

BEFORE THE UTAH STATE TAX COMMISSION

PETITIONER 1 & PETITIONER 2, Petitioners, vs. AUDITING DIVISION OF THE UTAH STATE TAX COMMISSION, Respondent.	INITIAL HEARING ORDER Appeal No. 07-0259 Account No. ##### Tax Type: Income Tax Tax Year: 2004 Judge: Jensen
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Presiding:

Clinton Jensen, Administrative Law Judge

Appearances:

For Petitioner: PETITIONER 1
PETITIONER 2

For Respondent: RESPONDENT REPRESENTATIVE 1, Assistant Attorney
General
RESPONDENT REPRESENTATIVE 2, from the Auditing
Division

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission for an Initial Hearing on March 11, 2008 in accordance with Utah Code §59-1-502.5. On the basis of the documents presented in connection with the hearing and the testimony of the parties, the Commission issues this decision.¹

The above-named Petitioners (the “Taxpayers”) are appealing the action of the Auditing Division of the Utah State Tax Commission (the “Division”) in making an assessment of Utah individual income tax and interest for the 2003 and 2004 tax years. The Taxpayers filed Utah tax returns indicating non-resident status from August 19, 2003 to December 31, 2003 for the 2003 tax year and from January 1, 2004 through August 31, 2004 for the 2004 tax year.

The Division issued a Statutory Notice of Deficiency and Audit Change for the 2003 tax year on April 13, 2007 and a Notice of Audit Change for the 2004 tax year on December 19, 2006. According to the Notices, the amount of the additional tax, penalties and interest as of the assessment date for each year are as follows:

¹ The Taxpayers presented a March 17, 2008 letter to the Commission, which the Commission did not consider in making this decision because the letter came after the close of evidence in the case.

<u>Year</u>	<u>Tax</u>	<u>Penalties</u>	<u>Interest</u> ²
2003	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$
2004	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$

APPLICABLE LAW

A tax is imposed on the state taxable income of every resident individual for each taxable year. (Utah Code Ann. §59-10-104).

For the 2003 tax year, Resident individual was defined in Utah Code Sec. 59-10-103(1)(p) as follows:

- (p) "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)(p)(ii), a fraction of a calendar day shall be counted as a whole day.

For the 2004 tax year, the Utah Legislature changed to the wording of the statute providing the definition for "resident individual." Effective January 1, 2004, Utah Code Ann. § 59-10-103(1)(q) provided as follows:

- (q)(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 subsection (I)(q)(i)(B), 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" for both 2003 and 2004 in Utah Administrative Rule R865-91-2 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

² Interest continues to accrue on the unpaid balance.

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 R864-24P-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 list of factors referred to in Utah Administrative Rule R865-9I-2 is set forth in Utah Administrative Rule R884-24P-52(E) provides as follows in pertinent part:

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) drivers 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;

The Utah Legislature has 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

The Division based its audit on the assertion that the Taxpayers were residents of Utah for tax purposes for all of 2003 and 2004. The Taxpayers had filed Utah Individual Income Tax Returns for 2003 and 2004 indicating non-resident status from August 19, 2003 to December 31, 2003 for the 2003 tax year and from January 1, 2004 through August 31, 2004 for the 2004 tax year. The Taxpayers make this claim on the basis of STATE 1 residency for the periods at issue. The issue in this appeal is whether one or both of the Taxpayers qualify as a "resident individual" in the State of Utah for the purposes of Utah Code Sec. 59-10-103 during the latter part of 2003 and the early part of 2004 at issue. The parties focused on the issue of domicile at the hearing.

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.³ As discussed by the courts in

³ The issue of domicile for Utah individual income tax purposes has been considered by

considering this issue, the factfinder may accord the party's activities greater weight than his or her declaration of intent.⁴

The parties agree that the Taxpayers were domiciled in Utah as Utah residents prior to August 19, 2003. The parties also agree on the facts of the Taxpayers' move to STATE 1 in 2003 and activities there through late 2004. The parties disagree regarding whether those facts are sufficient to show a change of domicile from August 19, 2003 through August 31, 2004

Until 2003, Taxpayer PETITIONER 1 worked for a Utah employer. His employer offered an early retirement with a severance package, which the PETITIONER 1 accepted. The Taxpayers indicated that they were of the opinion that the funds from the severance package would allow them to maintain a reasonable standard of living for two years, depending on how much other income they were able to earn. They indicated that they viewed this as a time to make at least an attempt to realize a lifelong dream to live in a setting by the ocean. PETITIONER 1 had two brothers living in STATE 1. PETITIONER 2 grew up in COUNTRY near the ocean and thus favored a setting by the ocean. On the basis of these factors, the Taxpayers moved to STATE 1 and commenced a search for employment. They indicated that they did so as a part of a hope to realize a goal of moving to STATE 1 permanently.

The Taxpayers testified that they originally planned to sell their home in CITY 1 Utah to make the move to STATE 1, but they found real property values in a slump in the CITY 1 area in late 2003. On that basis, they decided to hold the home as a rental property, hoping that property values would increase and that they could sell in a better market. They testified that the move was rushed because they wanted to move in time for their children to begin the school year in STATE 1. The Taxpayers indicated that to best manage the move in the time available, they took with them what they could, sold some furniture and other possessions, and left other possessions behind in a locked room in the home that they rented to tenants in CITY 1. The family had nine horses that they gave away as part of the move. The Taxpayers indicated that their plan was to make a trip back to Utah at some future date to sell or otherwise dispose of goods that did not warrant the cost of moving to STATE 1 and then rent a container to ship the rest of the family's property. PETITIONER 1's brother had previously moved from the state of STATE 2 to STATE 1 using the method of filling a container

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.

after the original move and the Taxpayers testified that they thought it would be a good idea to follow the same pattern. Through family in STATE 1, the Taxpayers rented a home at what they considered below market rent for the STATE 1 rental market.

In STATE 1, the Taxpayers considered giving up their Utah driver licenses. After speaking with STATE 1 officials on the matter, they indicate that they formed the opinion that STATE 1 officials did not care whether or not they obtained STATE 1 licenses. On that basis, they decided to switch to STATE 1 licenses when the time came for renewal but not before. As the renewal time did not come before they left STATE 1, they still had their Utah licenses when they left STATE 1. Their son, who reached the age to drive while in STATE 1, did apply for and obtain a STATE 1 driver's license.

The Taxpayers claimed a business deduction from federal taxes for a part of their Utah real property during the periods at issue. They explained that they had operated a music business when in Utah and that musical instruments and recording equipment from the business were among the property they left in their Utah home when they moved to STATE 1.

The Taxpayers indicated that during the times at issue, they and the children that made the move with them went to doctors and dentists in STATE 1. The Taxpayers moved most of their banking to STATE 1. They did keep a BANK account in Utah. They testified that this was mostly for sentimental reasons and that they had kept the BANK account since college days. They indicated that they had maintained the BANK account through moves to many other states. They maintained a second account at another Utah bank to allow for payments in connection with the home they held as a rental property in Utah. The Taxpayers licensed and used two vehicles in STATE 1. They also owned two cars that they left in Utah for the use of two sons. One was attending UNIVERSITY in CITY 2, Utah and the other attended COLLEGE in CITY 3, Utah. Those sons renewed the registration on these cars and did not transfer title into their names from their parents' names. The Taxpayers also had an old pickup and few old cars on their property in CITY 1, Utah. These were inoperable and were not registered, but had Utah titles in the names of the Taxpayers.

The Taxpayers indicate that they attended church in STATE 1 and engaged in volunteer and social events in STATE 1 through their church. Their church activities encompassed much of their time while in STATE 1. This left little time for other clubs or organizations as had been the case when they lived in Utah.

While in STATE 1, the Taxpayer's minor children attended public school in STATE 1. One son graduated from high school and a religious seminary. Prior to graduation, he had participated as a member of

the school paddling team. The Taxpayers received most, if not all, of their mail in STATE 1 during their time there. The Taxpayers did not have burial plots of their own. They had, however, previously had a child pass away. That child was buried in a plot in CITY 4, Utah owned by PETITIONER 1's parents. The Taxpayers did not live in CITY 4 at the time and indicated that they have no plans to move there. The Commission takes administrative notice that CITY 4 is in (X) Utah and is a drive of approximately 400 miles from CITY 1, which is in (X) Utah.

The Taxpayers indicated that as the start of the 2004-2005 school year approached, they had to consider whether their finances would allow them to realize their dream of staying in STATE 1 permanently. PETITIONER 1 and PETITIONER 2 both worked in STATE 1, but the jobs were a cut in pay from their previous employment. More important, the income from the Taxpayers' employment was not sufficient to sustain the family given the high cost of living on the islands. On that basis, they broadened their job search to mainland locations. The Taxpayers indicated that other than already owning a house in Utah and having a daughter who wanted to return to friends at her old school, they gave no real preference to Utah as a future home. That they eventually found employment in Utah had more to do with previous connections there than it did with any efforts to relocate to Utah, according to the Taxpayer's testimony.

In accordance with Utah law, the primary focus of the Commission's review of the Taxpayers' intent with regard to domicile is upon the Taxpayers' actions. In that regard, the Commission notes facts supporting Utah domicile as well as facts supporting a STATE 1 domicile. Utah, for example, was home to the Taxpayers' driver licenses and two bank accounts. The Taxpayers owned real property in Utah and none in STATE 1. Their federal tax returns showed what looked to be like a business operated in Utah including the taking of deductions for Utah real property. They left substantial amounts of personal property behind in Utah.

Supporting ties outside Utah, STATE 1 was home to the Taxpayers' employment activities and their minor children's schooling. The Taxpayers centered social activities in STATE 1 and were taking steps to become assimilated into life in STATE 1.

Given the facts showing some elements of domicile in Utah and others in STATE 1, this case presents a close call. Certainly one in which the Division acted properly in completing an audit and taking a position that the Taxpayers had not abandoned their Utah domicile for the periods at issue. But given the testimony presented by the Taxpayers at hearing, the Commission resolves this close call in favor of the Taxpayers. The Commission finds credible the testimony that the Taxpayers' intent was to make a new home in STATE 1, that

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ties left behind with Utah, while substantial, were lingering issues that the Taxpayers intended to resolve in favor of a move to STATE 1, and that the Taxpayers' return to Utah was the result of a failed effort to earn a living in STATE 1 rather than a move to STATE 1 that was temporary in nature.

DECISION AND ORDER

Based upon the information presented at the hearing, the Commission finds that Taxpayers were not domiciled in Utah for from August 19, 2003 through August 31, 2004. Therefore, the audit is reversed. 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 _____, 2008.

Clinton Jensen
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

Appeal No.

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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