

06-0254

INDIVIDUAL INCOME - DOMICILE

TAX YEARS: 2003, 2004

SIGNED: 12-11-2008

COMMISSIONERS: P. HENDRICKSON, R. JOHNSON, B. JOHNSON, D. DIXON

GUIDING DECISION

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BEFORE THE UTAH STATE TAX COMMISSION

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PETITIONER 1 &  
PETITIONER 2 (deceased),

Petitioners,

v.

AUDITING DIVISION OF THE  
UTAH STATE TAX COMMISSION,

Respondent.

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

Appeal No. 06-0254

Account No. #####

Tax Type: Individual Income

Tax Years: 2003 & 2004

Judge: Chapman

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**Presiding:**

R. Bruce Johnson, Commission Chair

Kerry R. Chapman, Administrative Law Judge

**Appearances:**

For Petitioner: PETITIONER REP. 1, Attorney

PETITIONER REP. 2, Attorney

PETITIONER 1

PETITIONER REP. 3

For Respondent: RESPONDENT REP. 1, Assistant Attorney General

RESPONDENT REP. 2, from the Auditing Division

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission for a Formal Hearing on June 4, 2008. The parties submitted post-hearing briefs on or before July 14, 2008 and reply briefs on or before August 5, 2008. Based upon the evidence and testimony presented at the hearing, the Tax Commission hereby makes its:

FINDINGS OF FACT

1. The tax at issue is individual income tax.

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2. The tax years at issue are 2003 and 2004.

3. On February 13, 2006, Auditing Division (the “Division”) issued a Statutory Notice of Audit Change for the 2003 tax year and a Statutory Notice of Estimated Income Tax for the 2004 tax year (“Statutory Notices”) to PETITIONER 1 and PETITIONER 2, deceased<sup>1</sup> (the “taxpayers”). Exhibits 23 and 24. In the Statutory Notices, the Division imposed additional tax, penalties, and interest (computed through March 15, 2006) for the 2003 and 2004 tax years, as follows:

<u>Year</u>	<u>Tax</u>	<u>10% Late File and Pay Penalties</u>	<u>Interest</u>	<u>Total</u>
2003	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$
2004	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$	<u>\$\$\$\$\$</u>
				<u>\$\$\$\$\$</u>

4. On March 9, 2006, the taxpayers timely appealed the assessments imposed in the Statutory Notices.

5. On May 20, 2008, the Division issued a letter to PETITIONER REP. 1, the taxpayers’ counsel, informing him that it was “imposing a negligence penalty on the 2003 and 2004 audits of PETITIONER 1.” Exhibit 26. The Division informed PETITIONER REP. 1 that it was imposing the penalty under UCA §59-1-401(7)(a)(1), which provides “if any underpayment of tax is due to negligence, the penalty is 10% of the underpayment.” The Division also indicated that the amounts now due for 2003 and 2004, with interest computed through May 20, 2008, were as follows:

<u>Year</u>	<u>Tax</u>	<u>Negligence Penalty</u>	<u>10% Late File and Pay Penalties</u>	<u>Interest</u>	<u>Total</u>
2003	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$
2004	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$	<u>\$\$\$\$\$</u>	\$\$\$\$\$

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1 PETITIONER 2 passed away on DATE.

6. For the 2003 tax year, the taxpayers filed a Utah part-year resident return in which they indicated that they were Utah residents from January 1, 2003 to August 21, 2003. Exhibit 25. The taxpayers claim that they changed their domicile to STATE 1 after this date. The taxpayers did not file a 2004 Utah tax return. (For purposes herein, the “audit period” refers to the period August 22, 2003 through December 31, 2004.)

7. The Division assessed the taxpayers as full-year Utah resident individuals for both the 2003 and 2004 tax years based on either of the two residency tests set forth in Utah Code Ann §59-10-103(1)(q)(i). First, the Division claims that the taxpayers were present in Utah for 183 or more days and maintained a permanent place of abode in Utah for both years at issue. Second, the Division claims that the taxpayers were domiciled in Utah for both years at issue. The Division also argues that should the Commission determine that the one or both taxpayers were not Utah resident individuals during the audit period, certain of their income may, nevertheless, be Utah source income subject to Utah taxation. Moreover, the Division specifically asks the Commission to sustain the 10% negligence penalties that it imposed subsequent to its issuing its Statutory Notices and subsequent to the taxpayers filing the appeal.

8. The taxpayers contest the Division’s claims that either of them were Utah resident individuals after August 21, 2003. They claim that they were STATE 1 domiciliaries after this date and for the entirety of the audit period. The taxpayers also contend that none of the income they earned during the audit period is Utah source income. In addition, they contend that the Division improperly imposed the 10% negligence penalties.

Domicile and the Taxpayers’ Contacts with Utah and STATE 1

9. The taxpayers became Utah domiciliaries around 1995 after PETITIONER 1 became the president of COMPANY A (“COMPANY A”), a corporation headquartered in Utah.

10. Also around 1995, the taxpayers purchased a home located at ADDRESS in CITY 1, Utah ZIP (the “Utah residence”).

11. PETITIONER 1 testified that in 2003, he and PETITIONER 2 began looking to purchase a home in a ( X ) climate. In June 2003, the taxpayers looked at homes in the CITY 2 area of STATE 2 (pictures of homes in Exhibit 60). PETITIONER 1 testified that in the summer of 2003, PETITIONER 2 saw a picture of a home in a CITY 3 community, which led to them eventually purchasing a home in STATE 1 instead of STATE 2.

12. Also in 2003, a deal was made to sell COMPANY A to COMPANY B., an event from which PETITIONER 1, as a primary owner of COMPANY A, would realize a significant amount of capital gains. On DATE, a Stock Purchase Agreement was signed to sell COMPANY A’s stock to COMPANY B. A Seller Purchase Price Allocation received on DATE shows that PETITIONER 1 sold his stock for \$\$\$\$\$. Exhibit 16. For federal tax purposes, PETITIONER 1 recognized a taxable gain of \$\$\$\$\$ from the sale. Exhibit 25.

13. In August 2003, prior to the COMPANY A sale, PETITIONER 1 received professional advice in regards to changing his tax residency from Utah to STATE 1. On August 29, 2003, PETITIONER 1 received a letter from a Utah attorney, ATTORNEY of LAW FIRM 1, who offered the following advice (Exhibit 20 at E0313):

Given that your wife has been present in Utah during 2003 for greater than 183 days, and that you would need to produce evidence to support whether or not you have been present in Utah for 183 days or more, it is critical that you and your wife establish that you have abandoned your Utah permanent place of abode to avoid invoking the first prong of the statutory resident test. Therefore, if you proceed in changing your domicile to STATE 1, you must do all that you can to abandon your Utah home, meaning that you must immediately move out of the home, never return to the home for any period of time, and take immediate steps to sell the home as soon as possible. Any indicia of abandonment of your Utah home that you can do, such as clearing out all of your present furniture and belongings, to show your intent to never return to the home, immediately listing the home with a real estate broker and

aggressively marketing your home for sale, are essential to avoid invoking the first prong of the statutory resident test. In the event you return to Utah for any reason, you should stay in a hotel and not in your home, and you should keep all hotel and travel receipts to document your stay.

14. ATTORNEY further concluded and advised PETITIONER 1 that:

If you immediately and strictly execute and adhere to the factors described in this letter for establishing STATE 1 domicile, and if you immediately take the steps described in this letter to abandon and sell your Utah residence to avoid invoking the “statutory resident” test prior to the time that a sale of your COMPANY A stock accrues, we believe that you will have a good-faith basis in defending against a challenge by the Utah State Tax Commission. Your position would be more defensible and less likely to be audited if the sale and recognition of gain were to occur in 2004 rather than in year 2003. You must understand, however, that even if all of such factors are achieved, there is still a significant risk that the Utah Tax Commission will contend that you are domiciled in or a resident of Utah and that your gain on a sale of your COMPANY A stock is subject to Utah tax.

. . . . Given the information known to us, and in particular the potentially short time period that may occur between the time that you establish STATE 1 domicile and the time of a sale of your COMPANY A stock, we believe that your chances of prevailing against a Utah Tax Commission challenge are less than fifty percent. However, there may be other facts that we are presently unaware of, or even future developments that would have a bearing on the outcome.

Exhibit 20 at E0321 - E0322.

15. PETITIONER 1 claimed that ATTORNEY was not his attorney. He stated that ATTORNEY was an attorney who represented his employer, COMPANY A, and that COMPANY A did not want him to move to STATE 1 for nexus reasons.

16. On September 2, 2003, PETITIONER 1 received an e-mail from INVESTMENT ADVISOR, a Utah investment advisor, who informed PETITIONER 1 that he had conferred with ATTORNEY of LAW FIRM 2 concerning a change of domicile from Utah to STATE 1. INVESTMENT ADVISOR summarized certain factors that could be important in demonstrating a change of domicile to

STATE 1. The factors INVESTMENT ADVISOR listed made no mention of the taxpayers' Utah residence. However, INVESTMENT ADVISOR concluded that it was important for the PETITIONERS "to have actually set up residence [in STATE 1]." Exhibit 19.

17. On September 24, 2003, PETITIONER 1 received a letter from ACCOUNTANT 1, a Utah accountant, in which ACCOUNTANT 1 also discussed the criteria to change domicile from Utah to STATE 1. ACCOUNTANT 1 listed a number of factors that might support a change of residence from Utah to STATE 1. Among the factors included were the "sale [of the] Utah principal residence" and a showing that the PETITIONERS "do not spend in the aggregate more than 183 days per year in the state of Utah" and "maintain more contacts in STATE 1 than with any other state." Exhibit 21.

18. On September 29, 2003, PETITIONER 1 sent an e-mail to ATTORNEY 2 concerning a bill received from LAW FIRM 1 for their legal advice about changing his domicile. In his e-mail, PETITIONER 1 characterized the domicile advice as "by the book and very uncreative to boot." Exhibit 9.

19. During the audit period, PETITIONER 1 continued to be employed by COMPANY A or its successor, COMPANY B. PETITIONER 1's "home" office for these companies was in Utah. COMPANY A also provided PETITIONER 1 with an executive assistant, PETITIONER REP. 3, who worked at the Utah office. PETITIONER 1 testified that many of his bills, including personal bills, were mailed to the COMPANY A office for PETITIONER REP. 3 or other staff to reconcile and pay. PETITIONER REP. 3 testified that her duties also included coordinating care for the taxpayers' pets. PETITIONER REP. 3 performed these duties throughout the audit period. PETITIONER 1 also testified that he traveled extensively for his work to visit the various places of business associated with each company.

20. In 2003, PETITIONER 2 was employed by COMPANY 3 and had an office in COUNTY, STATE 2. PETITIONER 2 was diagnosed with HEALTH CONDITION in 2001. PETITIONER 1

testified that his wife traveled extensively for her job when she was well. In 2003 and 2004, PETITIONER 2 had an assistant in Utah, ASSISTANT, who handled many of her personal affairs.

21. During the audit period, the taxpayers continued to own and to use their Utah residence. PETITIONER 1 testified that during the audit period, he would generally stay at the Utah residence when he was in Utah. As of the hearing date, PETITIONER 1 continues to own and use the Utah residence.

22. The taxpayers received the primary residential exemption from property taxes on the Utah residence for the 2003 and 2004 tax years. For the 2004 tax year, the Utah residence was assessed at a fair market value of \$\$\$\$\$. PETITIONER 1 has continued to receive the primary residential exemption on the Utah residence for the 2005, 2006 and 2007 tax years. Exhibit 44.

23. PETITIONER 2's son lived in Utah during the audit period.

24. On September 8, 2003, the taxpayers signed an agreement to purchase a home at ADDRESS in CITY 4, STATE 1 (the "STATE 1 residence"). Exhibit 18. The taxpayers signed the settlement papers on the STATE 1 residence on November 25, 2003, purchasing it for \$\$\$\$\$. Exhibit 8. Also on September 8, 2003, PETITIONER 1 signed the first of two documents to rent a condominium in CITY 4, STATE 1 for the period September 8, 2003 through November 30, 2003; i.e., for the period until the STATE 1 residence was ready to move into. Exhibit 22.

25. PETITIONER 1 claimed that he and his wife bought the STATE 1 residence in order to have warm weather during the winter months. He also stated that PETITIONER 2 considered the STATE 1 residence to be her "dream" home. He further explained, however, that during the winter of 2003-2004, PETITIONER 2 admitted that it had been a mistake to buy the STATE 1 residence because of the relatively cold winter that the CITY 3 area experienced that year. PETITIONER 1 also testified that at the time he and his wife purchased the STATE 1 residence, it was their future intention to retire in STATE 3. He

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testified that they purchased a home in STATE 3 on or before March 27, 2004 and had a car shipped to the home in STATE 3. PETITIONER 1 sold the STATE 1 residence in 2005.

26. Because the STATE 1 residence was already furnished at the time of purchase, the taxpayers did not move much furniture from their Utah residence to the STATE 1 residence. However, PETITIONER 1 and his assistant, PETITIONER REP. 3, both testified that the taxpayers moved some personal belongings to the STATE 1 residence. PETITIONER REP. 3 testified that some medical equipment was brought to the STATE 1 residence, in addition to some dishes, linens and towels.

27. PETITIONER 1 testified that he and his wife attempted to sell their Utah residence after purchasing the STATE 1 residence. He also stated that as of the hearing date, the Utah residence is still for sale. However, he could not recall the name of the agent who is listing the home or the price at which it is marketed. Furthermore, PETITIONER 1 stated that a “for sale” sign has never been placed on the property for fear that the home would be robbed. He stated that robbery was a concern because he kept his \$\$\$\$ ( X ) collection at the Utah residence throughout the audit period. He also stated that the Utah residence has a large storage area in which, during the audit period, he kept items collected throughout his life.

28. The taxpayers had a number of invoices for utilities and other bills mailed to the STATE 1 residence between October 31, 2003 and February 23, 2004. Exhibit 10. PETITIONER REP. 3 testified that she assisted in setting up the utilities for the STATE 1 residence and worked to get the taxpayers’ vehicles registered and insured in STATE 1.

29. PETITIONER 1 testified that he and his wife kept vehicles at all of their residences. During the audit period, the taxpayers purchased four vehicles from DEALERSHIP in CITY 5, Utah that were registered and insured in STATE 1. Also during this period, the taxpayers purchased a vehicle from the same dealership that was registered in STATE 3. Exhibits 3, 4 and 5.



30. On September 8, 2003, both of the taxpayers registered to vote in STATE 1. Both taxpayers listed the STATE 1 residence as their home address. Exhibit 1. PETITIONER 1 testified that he voted in STATE 1 and that prior to PETITIONER 2's death, she was called to jury duty in STATE 1.

31. On September 8, 2003, the taxpayers obtained STATE 1 driver's licenses. Exhibit 2.

32. PETITIONER 1 opened a checking account at a FINANCIAL INSTITUTION in STATE 1 on September 9, 2003, using the STATE 1 residence for the account's mailing address. PETITIONER 1 had his paycheck from COMPANY A automatically deposited into this account. Exhibit 12. Account statements from September 9, 2003 through November 6, 2003 show approximately five deposits and five withdrawals. Exhibit 6. No account statements for subsequent periods were provided.

33. PETITIONER 1 also opened a savings account at the FINANCIAL INSTITUTION in STATE 1 using his STATE 1 residence address. This account was opened on November 4, 2003, at which time he deposited \$\$\$\$ from the sale of his COMPANY A stock. Exhibit 6. Except for the period that included the November 4, 2003 deposit, no account statements were provided.

34. On November 8, 2003, PETITIONER 1 changed his address on the checking and savings accounts described above from the STATE 1 residence to the following address:

C/O COMPANY A  
ADDRESS  
CITY 6, UT ZIP

35. PETITIONER 2 also opened a checking account at the FINANCIAL INSTITUTION in STATE 1 using the STATE 1 residence address. An account statement for the September 19, 2003 through October 7, 2003 period showed no withdrawals or deposits. However, several deposits and two withdrawals were made on the account between October 8, 2003 and December 7, 2003. Exhibit 6. No account statements for subsequent periods were provided.

36. PETITIONER 1 testified that he and his wife closed the majority of their Utah bank accounts when they opened their STATE 1 accounts. Nevertheless, throughout the audit period, PETITIONER 1 maintained a checking account at FINANCIAL INSTITUTION 2 in CITY 6, Utah. Statements for this account were mailed to the COMPANY A office in CITY 6, Utah. Between September 2003 and January 2004, PETITIONER 1 personally wrote more than 50 checks on the account. The account also showed substantial ATM activity during this period. Exhibit 32.

37. PETITIONER 2 also maintained an account at FINANCIAL INSTITUTION 2 in CITY 6, Utah during the audit period. The 2003 “Year-End Summary of Charges” for this account was mailed to PETITIONER 2 at the taxpayers’ Utah residence. This account shows substantial activity occurring from September 2003 through December 2003, primarily at Utah businesses. Exhibit 34.

38. PETITIONER 1 had a CREDIT card during the audit period. The account’s “Year-End Summary” for each of the 2003 and 2004 years was mailed to PETITIONER 1 at the COMPANY A office in CITY 6, Utah. During the audit period, the number of charges associated with Utah businesses significantly outnumbered the number of charges associated with STATE 1 businesses. Exhibits 33 and 36.

39. PETITIONER 2 had a CREDIT card during the audit period. The account’s “Year-End Summary” for each of the 2003 and 2004 years was mailed to her at the taxpayers’ Utah residence. During the audit period, the number of charges associated with Utah businesses significantly outnumbered the number of charges associated with STATE 1 businesses. Exhibits 35 and 38.

40. PETITIONER 1 used the STATE 1 residence address for purposes of an employment contract dated September 15, 2003. Exhibit 11. Various W-2 forms and other wage information for 2003 were mailed to the STATE 1 residence for both taxpayers. Exhibit 15. PETITIONER 2 also received mailings from FINANCIAL INSTITUTION 3 addressed to the STATE 1 residence. Exhibit 6. Beginning October 3, 2003, PETITIONER 1’s paycheck stubs show his address to be at the STATE 1 residence. Exhibit 14.

41. PETITIONER 1 testified that he and his wife had no memberships in clubs in STATE 1, with the exception of memberships in casinos. He also stated that they did not participate in and did not contribute to charitable organizations in STATE 1 during the audit period. On the other hand, PETITIONER 1 was on the board of a number of charitable organizations during the audit period, many of which were located in Utah. Exhibit 59. In addition, letters mailed from various Utah charities in late 2003 and early 2004 were addressed either to the taxpayers' Utah residence or to PETITIONER 1's office in CITY 6, Utah. One letter from the FOUNDATION was signed by PETITIONER 1 on December 31, 2003 and addressed to himself at the taxpayers' Utah residence. Exhibit 52. PETITIONER 1 also testified that during 2004, he served as Chairman of the Board for the PETITIONER 2 COMPANY 4 at the LOCATION in CITY 6, Utah.

42. During the audit period, the taxpayers continued to retain and see Utah doctors. Exhibit 49. PETITIONER 1 testified that they also saw STATE 1 doctors during the audit period. PETITIONER 1 has continued to see Utah doctors and dentists subsequent to the audit period.

43. PETITIONER 1 testified that although his wife had had HEALTH CONDITION, it was ( WORDS REMOVED ) when they purchased the STATE 1 residence. He explained, however, that PETITIONER 2's HEALTH CONDITION returned during the winter of 2003 – 2004 and that STATE 1 did not offer the same quality of treatment as other locations. During the audit period, PETITIONER 1 testified that his wife was treated at locations in STATE 4, STATE 3, STATE 2, COUNTRY and Utah. In Utah, PETITIONER 2 was treated at the HOSPITAL in CITY 6 and by an alternative medicine doctor in CITY 5. For those periods that PETITIONER 2 was in Utah and not hospitalized, she resided at the taxpayer's Utah residence.

44. PETITIONER 1 testified that while PETITIONER 2 was being treated at a medical facility in COUNTRY, she became very ill and was transported to the HOSPITAL, where she later passed away in December 2004. PETITIONER 2's death certificate shows her "residence" to be at the Utah residence.

The document also shows that PETITIONER 1 provided the information on the death certificate and that his mailing address was also the Utah residence. Exhibit 45.

45. PETITIONER 2 was buried in Utah. PETITIONER 1 testified that his wife asked to be buried in Utah near the time of her death because her grandchildren lived in Utah. However, he claimed that her body will be exhumed when he passes away so that his wife can be buried with him outside of Utah.

46. ATTORNEY filed probate proceedings in regards to PETITIONER 2's estate on December 14, 2004 in Utah Third District Court, Salt Lake County. The probate document is signed by PETITIONER 1 and shows his and his wife's address to be the Utah residence. In the document, PETITIONER 1 further "states and represents" that "[v]enue is proper because at the time of death the decedent was domiciled in this county." Exhibit 46.

47. The PETITIONERS retained no accountants, legal advisors or investment advisors in the state of STATE 1 to advise them on accounting, tax, estate planning and investment matters. They continued to use advisors in Utah and other states during the audit period, however. In September 2004, each taxpayer signed a Last Will and Testament in CITY 6, Utah, which was witnessed and notarized by a Utah attorney, specifically ATTORNEY. In these documents, both taxpayers declared that they were domiciled in STATE 3. Exhibits 41 and 42.

48. There is also no evidence of the taxpayers using the STATE 1 court system during the audit period. However, on October 3, 2003, PETITIONER 2 filed a child support collection complaint in Utah Third District Court. Documents filed with this complaint show PETITIONER 2's mailing address to be the taxpayers' Utah residence. Exhibits 47 and 48. PETITIONER 1 has been a party in cases filed in Utah Third District Court subsequent to the audit period. Exhibits 43 and 56. Furthermore, in 2006, PETITIONER 1 signed Articles of Incorporation for a Utah corporation in which he identified himself as the corporation's registered agent and listed his address to be at the Utah residence. Exhibit 57.

49. The taxpayers did not employ an accountant in STATE 1. The taxpayers' 2003 federal income tax return was prepared in October 2004 by a STATE 4 tax preparer and shows the taxpayers' address to be the STATE 1 residence. The taxpayers' 2004 federal income tax return was prepared by a Utah tax preparer and shows PETITIONER 1's address to be in CITY 6, STATE 5. This document does not indicate its date of preparation or signature. Exhibit 7.

50. The taxpayers owned dogs that often went with the taxpayers to their various homes. During the audit period, the taxpayers took their dogs to the CLINIC in CITY 1, Utah. PETITIONER 1 also stated that they visited a veterinary clinic in STATE 3. However, he did not indicate that they ever used a clinic in STATE 1.

Number of Days the Taxpayers Were Present in Utah in 2003 and 2004

51. The Division contends that the taxpayers have not shown that they were present in Utah for less than 183 in each year at issue. In fact, the Division asserts that evidence shows that they were present in Utah for 183 days or more for both years. For this reason and because the taxpayers maintained a permanent place of abode in Utah, the Division argues that the taxpayers are resident individuals for Utah income tax purposes, regardless of whether they were domiciled in Utah.

52. The taxpayers do not believe that the Commission should consider them having been present in Utah for any particular day if they were in another state for the majority of that day. Based on this premise, the taxpayers assert that they were not in Utah for 183 or more days in either 2003 or 2004.

53. PETITIONER REP. 3 prepared a document showing the states or countries in which PETITIONER 1 was present for each day for the period August 23, 2003 through December 31, 2004.<sup>2</sup>

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<sup>2</sup> The audit period is August 22, 2003 through December 31, 2004, as explained earlier in the decision. Exhibit 17 provides information for all but the first day of the audit period, specifically August 22, 2003.

Exhibit 17. PETITIONER REP. 3 testified that she prepared the document not only from PETITIONER 1's CREDIT records, calendars and travel itineraries, but also from her own calendar.

54. Exhibit 17 shows that PETITIONER 1 was in more than one state on many days comprising the audit period. However, PETITIONER REP. 3 determined only one state to which to attribute PETITIONER 1's presence each day, by estimating the state in which he spent the most time that day. Exhibit 17 shows, however, that PETITIONER 1 was present in Utah for a portion of many days that PETITIONER REP. 3 attributed to other states and not to Utah.

55. With her methodology, PETITIONER REP. 3 determined that PETITIONER 1 was present in Utah for 53 days from August 23, 2003 through December 31, 2003 and for 161 days from January 1, 2004 through December 31, 2004.

56. For the Division, RESPONDENT REP. 2 testified that PETITIONER REP. 3's approach underestimated the number of days PETITIONER 1 was present in Utah. RESPONDENT REP. 2 explains that for purposes of determining the number of days spent in Utah, Utah Code Ann. §59-10-103(1)(q)(ii) provides that "a fraction of a calendar day shall be counted as a whole day." Using the comments that PETITIONER REP. 3 provided on Exhibit 17, RESPONDENT REP. 2 identified each day attributed to a state other than Utah even though PETITIONER 1 was present in Utah for a portion of the day. RESPONDENT REP. 2 identified these "additional" Utah days on Exhibit 61. With her approach, RESPONDENT REP. 2 determined that PETITIONER 1 was present in Utah for 75 days between August 23, 2003 and December 31, 2003 and for 228 days during 2004.

57. The taxpayers argued that RESPONDENT REP. 2's approach would count as Utah days those days that PETITIONER 1's only presence in Utah was to change airplanes at the CITY 6 airport. Section 59-10-103(1)(q)(ii) does not appear to exclude from Utah days those days where a taxpayer's only presence in at a Utah airport. Regardless, the Commission notes that from the comments provided by

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PETITIONER REP. 3 on Exhibit 17, there appear to be only two days when PETITIONER 1's only presence in Utah may have been a "stop over" at the CITY 6 airport, specifically October 20, 2003 and October 29, 2003.

58. The audit period from September 22, 2003 through December 31, 2004 covers 498 days. Exhibit 17 shows that PETITIONER 1 was present in STATE 1 for all or a fraction of 76 days during the audit period, which is approximately 15% of the 498 days comprising the audit period. Exhibit 17 also shows that PETITIONER 1 was in Utah for all or a fraction of 303 days, which is approximately 61% of the 498 days comprising the audit period. Exhibits 17 and 61.

59. RESPONDENT REP. 2 did not rely solely on the information provided by PETITIONER REP. 3 in Exhibit 17 to estimate the number of days that the taxpayers were present in Utah for each year. She also prepared her own estimates of the numbers of days that the taxpayers were present in Utah. To prepare her estimates, RESPONDENT REP. 2 used the taxpayers' credit and debit card information, bank statements, health care invoices or bills, expense reports, travel itineraries, and calendars for 2003 and 2004. If information was missing for certain days or months, RESPONDENT REP. 2 testified that she did not attribute the missing days to Utah. For this reason, she explains that her estimate of the number of days spent in Utah may be conservative. She also testified that she did not include purchases made by PETITIONER 2's assistant, ASSISTANT, in determining the number of days that PETITIONER 2 was present in Utah.

60. Using the information described above, RESPONDENT REP. 2 determined that PETITIONER 1 was present in Utah for 213 days in 2003. Of this total, she determined that PETITIONER 1 was present in Utah in 2003 for approximately 129 days prior to the audit period (i.e., January 1, 2003 through August 21, 2003) and for approximately 84 days during the audit period (i.e., August 22, 2003 through December 31, 2003). Exhibit 27. For the 2004 tax year, RESPONDENT REP. 2 determined that PETITIONER 1 was present in Utah for 234 days. Exhibit 29. The numbers of days that RESPONDENT

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REP. 2 calculated with this information are similar to the number of days that she calculated from Exhibit 17, which was prepared by PETITIONER REP. 3.

61. Using this same methodology, RESPONDENT REP. 2 determined that PETITIONER 2 was present in Utah for 248 days in 2003. Of this total, she determined that PETITIONER 2 was present in Utah in 2003 for approximately 148 days prior to the audit period (i.e., January 1, 2003 through August 21, 2003) and for approximately 100 days during the audit period (i.e., August 22, 2003 through December 31, 2003). Exhibit 28. RESPONDENT REP. 2 also pointed out that as of August 29, 2003, ATTORNEY of LAW FIRM 1 indicated to PETITIONER 1 that PETITIONER 2 had already been in Utah for more than 183 days in 2003. Exhibit 20. For the 2004 tax year, RESPONDENT REP. 2 determined that PETITIONER 2 was present in Utah for 185 days. Exhibit 30.

62. RESPONDENT REP. 2 also determined the number of days that each taxpayer was outside of Utah in 2003 and 2004, as shown by the credit card and other information. She determined that the information only shows PETITIONER 1 to be outside of Utah for 51 days in 2003 and 73 days in 2004. Furthermore, she determined that the information only shows PETITIONER 2 to be outside of Utah for 27 days in 2003 and 45 days in 2004. Exhibit 31.

63. The taxpayers argue that RESPONDENT REP. 2's estimates may be incorrect because persons other than the taxpayers had access to and were entitled to use their credit cards. PETITIONER REP. 3 also testified that vendors had access to the taxpayers' credit card numbers and could make charges, regardless of the taxpayers' presence on the day a charge was made. However, the taxpayers did not identify whether purchases used by RESPONDENT REP. 2 for her estimates were made without the taxpayers being present at the purchase.

64. The evidence submitted by both parties clearly shows that PETITIONER 1 was present in Utah for 183 days or more in 2004. In addition, it strongly suggests that he was present in Utah for



183 days or more in 2003, as well. It also strongly suggests that PETITIONER 2 was present in Utah for 183 days or more in both 2003 and 2004. The taxpayers have not provided evidence to show that they were present in Utah for less than 183 days during 2003 or 2004. Accordingly, the Commission finds that both taxpayers were present in Utah for 183 or more days in both 2003 and in 2004.

APPLICABLE LAW

1. Under Utah Code Ann. §59-10-104(1)<sup>3</sup>, “a tax is imposed on the state taxable income . . . of every resident individual[.]”

2. For purposes of Utah income taxation, a “resident individual” is defined in UCA §59-10-103(1)(q), as follows:

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

3. Utah Admin. Rule R865-9I-2 (“Rule 2”) provides guidance concerning when a person is “domiciled” in Utah for income tax purposes. For the years at issue, Rule 2 provided as follows in pertinent part:

- 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

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<sup>3</sup> All citations are to the 2003 versions of the Utah Code and the Utah Administrative Code, unless otherwise indicated.

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.

4. Utah Admin. Rule R884-24P-52 ("Rule 52") sets forth a non-exhaustive list of factors

or objective evidence that is determinative of domicile, as follows:

E. Factors or objective evidence determinative of domicile include:

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.

5. In individual income tax proceedings 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 petitioner except for the following issues, as to which the burden of proof shall be upon the commission:

- (1) whether the petitioner has been guilty of fraud with intent to evade tax;
- (2) whether the petitioner 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 petitioner 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.

6. UCA §59-1-401 (2008) concerns the imposition of penalties and provides as follows

in pertinent part:

(7)(a) Additional penalties for underpayments of tax are as provided in this Subsection (7)(a).

- (i) . . . if any underpayment of tax is due to negligence, the penalty is 10% of the underpayment.

....

(13) 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 part.

### DISCUSSION

First, the Commission will address whether the taxpayers are Utah resident individuals. If the taxpayers are Utah resident individuals for the entirety of the 2003 and 2004 tax years, all of the income they earned during these years is subject to Utah taxation. Section 59-10-103(1)(q) provides that a person may qualify as a Utah resident individual under either of two different criteria. Although a person need only meet one of these criterion to be deemed a Utah resident individual, the Commission believes, as explained below, that the taxpayers meet both of the criteria for the years at issue. Because the Commission deems both taxpayers to be Utah resident individuals for the entirety of the 2003 and 2004 tax years, the Commission need not address whether the income earned during the audit period is Utah “source income.” Lastly, the Commission will determine if the Division properly imposed the 10% negligence penalties and, if so, whether reasonable cause exists to waive these penalties.

#### **I. Permanent Place of Abode and 183 or More Days in Utah.**

One of the criterion that qualifies a person as a Utah resident individual is found in Section 59-10-103(1)(q)(i)(B). Specifically, this subsection provides that a person is a resident individual if that person: “(I) maintains a permanent place of abode in this state; and (II) spends in the aggregate 183 or more days of the taxable year in this state.”

Permanent Place of Abode. Although the term “permanent place of abode” is not defined in statute or rule, Rule 2(B) provides the following exception: a “[p]ermanent 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.”

While a person may have only one domicile, he or she may have multiple residence or places of abode. The Rhode Island Supreme Court recognized this difference in *Flather v. Norberg*, 377 A.2d 225 (R.I. 1977). In that case, the Court found that “the establishment of a permanent place of abode requires the maintenance of a fixed place of abode over a sufficient period of time to create a well-settled physical connection with a locality.”

Given the facts in this case, the Commission finds that the exception described in Rule 2(B) is not present. Specifically, the Commission finds that the taxpayers did not maintain their Utah residence during the audit period for “a temporary stay for the accomplishment of a particular purposes.” The taxpayers contend that PETITIONER 2’s unexpected illness in late 2003 necessitated their using the Utah residence for medical purposes. However, the Commission believes the totality of the facts show that the taxpayers maintained the Utah residence “over a sufficient period of time to create a well-settled physical connection with [Utah].”

First, both taxpayers maintained the Utah residence from 1995 through the end of the audit period, and PETITIONER 1 has maintained and used the residence since PETITIONER 2 passed away in December 2004. It is the home where the taxpayers almost exclusively stayed when they were in Utah during the audit period and where PETITIONER 1 currently stays when he is in Utah. It is also the home where the taxpayers kept their \$\$\$\$ art collection and stored their belongings collected over a lifetime, even after they purchased their STATE 1 residence.

During the audit period, the taxpayers continued to maintain a physical connection with Utah through the Utah residence. Evidence shows that the taxpayers identified the Utah residence during the audit period for purposes of filing a lawsuit and probating PETITIONER 2’s estate after she passed away. PETITIONER 2’s illness cannot be construed as a temporary purpose for maintaining the home, as PETITIONER 1 continues to maintain the home three years after her death. There is no basis to conclude that the maintenance and use of the Utah residence of the Utah home over a 13-year period is for a temporary

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purpose. For these reasons, the Commission finds that the taxpayers maintained a permanent place of abode in Utah during the audit period and meet the first condition in order to qualify as a resident individual under Section 59-10-103(1)(q)(i)(B).

Spends 183 or More Days in Utah. The second condition under Section 59-10-103(1)(q)(i)(B) is satisfied if a person spends 183 or more days in Utah during the taxable year. For purposes of determining the number of days spent in Utah, Section 59-10-103(1)(q)(ii) provides that “a fraction of a calendar day shall be counted as a whole day.” From the evidence submitted at the hearing, it is clear that PETITIONER 1 spent at least 228 days in Utah during 2004. Furthermore, the Division presented evidence that strongly suggests that he spent at least 213 days in Utah in 2003, as well. The Division’s evidence also strongly suggests that PETITIONER 2 spent at least 234 days in Utah in 2003 and at least 185 days in Utah for 2004. Although the taxpayers argued that the Division’s estimated numbers of days may be incorrect, they did not present evidence to convince the Commission that either of the taxpayers spent less than 183 days in Utah in either of the years at issue.

Pursuant to Section 59-10-543, the taxpayers have the burden of proof in this matter. The taxpayers have not met their burden in this instance. Accordingly, the Commission finds that the taxpayers also meet the second condition needed to qualify as a resident individual under Section 59-10-103(1)(q)(i)(B).

Conclusion. The Commission finds that the taxpayers maintained a permanent place of abode in Utah throughout the 2003 and 2004 tax years. The Commission also finds that both taxpayers spent at least 183 days in Utah in 2003 and in 2004. Accordingly, the Commission finds that the taxpayers were Utah resident individuals for the entirety of the 2003 and 2004 tax years.

## **II. Domicile.**

The Commission has found above that the taxpayers were Utah resident individuals for all of 2003 and 2004 because they maintained a permanent place of abode in Utah and spent 183 or more days in

Utah for both of the years. Accordingly, the taxpayers are Utah resident individuals regardless of whether they changed their domicile from Utah to STATE 1 in August 2003. However, as explained below, the Commission also finds that the taxpayers were domiciled in Utah for the entirety of 2003 and 2004 and, in accordance with Section 59-10-103(1)(q)(i)(A), were Utah resident individuals under this criterion as well.

The taxpayers admit that they were domiciled in Utah from the mid-1990s until August 21, 2003. Once domicile is established, Rule 2(A)(3) provides that domicile “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.” It is uncontested that the taxpayers purchased a home in STATE 1 in 2003 and stayed in it on occasion. Accordingly, the taxpayers established a physical presence in STATE 1. Nevertheless, the Commission does not believe that the taxpayers met the other two conditions of Rule 2(A)(3) that would be necessary for them to have changed their Utah domicile to STATE 1. Specifically, the Commission does not find that the taxpayers had a specific intent to abandon their Utah domicile or the intent to remain in STATE 1 permanently.

The taxpayers’ stated intent is only one factor to consider in deciding whether they changed their domicile from Utah to STATE 1. Utah appellate courts have addressed whether a person is domiciled in Utah for state income tax purposes<sup>4</sup> and have determined that a person’s actions may be accorded greater weight in determining his or her domicile than a declaration of intent.<sup>5</sup> Accordingly, the Commission must also look at the taxpayers’ actions to determine whether the intent required by Rule 2(A)(3) exists.

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4 The issue of domicile for Utah individual income tax purposes has been considered by the Utah Supreme Court and the Court of Appeals. See *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).

5 See *Clements v. Utah State Tax Comm’n*, 893 P.2d 1078 (Ct. App. 1995); and *Allen v. Greyhound Lines, Inc.*, 583 P.2d 613, 614 (Utah 1978).

There is no question that the taxpayers took a number of steps beginning in September 2003 to establish contacts with STATE 1. They purchased a home and opened bank accounts in STATE 1. They also obtained STATE 1 driver's licenses and registered to vote in STATE 1. Furthermore, they registered several vehicles in STATE 1 and had a number of bills and other documents mailed to their STATE 1 residence. They also declared the STATE 1 residence to be their address on several documents, including their 2003 federal tax return.

However, when the facts are looked at as a whole, the Commission finds that the taxpayers' steps were insufficient to show that they abandoned their Utah domicile and established domicile in STATE 1, regardless of their stated intent. The Commission notes that the taxpayers kept their Utah residence throughout the audit period and stayed in it when they were in Utah. Evidence also suggests that during the audit period, they stayed at the Utah residence significantly more often than they stayed at the STATE 1 residence. In addition, the taxpayers did not move many of their personal belongings, including their expensive art collection, to the STATE 1 residence. They kept the art collection at their Utah residence, as well as their accumulated personal belongings that were stored at the Utah residence. Furthermore, even though the taxpayers declared an intent to sell the Utah residence in 2003, PETITIONER 1 continues to own and use it in 2008.

In addition, although the taxpayers opened bank accounts in STATE 1 in 2003, the statements provided for periods beginning in September 2003 showed little activity on these accounts and significantly less activity than shown on the taxpayers' Utah accounts for the same periods. Furthermore, credit card statements show significantly more charges in Utah than in STATE 1 during the audit period.

The taxpayers also continued to use their Utah residence throughout 2003 and 2004 for mailing purposes. PETITIONER 2's 2003 year-end summaries for her FINANCIAL INSTITUTION 2 and Delta CREDIT accounts were mailed to the Utah residence. The taxpayers also represented in public



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documents that their residence was in Utah. For example, PETITIONER 2 filed a suit in Utah Third District Court in October 2003 in which she declared her mailing address to be the Utah residence.

In addition, the taxpayers retained a number of Utah legal and tax professionals during the audit period and do not appear to have established relationships with any similar professionals in STATE 1. Moreover, the taxpayers had been involved with many Utah charities and organizations and continued these associations during the audit period. There is no evidence to show that they were involved with any STATE 1 charities during the audit period. In addition, PETITIONER 2's personal assistant, ASSISTANT, was located in Utah. She did not hire a personal assistant in STATE 1.

The taxpayers also maintained relationships with doctors and dentists in Utah during the audit period. Although they claim that they also saw doctors and dentists in STATE 1, there is no evidence to show which doctors and dentists they saw and whether these contacts were as extensive as the ones maintained in Utah.

PETITIONER 1 also had his wife's estate probated in Utah near the end of the audit period and probate documents show that he declared his wife's domicile, at the time of her death in December 2004, to be in Utah. Also, because of PETITIONER 2 stated desire, she was buried in Utah where her son and grandchildren live.

The taxpayers have the burden of proof to show that they changed their domicile from Utah. The taxpayers argue that the Utah contacts they maintained during the audit period are relatively unimportant because they have a lifestyle in which they maintain various contacts with more than one state. The taxpayers also argue that they stayed in Utah during the audit period and maintained more Utah contacts than anticipated because PETITIONER 2's HEALTH CONDITION recurred unexpectedly soon after establishing contacts in STATE 1. However, when the Commission looks at these facts as a whole, it is not convinced that the taxpayers' actions during the audit period demonstrated an intent to abandon their Utah domicile or an intent to

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remain in STATE 1 permanently. Accordingly, the Commission finds that the taxpayers did not lose their Utah domicile during the audit period.

**III. Negligence Penalties.**

For each of the tax years at issue, the Division imposed a negligence penalty pursuant to Section 59-1-401(7)(a)(i). The Division imposed the negligence penalties after determining that the taxpayers did not have a reasonable basis to file the part-year Utah return in 2003 and not file a Utah return in 2004.

The Division imposed the negligence penalties in May 2008. The Division initially asserted the negligence penalties nearly two years after it mailed its Statutory Notices and after the taxpayers filed their appeal. As a result, the burden of proof regarding the negligence penalties is upon the Division, pursuant to Section 59-10-543(3).

“Negligence” is defined in Black’s Law Dictionary 930, 931 (5<sup>th</sup> ed. 1979) to include the following:

The omission to do something which a reasonable man, guided by those ordinary considerations which ordinarily regulate human affairs, would do, or the doing of something which a reasonable and prudent man would not do.

Negligence is the failure to use such care as a reasonably prudent and careful person would use under similar circumstances; it is the doing of some act which a person of ordinary prudence would not have done under similar circumstances or failure to do what a person of ordinary prudence would have done under similar circumstances.

The Utah Supreme Court has held that the “negligence penalty is appropriate ‘when the taxpayer has failed to pay taxes and a reasonable investigation into the applicable rules and statutes would have revealed that the taxes were due.’” *Broadcast International, Inc. v. Tax Comm’n*, 882 P.2d 691, 701 (Utah 1994), quoting *Hales Sand & Gravel, Inc. v. Tax Comm’n*, 842 P.2d 887, 895 (Utah 1992). Furthermore, it held that “[t]he taxpayer can escape the penalty if he or she can show that he or she based the nonpayment of taxes on a legitimate, good faith interpretation of an arguable point of law.” *Id.*

The Division believes that the taxpayers acted unreasonably by ignoring advice they received from ATTORNEY. ATTORNEY informed PETITIONER 1 that he and his wife needed to move all possessions out of their Utah residence and that they should no longer stay at the residence in order to have a good-faith argument for a change of domicile. He further warned the taxpayers that they could also be deemed residents due to the number of days they had already spent in Utah in 2003 unless they moved out of the Utah residence. In addition, he informed PETITIONER 1 that PETITIONER 2 had already spent 183 or more days in Utah in 2003 as of August 29, 2003.

The Commission finds that the Division has met its burden of proof in showing that the taxpayers acted negligently under the circumstances. Before deciding to file as Utah nonresidents, the taxpayers had the benefit of professional advice from several persons. Of these professionals, only ATTORNEY addressed both of the criteria associated with residency. It is apparent that PETITIONER 1 did not want to take the steps suggested by ATTORNEY. As a result, the Commission finds that the taxpayers have not shown that they “based the nonpayment of taxes on a legitimate, good faith interpretation of an arguable point of law.”

Moreover, on probate documents and the death certificate, PETITIONER 1 affirmatively represented that PETITIONER 2 was domiciled in Utah at the time of her death, which occurred during the years at issue. Also, PETITIONER 2 declared her address to be in Utah in court documents filed during the audit period. Thus, PETITIONER 1’s claim is not only inconsistent with the legal advice he received, but also inconsistent with his and his wife’s own declarations in judicial proceedings during the audit period. For these reasons, the Commission finds that the taxpayers’ actions were negligent and that the Division properly imposed the negligence penalties.

Furthermore, although the Commission is authorized to waive penalties, it finds that reasonable cause does not exist to waive any of the penalties imposed in this case. The taxpayers received

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credible and detailed advice from ATTORNEY, a tax attorney, which they chose to ignore. The Commission does not believe that reasonable cause exists to waive penalties exist under such circumstances.

#### CONCLUSIONS OF LAW

1. The Commission finds that the taxpayers maintained a permanent place of abode in Utah during all of 2003 and 2004.

2. The Commission finds that PETITIONER 1 spent 183 or more days in Utah not only in 2003, but also in 2004.

3. The Commission finds that PETITIONER 2 also spent 183 or more days in Utah not only in 2003, but also in 2004.

4. The Commission finds that neither of the taxpayers changed their domicile from Utah to STATE 1 in 2003. Instead, the Commission finds that both taxpayers were Utah domiciliaries for the entirety of the 2003 and 2004 tax years.

5. The Commission finds that both taxpayers were Utah resident individuals for the entirety of the 2003 and 2004 tax years under either of the criteria provided in Section 59-10-103(1)(q). As a result, all income earned by the taxpayers in 2003 and 2004 is subject to Utah taxation.

6. The Commission finds that the negligence penalties assessed by the Division were properly imposed and that reasonable cause does not exist to waive any of the penalties imposed in this matter.

#### DECISION AND ORDER

Based upon the foregoing, the Commission sustains the entirety of the Division's assessments for the 2003 and 2004 tax years, including the 10% negligence penalties that were subsequently imposed. It is so ordered.

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 2008.

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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 \_\_\_\_\_, 2008.

Pam Hendrickson  
Commission Chair

R. Bruce Johnson  
Commissioner

Marc B. Johnson  
Commissioner

D'Arcy Dixon Pignanelli  
Commissioner

**NOTICE OF APPEAL RIGHTS:** 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 Ann. §63G-4-302. 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 Ann. §§59-1-601 and 63G-4-401 et seq. 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.

*KRC/06-0254.fof*