

06-0511
Income
Signed 05/30/2007

BEFORE THE UTAH STATE TAX COMMISSION

PETITIONER 1 & PETITIONER 2,)		
	)	INITIAL HEARING ORDER	
Petitioners,)		
	)	Appeal No.	06-0511
v.)		
	)	Account No.	#####
AUDITING DIVISION OF	)	Tax Type:	Income
THE UTAH STATE TAX	)	Tax Years:	2002-2004
COMMISSION,)		
)		
Respondent.	)	Judge:	Phan

Presiding:

Jane Phan, Administrative Law Judge

Appearances:

For Petitioner: PETITIONER 1
 PETITIONER 2

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

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission for an Initial Hearing pursuant to the provisions of Utah Code Sec. 59-1-502.5, on March 28, 2007. Petitioners are appealing audit deficiencies of Utah individual income tax and interest for tax years 2002 through 2004. The Statutory Notices of Audit Change were issued on April 3, 2006. The amounts of the additional tax and interest as of the assessment date are as follows:

	Tax	Penalty	Interest	Total Due on Notice ¹
2002	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$
2003	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$
2004	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$

¹ Interest continues to accrue on the unpaid balance.

APPLICABLE LAW

A tax is imposed on the state taxable income of every resident individual for each taxable year.

(Utah Code Sec. 59-10-104).

Resident individual is defined in Utah Code Sec. 59-10-103(1)(k) as follows:

(k) "Resident individual" means:

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

For purposes of determining whether an individual is domiciled in this state the Commission defined "domicile" in Utah Administrative Rule R865-9I-2(D) (2002), which was the rule in effect at the beginning of the audit period 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 “domicile” rule was revised at the end of 2002. For the later part of the audit period the Commission applies the new rule that provides at Utah Administrative Rule R865-9I-2² (2003) as follows:

A. Domicile

- 1. Domicile is the place where an individual has a permanent home and to which he intends to return after being absent. It is the place at which an

2 This version of the Utah Admin. Rule R865-9I-2 became effective as of December 9, 2002 and was a revision from the prior rule.

individual has voluntarily fixed his habitation, not for a special or temporary purpose, but with the intent of making a permanent home.

2. For purposes of establishing domicile, an individual's intent will not be determined by the individual's statement, or the occurrence of any one fact or circumstance, but rather on the totality of the facts and circumstances surrounding the situation.

a) Tax Commission rule R884-24P-52, Criteria for Determining Primary Residence, provides a non-exhaustive list of factors or objective evidence determinative of domicile.

b) Domicile applies equally to a permanent home within and without the 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.

The Utah Legislature has specifically provided that the taxpayer bears the burden of proof in proceedings before the Tax Commission. Utah Code Sec. 59-10-543 provides the following:

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

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

1. whether or not the individual voted in the place he claims to be domiciled;
2. the length of any continuous residency in the location claimed as domicile;
3. the nature and quality of the living accommodations that an individual has in the location claimed as domicile as opposed to any other location;
4. the presence of family members in a given location;
5. the place of residency of the individual's spouse or the state of any divorce of the individual and his spouse;
6. the physical location of the individual's place of business or sources of income;
7. the use of local bank facilities or foreign bank institutions;
8. the location of registration of vehicles, boats, and RVs;

9. membership in clubs, churches, and other social organizations;
10. the addresses used by the individual on such things as:
 - a) telephone listings;
 - b) mail;
 - c) state and federal tax returns;
 - d) listings in official government publications or other correspondence;
 - e) driver's license;
 - f) voter registration; and
 - g) tax rolls;
11. location of public schools attended by the individual or the individual's dependents;
12. the nature and payment of taxes in other states;
13. declarations of the individual:
 - a) communicated to third parties;
 - b) contained in deeds;
 - c) contained in insurance policies;
 - d) contained in wills;
 - e) contained in letters;
 - f) contained in registers;
 - g) contained in mortgages; and
 - h) contained in leases.
14. the exercise of civil or political rights in a given location;
15. any failure to obtain permits and licenses normally required of a resident;
16. the purchase of a burial plot in a particular location;
17. the acquisition of a new residence in a different location.

DISCUSSION

The issue in this appeal is whether PETITIONER 1 was a "resident individual" in the State of Utah for the purposes of Utah Code Sec. 59-10-103(1)(k) during 2002 through 2004. The parties agree that PETITIONER 2 was a Utah resident for the entire period. A person may be a resident of Utah for income tax purposes if they spend in the aggregate more than 183 days per year in Utah, or, in the alternative, a "resident individual" is one who is "domiciled" in the State of Utah. There was no indication that PETITIONER 1 was in Utah for more than 183 days. Respondent's position was based on the alternative criteria for "resident individual." It was Respondent's position that PETITIONER 1 was "domiciled" in Utah.

"Domicile" is defined by Utah Admin. Rule R865-9I-2 and the rule provides that once a domicile has been established three elements must be shown before a new domicile is indicated: a) a specific

intent to abandon the former domicile; b) the actual physical presence in a new domicile; and c) the intent to remain in the new domicile permanently. The question of whether one maintains a domicile in Utah is a question of fact. The Commission has considered this issue in numerous appeals and whether someone is a "resident individual" for state tax purposes has been addressed by the appellate courts in Utah.³ As discussed by the courts in considering this issue, the fact finder may accord the party's activities greater weight than his or her declaration of intent.⁴ Additionally Petitioner has the burden of proof to establish that the audit is incorrect.

Upon reviewing the evidence submitted by the parties, and the facts as proffered by Petitioners at the hearing which were generally unrefuted by Respondent, the Commission concludes that PETITIONER 1 had established a domicile in STATE 1 during the 1990's. During the audit period at issue she did not have the specific intent to abandon the STATE 1 domicile, and although there was a physical presence in Utah with the ownership of the residence, there was not the requisite intent to remain permanently in Utah.

PETITIONER 1 worked as a flight attendant beginning in the 1970's. She indicates that she started working for COMPANY A in 1987 and her base was out of CITY 1, STATE 2, which was also her place of domicile during that time. She had purchased a residence; her mother and brother lived there. Her doctors were there. However, COMPANY A merged with COMPANY B, the CITY 1 base was closed and PETITIONER 1 was transferred to CITY 2, STATE 3. She remained based out of CITY 2, STATE 3 where she was flying international routes throughout the period at issue except when she was on medical leave at the

3 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).

4 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);

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end of 2004. She never rented or purchased a residence in CITY 2, always commuting to work from elsewhere.

In 1988 PETITIONER 1 did purchase a residence in Utah, at ADDRESS 1, CITY 3. She indicates she did this in part for investment. She had been thinking about buying a place in CITY 4, at the same time, but purchased the Utah residence instead. She could commute to CITY 2 from CITY 3. She flew long international trips and spent most nights in hotels. She had also purchased a small residence in CITY 5, STATE 4. It was CITY 5 where she would spend her vacation time. Around this time Petitioner did obtain a Utah Drivers License.

However, in 1992 she met and married PETITIONER 2 who was a resident of CITY 6, STATE 1. PETITIONER 2 maintained a residence in CITY 6, although eventually he began working more in CITY 3. During the audit period he filed and paid tax on his income because it was earned in Utah. However, he felt his domicile remained the residence in CITY 6.

By 1992, PETITIONER 1 considered herself to be a resident of STATE 1. She registered to vote and obtained a STATE 1 drivers license. These things never changed throughout the audit period. The couple purchased a condominium residence in CITY 4 in 1999. PETITIONER 2 had a child from a previous marriage who lived there. PETITIONER 1 had friends there and could fly out of the CITY 4 airport to commute to work in CITY 2. They continued to own the Utah residence. PETITIONER 2 would stay there when working. They continued to spend time in CITY 6 at his residence as well. PETITIONER 1 also spent time in CITY 1 on a monthly basis with her mother and to help care for her disabled brother. She continued to see her doctors and dentist in STATE 2. The Commission concludes from this information that PETITIONER 1 established a domicile in STATE 1 during this period and remained domiciled in STATE 1 up through the audit period.

Respondent points out that PETITIONER 1 did own and maintain the residence in Utah throughout the entire audit period. She spent time in Utah with her husband, who used the CITY 3 property as his primary residence due to his employment. In addition, some of her financial mail was sent to the Utah residence. However, due to the fact that the Commission has concluded Petitioner established a domicile in STATE 1 during the 1990's, these ties alone are not sufficient to show that she abandoned the STATE 1 domicile and had intent to make Utah her permanent residence. Respondent also indicates that if PETITIONER 1 were to be found not domiciled in Utah, PETITIONER 2's tax filings would need adjustment, as there was some error on how they had been filed.

The only changes in Petitioners' living arrangements during the audit period occurred in 2004. They sold their condominium in CITY 4 in March 2004. They were intending to purchase a large tract of land in a rural area of STATE 1, possibly closer to CITY 6, and construct a residence. Late in 2004, PETITIONER 1 was diagnosed with cancer. Treatment included surgery and chemotherapy so she had to take a medical leave from flying and did end up spending more time in Utah toward the end of 2004 as she chose to have her treatment at the Huntsman Cancer Institute. However, as this was late in the year she did not spend more than 183 days in Utah in 2004.

DECISION AND ORDER

Based upon the information presented at the hearing, the Commission finds that PETITIONER 1 was not domiciled in Utah during the tax years 2002 through 2004. Respondent is to recalculate the audits on this basis. It is so ordered.

Appeal No. 05-1429

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
CITY 3, 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

D'Arcy Dixon Pignanelli

Appeal No. 06-0793

Commissioner

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.

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