

BEFORE THE UTAH STATE TAX COMMISSION

<p>PETITIONER 1 & PETITIONER 2, Petitioner, vs. AUDITING DIVISION OF THE UTAH STATE TAX COMMISSION, Respondent.</p>	<p>INITIAL HEARING DECISION</p> <p>Appeal No. 06-1554</p> <p>Account No. ##### Tax Type: Income Tax Tax Year: 2005</p> <p>Judge: Phan</p>
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Presiding:

Jane Phan, Administrative Law Judge

Appearances:

For Petitioner: PETITIONER REPRESENTATIVE, Accountant
PETITIONER 2

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 May 30, 2007. Petitioner is appealing an audit deficiency of Utah individual income tax and interest for the year 2005. The Statutory Notice of Audit Change was issued on December 6, 2006. The amount at issue is \$\$\$\$ in additional tax and \$\$\$\$ in interest as of the date the Statutory Notice.¹ No penalties were assessed with the audit. Additionally in the audit Respondent had given Petitioners credit for taxes paid to the other states that were relevant in this matter.

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 is further clarified at Utah Administrative Rule R865-9I-2(A) 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 Untied 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.

1 Interest continues to accrue on the unpaid balance.

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 both Petitioners were residents of Utah for tax purposes during 2005. Petitioners acknowledged that PETITIONER 2 was a resident of Utah during this period, but it is their contention that PETITIONER 1 was a resident of STATE 1. The issue before the Commission is whether PETITIONER 1 was a "resident individual" of Utah for the purposes of Utah Code Sec. 59-10-103(1)(k). From the information presented Petitioner did not spend in the aggregate more than 183 days per year in Utah during the period in question. A resident individual, in the alternative, is one who is "domiciled" in the State of Utah.

The question 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.² 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.³

At some point in 2004 PETITIONER 1 was "domiciled" in Utah and had been since Petitioners moved to Utah in 1999. Domicile is defined by Utah Admin. Rule R865-9I-2(A). The rule

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);

requires that once a domicile has been established, as PETITIONER 1 had established Utah domicile, it is not lost until there is a concurrence of the three circumstances: 1) a specific intent to abandon the former domicile; 2) the actual physical presence in a new domicile; and 3) the intent to remain in the new domicile permanently.

Although PETITIONER 1 did have the requisite physical presence in STATE 1 during 2005, the facts and circumstances do not demonstrate the intent to abandon the Utah domicile, nor intent to remain in the new domicile permanently.

Upon moving to Utah in 1999, Petitioners purchased a residence, obtained Utah driver's licenses, registered to vote in Utah, filed Utah resident returns and had taken all the steps that are typical of establishing domicile. PETITIONER 2 did own a condominium in STATE 2 during this period that she generally rented out because they were able to pay the mortgage on the condominium with the rent they received. In January 2004, PETITIONER 1 found employment in STATE 3, with the STATE 3 State Fair. This was to be a full time permanent position and PETITIONER 1 had an expectation that the salary would be increased after he started working. PETITIONER 1 went to STATE 3 and began working. While there he rented a room in someone else's house rather than an apartment. He did not obtain an STATE 3 driver's license, register to vote, or register vehicles.

PETITIONER 2 indicated that she did travel with him to STATE 3 and looked for a residence to purchase there. However, after looking at the housing market they concluded that they could not afford to purchase with PETITIONER 1's initial salary, at least not in any neighborhood where they would want to reside. It was Petitioners' determination that they would wait and see if the job was going to work out and if PETITIONER 1 would receive the expected raise, before PETITIONER 2 would move to STATE 3. So PETITIONER 2 remained at their residence in Utah.

The STATE 3 position did not work out as expected and in June of 2005 PETITIONER 1 found a new job at a theme park in STATE 1, where he worked for the remainder of that year and continued to work into 2007. Again he rented a room in someone's house, rather than an apartment. Petitioners concluded it was too expensive to buy a residence in STATE 1 near his employment, and even rent for an apartment was high, so PETITIONER 2 continued to remain at the residence in Utah. PETITIONER 1 worked full time in STATE 1. He did register his vehicle there and had some mail sent to the STATE 1 address, including some bank statements. He attended church in STATE 1. However, he never obtained a STATE 1 driver's licenses or registered to vote and most of the financial and all tax related documents were mailed to the Utah address, as it was PETITIONER 1 who handled those matters. PETITIONER 2 indicated that ultimately they intended to move back to STATE 2, and the hope was that PETITIONER 1 would eventually be able to find employment there.

In looking at PETITIONER 1's actions to determine if there was intent to abandon the Utah domicile or to establish a permanent domicile in either STATE 3 or STATE 1, he did not take the typical actions that would result in either. Petitioners continued to maintain the residence in Utah and PETITIONER 2 lived at the residence. If PETITIONER 1 truly intended to establish a permanent domicile, he would have established a more permanent residence. Taking their income into account it would be typical to enter into a lease of an apartment or purchase a residence if one expected to establish a permanent domicile in a new location. It is true that this would result in higher expenses, but if someone were truly abandoning a domicile in one state and establishing one elsewhere they would take that step. Additionally the fact he failed to obtain a drivers license in either state or register to vote also indicates lack of intent to abandon Utah or establish a domicile elsewhere.

Petitioners also raised the point that their tax advisor, PETITIONER REPRESENTATIVE, had called the Tax Commission when preparing Petitioners' 2005, because she was unsure how the Petitioners should be filing. PETITIONER REPRESENTATIVE stated at the hearing that she had called in on the Tax Commission number 297-2200 and had explained to the Tax Commission employee the situation regarding Petitioners and asked how they should file. PETITIONER REPRESENTATIVE did not remember the person's name that she had spoken with, but she states that she was told by that person that Petitioners should file a Utah return for PETITIONER 2 and that PETITIONER 1 would not need to file a Utah return.

Upon considering the telephone conversation between PETITIONER REPRESENTATIVE and a Tax Commission employee, erroneous verbal advice is not basis for waiver of a tax deficiency. Additionally, the Commission would note that the Tax Commission employee advice would have been based only on the facts as presented by PETITIONER REPRESENTATIVE over the telephone and may have been correct based on the information presented.

DECISION AND ORDER

Based upon the information presented at the hearing, the Commission finds that PETITIONER 1 was domiciled in Utah for the tax year 2005. Therefore, the audit is sustained as to the Utah income tax and interest accrued thereon. 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

Appeal No.

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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