

06-1234
Income
Signed 03/19/2007

BEFORE THE UTAH STATE TAX COMMISSION

PETITIONER 1 & PETITIONER 2,)		
)	INITIAL HEARING ORDER	
Petitioners,)		
)	Appeal No.	06-1234
v.)		
)		
AUDITING DIVISION OF)	Tax Type:	Income
THE UTAH STATE TAX)	Tax Years:	2003 & 2004
COMMISSION,)	Judge:	Phan
)		
Respondent.)		

Presiding:

Jane Phan, Administrative Law Judge

Appearances:

For Petitioner: PETITIONER REPRESENTATIVE, Accountant
 PETITIONER 1

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

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission for an Initial Hearing pursuant to the provisions of Utah Code Sec. 59-1-502.5, on February 28, 2007.

Petitioners are appealing the assessment of Utah individual income tax and interest for tax years 2003 & 2004. The Statutory Notices of Audit Change were issued on September 20, 2006. The amount of the additional tax and interest as of the assessment date are as follows:

	Tax	Interest	¹ Total Due on Notice
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 has defined "domicile" in Utah Administrative Rule R865-9I-2(D) (2003) as follows:

A. Domicile

1. Domicile is the place where an individual has a permanent home and to which he intends to return after being absent. It is the place at which an individual has voluntarily fixed his habitation, not for a special or temporary purpose, but with the intent of making a permanent home.
2. For purposes of establishing domicile, an individual's intent will not be determined by the individual's statement, or the occurrence of any one fact or circumstance, but rather on the totality of the facts and circumstances surrounding the situation.
 - a) Tax Commission rule R884-24P-52, Criteria for Determining Primary Residence, provides a non-exhaustive list of factors or objective evidence determinative of domicile.
 - b) Domicile applies equally to a permanent home within and without the 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. . .

DISCUSSION

Respondent based its audit on the assertion that PETITIONER 1 was a resident of Utah throughout 2003 and 2004. Although Petitioners acknowledge that PETITIONER 2 was a Utah resident, they maintain that PETITIONER 1 was a resident of STATE during 2003 and 2004. They had filed joint federal returns and PETITIONER 2 had filed separate Utah Individual Income Tax Returns using special instructions for the tax years at issue.

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 the audit years. 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. Respondent did not argue that PETITIONER 1 was in the state of Utah more than 183 days per year of the audit period. 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.² 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.³ Additionally Petitioner has the burden of proof to establish that the audit is incorrect.

It is clear that up through some point of time prior to the audit period Petitioner had established a domicile in Utah. He had filed Utah Resident Individual Income Tax Returns for several years up through 2000. PETITIONER 1 had purchased a townhouse in CITY 1, which he continues to own but leases out. Subsequently, but prior to the audit period, PETITIONER 1 and PETITIONER 2 purchased a residence at ADDRESS, CITY 2, Utah, where they resided. As Petitioner had established a domicile in Utah, the Commission must consider whether he intended to abandon the Utah domicile, whether there was a physical presence in the new domicile and whether there was intent to remain in the new domicile permanently.

PETITIONER 1 is an airline pilot working for COMPANY A. Sometime around 2000, Petitioner's base of operations was transferred to CITY 3. PETITIONER 1 flight schedule was such that he has numerous overnight layovers. At the most he was not flying or laying over 14 to 17 days per month. He maintains that much of the time when he was not working was spent in CITY 3. While in CITY 3 he resided with his cousin, at her residence. This was a rent-free arrangement. Also on his days off, he spent time in Utah with PETITIONER 2 and the children, but indicated that this was less than 100 days per year.

2 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).

3 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);

Although the facts presented by the parties in this matter show a physical presence in STATE, they do not show intent to abandon the Utah domicile, nor do they show intent to remain in the new domicile permanently. PETITIONER 1 did not take the steps one takes when they abandon a domicile. PETITIONER 1 retained his Utah driver's license. In fact, he renewed his Utah driver's license in 2004. His cars were registered in Utah. His FAA License Address was Utah. The doctor he saw for the regular checkup required for his FAA license was in Utah. He obtained a Utah Resident Fishing license during the audit period. PETITIONER 2 and the children continued to reside in Utah. The only residential properties that PETITIONER 1 owned where located in Utah, consisting of the CITY 2 residence and the town home in CITY 1 that PETITIONER 1 leased out as a rental.

Additionally, the facts also do not support that there is any intent to remain permanently at the domicile in CITY 3. He has not acquired a residence there or even entered into a lease of an apartment. He has a rent free arrangement with his cousin. He did not obtain a STATE driver's license, register to vote, or register his vehicle there. This appears to be a temporary arrangement, only for the time that he is stationed out of that airport.

Based on these factors, despite not being physically present in Utah for more than 183 days a year, Petitioner remains a resident individual for Utah income tax purposes because his domicile remains in Utah.

DECISION AND ORDER

Based upon the information presented at the hearing, the Commission finds that PETITIONER 1 was domiciled in Utah for tax years 2003 and 2004. Therefore, the audits are 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

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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.

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