

06-0444  
Income Tax  
Signed 09/13/2007

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BEFORE THE UTAH STATE TAX COMMISSION

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PETITIONER 1 & PETITIONER 2,

Petitioners,

vs.

AUDITING DIVISION OF THE UTAH  
STATE TAX COMMISSION,

Respondent.

**INITIAL HEARING DECISION**

Appeal No. 06-0444

Account No. #####

Tax Type: Income Tax

Tax Years: 1998 , 2000-2001

Judge: Phan

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**Presiding:**

Jane Phan, Administrative Law Judge

**Appearances:**

For Petitioner: PETITIONER 1

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

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission for an Initial Hearing pursuant to the provisions of Utah Code Sec. 59-1-502.5, on July 10, 2007. Petitioner filed an appeal of audit deficiencies of Utah individual income tax and interest for the years 1998, 2000 & 2001. The Statutory Notices of Audit Change were issued on April 3, 2006. It should be noted that when Petitioner filed the document contesting the audit, which was a letter dated April 7, 2006, he specifically indicated in the letter that he was contesting the amounts for years 1998, 2000 & 2001. An audit had also been issued for the tax year 2002, but Petitioner had not indicated in his letter that he contested the amount for that year.

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The amount at issue for each year is as follows:

Year	Tax	Penalties	Interest <sup>1</sup>	Total Indicated on Notice
1998	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$
2000	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$
2001	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$

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.

Domicile was further clarified during the audit period at issue pursuant to Utah Administrative Rule R865-9I-2(A) (2001) as follows:

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

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:

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1 Interest continues to accrue on the unpaid balance, and therefore the total due continues to increase.

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In any proceeding before the commission under this chapter, the burden of proof shall be upon the petitioner. . .

### DISCUSSION

Respondent based its audit on the assertion that Petitioners were residents of Utah for tax purposes during 1998, 2000 and 2001. Petitioners acknowledge that they had moved from STATE 1 to Utah during 1998 and resided in Utah for approximately one year. They indicate that they then moved to STATE 2, where they resided until early 2002. Petitioner, PETITIONER 1, indicates that he had mailed to the Tax Commission a part year 1998 return and copy of his STATE 1 return. However, Respondent does not have these returns and there is no indication that a 1998 Utah return had ever been filed. Petitioners did not file Utah returns for 2000 or 2001 as it was their position that they were not residents of Utah during this period.

The issue before the Commission is whether Petitioners were "resident individuals" of Utah for the purposes of Utah Code Sec. 59-10-103(1)(k) for any portions of the tax years at issue. A person may be a resident individual if they spend in the aggregate more than 183 days per year in Utah and maintain a permanent place of abode. In the alternative, a resident individual is one who is "domiciled" in Utah. The issue of whether one establishes or maintains a domicile in Utah is a question of fact. The Commission has considered this issue in numerous appeals and whether someone is a "resident individual" for state tax purposes has been addressed by the appellate courts in Utah.<sup>2</sup> As discussed by the courts in considering this issue, the factfinder may accord the party's activities greater weight than his or her declaration of intent.<sup>3</sup>

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<sup>2</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. 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).

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

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The evidence and proffers of Petitioner indicate that Petitioners were residents and domiciled in STATE 1 up through the first half of 1998. There is no information that would contradict Petitioners' proffer that they had been residing in STATE 1 for about seven years prior to this time. Petitioner, PETITIONER 1, indicates that he had a verbal job offer in Utah. He quit his job in STATE 1. They bought a house in Utah and moved to Utah late in 1998. They obtained Utah Drivers Licenses and registered vehicles in Utah. Petitioners' assertion that they had worked in STATE 1 during the first half of 1998 is supported by the W-2 information available for that year that indicates Petitioner worked for COMPANY A in STATE 1. Therefore, Petitioners were only part year residents for 1998 and the audit needs to be adjusted on that basis. Petitioners indicate that they had mailed to the State of Utah their only copy of their 1998 Utah part year resident return and STATE 1 1998 part year resident return. Petitioners provided a certified mail receipt that they felt indicated these copies had been received by the Tax Commission in April 2006.

Tax year 1999 was not at issue in the audit. However, to understand residency and domicile for the later years, the events that occurred during 1999 were relevant to Petitioners' residency status. PETITIONER 1 indicated that the promised job in Utah did not materialize and he was unable to find full time employment in Utah. By mid 1999 they moved to STATE 2 where PETITIONER 1 was able to find employment in the telecommunications industry. They put their Utah residence up for sale. They rented an apartment in STATE 2, opened bank accounts there, and joined various organizations. Petitioners were able to provide copies of checks that supported establishing domicile in STATE 2. PETITIONER 1 indicated that he was required to have a STATE 2 Drivers license and that he had obtained one in that state. He remembered taking the test. They were not able to purchase a residence because they were still paying the mortgage and expenses for their Utah residence. Eventually in 2000 they did have a rent to own type offer for the Utah residence, and although it was below what they had

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paid, they accepted the offer due to the fact that it was so difficult to make the mortgage payments and their living expenses in STATE 2. The sale of their Utah residence closed in November 2000, although it had been leased out to the new owners for many months prior to the actual sale date.

PETITIONER 1 indicated that it would have been their intent to stay in STATE 2 and eventually purchase a residence there, had things worked out for them. They remained living and working full time in STATE 2 through 2000 and into 2001. However, shortly after September 11, PETITIONER 1 was laid-off, with thousands of others in the telecommunications industry. He indicates the CITY area where he had been working was hard hit by lay-offs. Petitioners concluded that there were no jobs to be had in that area and they would have to move. They traveled to Utah over Thanksgiving 2001 to visit with PETITIONER 2's family and PETITIONER 1 searched for employment in Utah. They worked briefly for a temp agency in Utah then returned to STATE 2 for Christmas. They made the decision to move to Utah late in 2001. Their lease on their STATE 2 apartment was up in January 2002, and the move to Utah was based on the circumstances that PETITIONER 2's brother, who resided in Utah, had become terminally ill and PETITIONER 1 thought the job prospects looked better in Utah. Early in 2002 they moved back to Utah. For 2002 they filed Utah resident returns.

Respondent's representative indicates that he had done a query with the State of STATE 2 regarding Petitioners' drivers-license records and his search resulted in no record of PETITIONER 1 obtaining a drivers license in that state. Utah records indicated that his Utah license was valid during this period and had not been surrendered. Generally when one obtains a drivers license in a new state, the old license is surrendered to the new state and the new state notifies the old state that this has occurred. Other than this lack of drivers' license information, Respondent did not refute Petitioners' contentions regarding 2000 and 2001. There was no indication that Petitioners had worked in Utah except briefly for the temp agency in 2001. Additionally Respondent provided no evidence that would

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refute Petitioners' contention that they listed their Utah residence for sale in 1999 and it eventually sold in 2000. There was apparently a vehicle registered in Utah in 2001, but PETITIONER 1 indicated it was for his daughter to drive.

Petitioners have since filed a Utah return as nonresidents for 2001 to claim the small amount of income they earned in Utah while working for the temp agency at the end of 2001. They indicated that they just did not realize their earnings of less than \$\$\$\$ in Utah would create tax liability in this state.

It is clear that Petitioners established "domicile" in Utah during 1998. Pursuant to Utah Admin. Rule R865-9I-2(A), once domicile has been established it is not lost until there has been an abandonment of the old domicile and the intent to establish and actual establishment of a new domicile. From the limited information provided, it is the Commission's conclusion that Petitioners did take these steps, abandoning Utah and establishing domicile in STATE 2, when they moved from Utah in 1999. Therefore, the Commission would abate the audit for 2000 in its entirety and require Respondent to adjust the 2001 audit to a nonresident return with tax liability only for the Utah source income.

Following the hearing in this matter, Petitioner submitted correspondence regarding tax year 2002. Petitioners had not indicated on their original appeal letter that 2002 was an issue. However, it does appear that PETITIONER 1 included a copy of the 2002 Statutory Notice with the Notices for the other years. Respondent's Answer to Petition for Redetermination indicated the years at issue were 1998, 2000 & 2001. A previous order from the Commission in this matter listed the years at issue as 1998, 2000 and 2001. At the hearing Petitioner did not provide evidence that the audit assessment was incorrect for 2002. In 2002 Petitioners filed a Utah resident return and there was a discrepancy between the taxable income reported on the Utah return that resulted in an amount of tax due. It is unclear whether Petitioners timely contested the 2002 year, but they did not support abatement of the audit for

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that year at the hearing. Petitioners should know if they were Utah residents when they received this income, even if it was STATE 2 source income, it could be taxable to Utah.

DECISION AND ORDER

Based upon the information presented at the hearing, the Commission finds that Petitioners were part year residents in Utah during 1998 and orders Respondent to adjust the audit on that basis using the W-2's and other tax information to determine the portion of income earned after Petitioners moved to Utah. Penalties for 1998 are waived. The Commission finds that Petitioners were not residents of Utah for tax purposes in 2000 and 2001. The 2000 audit is to abated in its entirety. Respondent is hereby ordered to adjust the 2001 audit to a nonresident basis, with tax liability only on Utah source income. Penalties for 2001 are to be abated as well. The audit for 2002 is sustained. 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

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

*JKP/06-0444.int*