

06-0172  
Income  
Signed 10/23/2007

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BEFORE THE UTAH STATE TAX COMMISSION

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PETITIONER 1 & PETITIONER 2,

Petitioners,

v.

AUDITING DIVISION  
OF THE UTAH STATE  
TAX COMMISSION,

Respondent.

**ORDER**

Appeal No. 06-0172

Account No. #####

Tax Type: Income

Tax Years: 1996 & 1997

Judge: Chapman

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**Presiding:**

Kerry R. Chapman, Administrative Law Judge

**Appearances:**

For Petitioners: PETITIONER 2

PETITIONER REPRESENTATIVE, the Petitioners' son

For Respondent: RESPONDENT REPRESENTATIVE 1, Assistant Attorney General

RESPONDENT REPRESENTATIVE 2, from the Auditing Division

RESPONDENT REPRESENTATIVE 3, from the Auditing Division

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission for an Initial Hearing pursuant to the provisions of Utah Code Ann. §59-1-502.5, on October 3, 2007.

On February 7, 2006, Auditing Division ("Division") issued Statutory Notices of Estimated Income Tax ("Statutory Notices") to the Petitioners for the 1996 and 1997 tax years, in which it imposed additional tax, 10% failure to timely file penalties, 10% failure to timely pay penalties, and interest, as follows:

<u>Year</u>	<u>Tax</u>	<u>Penalties</u>	<u>Interest</u>	<u>Total</u>
1996	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$
1997	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$	<u>\$\$\$\$\$</u>
				\$\$\$\$\$

The Petitioners appealed the Division's assessments on the basis that they were domiciled in STATE 1 for the two years at issue, not Utah. The Division, however, contends that the Petitioners were domiciled in Utah for both years at issue and asks the Commission to sustain its assessments. In the alternative, should the Commission find that the Petitioners were not domiciled in Utah, the Division contends that the majority of the Petitioners income was Utah source income regardless of domicile and, thus, subject to Utah income tax.

APPLICABLE LAW

**I. Utah Resident Individual for Tax Purposes.**

Pursuant to Utah Code Ann. §59-10-104(1)<sup>1</sup>, “a tax is imposed on the state taxable income . . . of every resident individual[.]”

For purposes of Section 59-10-104(1), a “resident individual” is defined in UCA §59-10-103(1)(j) to mean:

- (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. . . .

Utah Admin. Rule R865-9I-2 (“Rule 2”) further explains when a person is “domiciled” in Utah for income tax purposes. During the 1996 and 1997 tax years, Section D. of Rule 2 provided 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 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

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<sup>1</sup> All citations to the Utah Code and the Utah Administrative Code contained herein are to the 1997 version of the Code and Administrative Code, unless otherwise indicated.

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 domicile, a new domicile must be shown.

**II. Utah Source Income of Nonresident Individuals.**

For purposes of determining a nonresident individual's state taxable income, UCA §59-10-117 provides, as follows in pertinent part:

(1) For the purpose of Section 59-10-116, federal adjusted gross income derived from Utah sources shall include those items includable in federal "adjusted gross income" (as defined by Section 62 of the Internal Revenue Code) attributable to or resulting from:

(a) the ownership in this state of any interest in real or tangible personal property (including real property or property rights from which "gross income from mining" as defined by Section 613(c) of the Internal Revenue Code is derived); or

(b) the carrying on of a business, trade, profession, or occupation in this state.

(2) For the purposes of Subsection (1):

....

(c) Salaries, wages, commissions, and compensation for personal services rendered outside this state shall not be considered to be derived from Utah sources.

(d) A nonresident shareholder's distributive share of ordinary income, gain, loss, and deduction derived from or connected with Utah sources shall be determined under Section 59-10-118.

....

(f) If a trade, business, profession, or occupation is carried on partly within and partly without this state, items of income, gain, loss, and deductions derived from or connected with Utah sources shall be determined in accordance with the provisions of Section 59-10-118.

....

(h) The share of a nonresident estate or trust and nonresident beneficiaries of any estate or trust in income, gain, loss, and deduction derived from or connected with Utah sources shall be determined under Section 59-10-207.

....

**III. Burden of Proof.**

In proceedings involving individual income tax before the Tax Commission, UCA §59-10-543 provides, as follows:

In any proceeding before the commission under this chapter, the burden of proof shall be upon the Petitioners except for the following issues, as to which the burden of proof shall be upon the commission:

- (1) whether the Petitioners has been guilty of fraud with intent to evade tax;
- (2) whether the Petitioners is liable as the transferee of property of a taxpayer, but not to show that the taxpayer was liable for the tax; and
- (3) whether the Petitioners is liable for any increase in a deficiency where such increase is asserted initially after a notice of deficiency was mailed and a petition under Title 59, Chapter 1, Part 5 is filed, unless such increase in deficiency is the result of a change or correction of federal taxable income required to be reported, and of which change or correction the commission had no notice at the time it mailed the notice of deficiency.

#### DISCUSSION

At issue is whether the Petitioners were Utah resident individuals for the 1996 and 1997 tax years. If the Petitioners were either domiciled in Utah or present in Utah for 183 or more days during each of these years, the Petitioners would be considered Utah resident individuals for these years pursuant to Section 59-10-103(1). The Division does not argue that the Petitioners were present in Utah 183 or more days during the year, and the testimony proffered at the Initial Hearing does not indicate that the Petitioners were present in Utah for this amount of time either. As a result, the Petitioners will be deemed Utah resident individuals for 1996 and 1997 unless they show that they were domiciled in a place other than Utah for these two years. If the Commission finds that the Petitioners were domiciled in Utah, it will sustain the Division's assessments for the years at issue.

If, on the other hand, the Commission finds that the Petitioners were not domiciled in Utah for the two years, the Commission will determine whether any of the Petitioners' items of income are considered Utah source income and, thus, subject to Utah income taxes regardless of the Petitioners' domicile.

**Domicile.** PETITIONER 1 passed away in February 2007 in CITY 1, Utah. However, prior to his death, he completed and submitted the Petition for Redetermination (“Petition”) for this appeal in February 2006. On the Petition, PETITIONER 1 stated that in 1996 and 1997, he was a full-time “RVer” (a person who travels in a recreational vehicle) and that he “was not then and am not now a resident of Utah.”

PETITIONER 1 also submitted written responses to the Division’s interrogatories (PETITIONER 1’s “Response”) concerning his domicile prior to his death. In his Response, PETITIONER 1 stated again that his home in CITY 1, Utah was his winter home and that his permanent residence was in CITY 2, STATE 1, where he had resided since 1976. He also stated that in 1996 and 1997, he was a full-time RVer and that he received all of his mail in CITY 3, STATE 1.

At the time of her husband’s death, PETITIONER 2 was not aware of this appeal. Furthermore, PETITIONER 2 has macular degeneration and cannot read anything but large print and has had trouble finding records from the 1990’s. However, with the help of her son, PETITIONER 2 was able to provide some documents and proffered testimony at the Initial Hearing. PETITIONER 2 stated that she and her husband moved from STATE 2, where PETITIONER 1 had been a police officer prior to being disabled, to STATE 1 around 1977. PETITIONER 2 proffered that she and her husband purchased a home between CITY 3 and CITY 4, STATE 1 and lived there until they “lost” the home around 1983. After losing this home, PETITIONER 2 stated that they lived in rented homes in STATE 1 until 1986 or 1987, at which time they purchased an RV and began to live and travel in it. Around 1987, the Petitioners began to spend the winters in CITY 1, Utah, where they rented a pad at which they could park the RV.

From 1988 through the years at issue, PETITIONER 2 stated that they considered themselves STATE 1 residents and that they continued to rent a post office box in STATE 1, maintain STATE 1 bank accounts, and return to STATE 1 after April 15<sup>th</sup> of each year.

PETITIONER 2 also explained that as they got older, they decided not to RV anymore and bought homes in CITY 2, STATE 1 and CITY 1, Utah around 2000. Division records show that the CITY 1 home was purchased in late 1998. PETITIONER 2 stated that they would live at the STATE 1 home except for the winter months when they lived in CITY 1. Beginning around 2003, PETITIONER 1's health deteriorated and it became difficult to travel. PETITIONER 2 explained that they remained in CITY 1 more frequently to be near better health facilities. After PETITIONER 1 passed away in February 2007 in CITY 1, PETITIONER 2 purchased a burial lot in CITY 1.

From 1988 through the audit years, the Petitioners maintained post office boxes in CITY 3, STATE 1 and in CITY 1, Utah. Documents proffered by the Division show that the Petitioners received mail at both addresses. The Petitioners' 1996 and 1997 federal tax returns show their address to be at the post office box in CITY 3, STATE 1. However, PETITIONER 1 signed the 1996 federal return as an "enrolled agent" in the paid preparer's space using a business address at the CITY 1 post office box. PETITIONER 1 signed the 1997 federal return and provided that his firm's name was the TRUST 1 Trust, whose address was also located at the Petitioners' CITY 1 post office box.

PETITIONER 2 explained that during tax season (i.e., until April 15 of each year), her husband, who was an enrolled agent, would prepare clients' tax returns while they were in CITY 1 for the winter. On his Response, PETITIONER 1 indicated that he conducted a tax return preparation service and that he had between one and 150 tax clients in Utah and another 450 or more clients in other states and countries. PETITIONER 2 stated that her husband worked out of their RV during some years. However, she admitted that for some years, PETITIONER 1 rented a room at a school or bank in CITY 1 from January 1<sup>st</sup> through April 15<sup>th</sup>, at which he would perform his tax services. In fact, PETITIONER 2 proffered that as soon as tax season ended each year on April 15<sup>th</sup>, she and her husband would leave CITY 1.

PETITIONER 1 used both the Utah post office box address and the STATE 1 post office box address for purposes of receiving documents concerning the Petitioners' own taxes. PETITIONER 1 received his Internal Revenue Service ("IRS") Form 1099-R from the City of CITY 4, on which his pension income was reported, at the CITY 1 post office box. On the other hand, PETITIONER 1 prepared a 1997 W-2 showing PETITIONER 2 as the employee of the TRUST 2 Trust, a trust the Petitioners controlled. PETITIONER 1 mailed this W-2 to PETITIONER 2 at the CITY 3, STATE 1 post office box, but showed the address of their trust to be the CITY 1 post office box. Most, if not all, of the Petitioners' IRS 1099 forms, which reported their interest and other income, were also sent to their CITY 1 post office box. PETITIONER 2 stated that the post office box in CITY 3, STATE 1 was their "major" mailing address, but did not know what addresses her husband used for business purposes.

During the audit period, PETITIONER 1 indicated on his Response that he was registered to vote in STATE 1 and did so by absentee ballot. PETITIONER 2 obtained a letter dated May 31, 2007 from the COUNTY 1 Elections Deputy, who attested that the Petitioners registered to vote in COUNTY 1 in 1986 and voted in every general election in COUNTY 1 from 1986 until they were purged from the voter registration list in February 1999, which is after the 1996 and 1997 tax years at issue.

PETITIONER 1 also claimed to have a STATE 1 Driver's License during the years at issue, which was supported by PETITIONER 2's testimony and by a document she obtained from the STATE 1 Department of Transportation. PETITIONER 2, however, has had a Utah driver's license since January 1988. PETITIONER 2 explained that in 1988, near the time the Petitioners began to spend winters in CITY 1, she was stopped by the police and was told that she had to get a Utah driver's license. She stated that she obtained a Utah driver's license in order to comply with the policeman's directions. Records also show that in 2004, seven years after the tax years at issue in this appeal, PETITIONER 1 obtained a Utah identification card.

On his Response, PETITIONER 1 indicated that the Petitioners did not own any vehicles during the audit period. PETITIONER 2, however, stated that their RV vehicles (a truck to which was attached a 42-foot “fifth wheel” trailer) were always registered in STATE 1. PETITIONER 2 obtained a letter dated June 1, 2007 letter from the COUNTY 2 Treasurer in STATE 1 attesting that the Petitioners had a truck registered in STATE 1 during 1996 and 1997 under the name TRUST 3 Trust. The Division also proffered records to show that the Petitioners also registered a car in Utah from 1989 through the audit period. PETITIONER 2 proffered that she and her husband had a STATE 1 insurance agent until the last few years prior to the hearing, when they switched to an agent in CITY 1.

On his Response, PETITIONER 1 indicated that he had had a STATE 1 resident hunting license for all years since 1976. PETITIONER 2 proffered that she had written to the STATE 1 Game and Fish Department to obtain her husband’s records and that they responded with a letter indicating that PETITIONER 1 had obtained resident hunting licenses in STATE 1 in 2001, 2002, 2003 and 2005.

Furthermore, PETITIONER 1 responded that he was a member of the LDS Church in CITY 3, STATE 1 during the audit period. PETITIONER 2 confirmed that their church records were located either in CITY 3 or CITY 5, STATE 1 until 2003 or 2004, when they had their records transferred to CITY 1.

On his Response, PETITIONER 1 answered that during the audit period, he banked at the BANK in CITY 3, STATE 1, which is confirmed by the small amount of interest income the Petitioners received from this bank in 1996 and 1997. In addition, for each of the tax years at issue, the Petitioners received between \$\$\$\$ and \$\$\$\$ in interest income from accounts located at as many as five Utah financial institutions.

Based on the facts proffered at the Initial Hearing, it appears clear that the Petitioners were domiciled in STATE 1 when they purchased an RV in which to live and travel in 1987. Furthermore, the facts



do not convince the Commission that the Petitioners had abandoned their STATE 1 domicile and established a new domicile in Utah by tax years 1996 and 1997. First, it does not appear that the Petitioners' living quarters in Utah were any different than their living quarters in STATE 1 from 1988 through the audit period. Furthermore, from the time they began to live in an RV and until well past the audit period, the Petitioners retained many of their contacts with STATE 1.

Not only did PETITIONER 1 retain a STATE 1 driver's license, but he also obtained STATE 1 resident hunting licenses until 2005. Both Petitioners were registered to vote and voted in every general election in STATE 1 until 1999, two years past the audit period. Furthermore, the Petitioners retained a post office box and a bank account in STATE 1 throughout the audit period, as well as keeping their church affiliation in STATE 1. During the audit period, the Petitioner's insurance agent was also located in STATE 1, and they registered at least one vehicle in STATE 1. Moreover, when the Petitioners decided to purchase a home to live in instead of the RV after the audit period, they purchased a home in STATE 1, in addition to a winter home in CITY 1.

The Commission recognizes that the Petitioners had established some Utah contacts prior to the audit period, but do not believe that these contacts are sufficient to show that the Petitioners had an intent to abandon their STATE 1 domicile and establish a new domicile in Utah. Although it appears that PETITIONER 1 ran his tax return preparation business from Utah, the Commission notes that tax return preparation season overlaps, to a good extent, the winter months the Petitioners chose to spend in CITY 1. Furthermore, because the tax season coincided with the time the Petitioners spent in CITY 1, it is seems reasonable that they would receive much of their time-sensitive tax information at their CITY 1 post office box instead of their STATE 1 post office box. Lastly, the Commission finds PETITIONER 2's testimony concerning her obtaining a Utah driver's license in 1988 to be reasonable and that under the circumstances, her

action did not show an intent to change her domicile. For these facts, the Commission finds that the Petitioners were not domiciled in Utah during 1996 and 1997 and, as a result, were not Utah resident individuals for the two tax years at issue.

**Utah Source Income.** As the Commission has found the Petitioners to be domiciled in STATE 1 for the tax years at issue, the Commission must address whether any of the Petitioners' income was Utah source income that is subject to Utah taxation, regardless of domicile.

The Division admitted that if the Petitioners were deemed not to be domiciled in Utah, several items of their taxable income would not be Utah source income as defined in Section 59-10-117, specifically: 1) their social security income; 2) the interest income they received from banking institutions, as identified on Schedule B of the federal returns; and 3) their dividend income from the ( X ) Account. Accordingly, the Commission finds that these items of income should be removed from the Division's assessments.

The Division, however, proffered that the remainder of the Petitioners' income for 1996 and 1997 was derived from Utah sources and as a result, should be considered Utah source income. The evidence shows that the Petitioners controlled numerous trusts, two of which included the TRUST 2 Trust and TRUST 1 Trust<sup>2</sup>, as well as a corporation identified as COMPANY A. On their original federal returns for 1996 and 1997, the Petitioners reported wages and trust income received from the TRUST 2 Trust and wages received from COMPANY A. In addition, PETITIONER 1 claimed to be a paid tax return preparer employed by the TRUST 1 Trust. Furthermore, PETITIONER 1 admitted that the address of COMPANY A. was the same as the Petitioners' CITY 1 post office box. The IRS reviewed the Petitioners' trusts and corporation and the amounts of income they claimed as wages from these entities and found the reporting to be erroneous. In 1999, the Division proffers that IRS the agency "collapsed" these entities and characterized all income received by them as the Petitioners' personal income.

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2 The letters "( X )" represent PETITIONER 1's first two initials ("( X )") and PETITIONER 2's

There is no evidence that PETITIONER 2 was employed during the audit period. However, it is apparent from the information proffered at the Initial Hearing that PETITIONER 1 operated a tax return preparation business in Utah. He often rented rooms in CITY 1 during the tax season to operate the business. Furthermore, he used the CITY 1 post office box as the business address on federal tax returns. As it is apparent that PETITIONER 1 carried on a “business, trade, profession, or occupation” in Utah, his income from this business is Utah source income subject to taxation in accordance with Section 59-10-117(1)(b).

PETITIONER 1 answered that he had clients in other states and countries, and PETITIONER 2 stated that her husband often visited these clients when they traveled in their RV. However, there is no evidence to show whether any portion of his income was earned for personal services rendered outside of Utah, which might be excludable under Section 59-10-117(2)(c). For these reasons, the Commission finds that all of the Petitioners’ income that is includable in their federal adjusted gross income for 1996 and 1997 is Utah source income, with the exception of their social security income, their interest income from financial institutions, and their ( X ) dividend income.

DECISION AND ORDER

Based on the foregoing, the Commission finds that the Petitioners were not Utah resident individuals for the 1996 and 1997 tax years. However, except for their social security income, their interest income from financial institutions identified on Schedule B of the federal returns, and their ( X ) dividend, the Commission finds that the remainder of the Petitioners’ taxable income is Utah source income subject to Utah income taxation. The Division is ordered to revise its assessments in accordance with this decision. It is so ordered.

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first two initials (“( X )”).

Appeal No. 06-0172

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 Petitioners'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.

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Kerry R. Chapman  
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

**Notice:** If a Formal Hearing is not requested as discussed above, failure to pay any remaining balance resulting from this order within thirty (30) days from the date of this order may result in a late payment penalty.

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