. A Petition for divorce was eventually filed in 2003 but was later withdrawn. PETITIONER 1 and PETITIONER 2 purchased a Utah residence in 2000 where PETITIONER 2 reestablished a Utah domicile with the couple's children. PETITIONER 1 and PETITIONER 2 sold their STATE 1 residence.

PETITIONER 1 obtained a post office box in STATE 1 for his mail, due to the number of days he was traveling. He entered into a house-sitting arrangement with a coworker. The coworker owned a house in STATE 1, but had been transferred to a position in COUNTRY 2. PETITIONER 1 resided at the coworker's residence while in STATE 1 rent free. However, he oversaw the maintenance and upkeep of the residence. At this point, as Respondent noted, PETITIONER 1's only substantial tie with STATE 1 was through his employment. PETITIONER 1 continued with these same living arrangements from 2000 to 2002. In 2002 PETITIONER 1 had started dating and began thinking about finalizing the divorce.

The question for the Commission to consider is if at some point during 2002 PETITIONER 1 abandoned his STATE 1 domicile and established a new one in Utah. In order to do so there must be a specific intent to abandon the old domicile and PETITIONER 1's proffer did not indicate that intent, nor was there intent in 2002 to establish a permanent domicile in Utah. By September 29, 2002, PETITIONER 1 took an unpaid leave of absence from COMPANY A. PETITIONER 1 stated the purpose of the leave was to work on the issues in his personal life. From the information provided at the hearing, this was a transitional period for him and he did not know what his next step would be.

PETITIONER 1 indicates that it was his intent upon taking the leave of absence from work to tell his children about the divorce in person, liquidate their assets so that he and PETITIONER 2 could establish separate lives and then file for divorce. He indicates that he was still considering going back to work for COMPANY A after a few months of leave. There were stock options that he would lose if he did not return. In October PETITIONER 1 traveled to Utah. PETITIONER 1 and PETITIONER 2 listed their Utah

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

residence for sale in November 2002, but there were no offers that year and eventually they decided to keep the residence. However, also during this period PETITIONER 1 purchased another residence, this one in CITY 2, Utah. This is one factor that tends to indicate an intent to remain in Utah. He indicates this purchase was for investment reasons. He had also acquired another cabin/recreational property in Utah during 2000. During the last two months in 2002 PETITIONER 1 did perform some consulting work for COMPANY A, in COUNTRY 3. He traveled to COUNTRY 3 once in November and once December of 2002, then six more times in 2003. He states he did not want to burn bridges with COMPANY A at that point because he was thinking about going back to work at COMPANY A. He indicates that he spent Thanksgiving in COUNTRY 3 with the woman he had been dating. She resided in COUNTRY 3 but could have transferred to STATE 1. He also could have transferred to COUNTRY 3. He was even considering moving to STATE 2 where his parents resided, but at the end of 2002, he had not made a determination on where he would live. Eventually, however, after the audit period, PETITIONER 1 did not return to STATE 1 to work full time for COMPANY A, and he ended up establishing a Utah domicile.

The issue of whether PETITIONER 1 established a domicile in Utah some time during 2002, or if it was after 2002 had ended, becomes more significant due to the fact that PETITIONER 1 exercised stock options from COMPANY A on November 2, 2002 and December 26, 2002. The income from the options comprises the bulk of his taxable income for that year. However, the Commission does not find the requisite intent to abandon the STATE 1 domicile or establish a Utah domicile as provided by rule, for this period of time when he was in a transition and had not yet reached a conclusion regarding where he would end up residing.

DECISION AND ORDER

Based upon the information presented at the hearing, the Commission finds that PETITIONER 1 had not established a domicile in Utah during any part of 2002. Therefore, the audit assessment is abated in its entirety for the 2002 tax year as well as the years 1999 through 2001 that Respondent has conceded. 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

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



Appeal No. 06-0793

**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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