

07-1180
Audit
Signed 06/23/2008

BEFORE THE UTAH STATE TAX COMMISSION

PETITIONER 1 & PETITIONER 2,

Petitioner,

vs.

AUDITING DIVISION OF THE UTAH
STATE TAX COMMISSION,

Respondent.

INITIAL HEARING ORDER

Appeal No. 07-1180

Account No. #####

Tax Type: Income Tax

Tax Year: 2004 & 2005

Judge: Phan

Presiding:

Jane Phan, Administrative Law Judge

Appearances:

For Petitioner: PETITIONER REPRESENTATIVE 1, JD CPA
PETITIONER REPRESENTATIVE 2, CPA

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 May 8, 2008. Petitioner is appealing an audit deficiency of Utah individual income tax, penalty and interest for the years 2004 and 2005. The Statutory Notices of Deficiency and Audit Change had been issued on July 14, 2007. Petitioner timely appealed the audit. The amount of the audit deficiency listed on the statutory notice at issue is as follows:

	Tax	Penalty	Interest ¹	Total as of Notice Date
2004	\$\$\$\$\$	\$	\$\$\$\$\$	\$\$\$\$\$
2005	\$\$\$\$\$	\$	\$\$\$\$\$	\$\$\$\$\$

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.

The term "domicile" is defined at Utah Administrative Rule R865-91-2(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.

1 Interest continues to accrue on the unpaid balance.

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 applicable statutes specifically provide 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 for tax purposes during 2004 and 2005. It was the position of Petitioners (taxpayers) that although PETITIONER 2 and their daughter were residents of Utah during those years, PETITIONER 1 was a resident of STATE. However, instead of filing the Utah return using special instructions for when one spouse is a resident of Utah and another a nonresident, Petitioners claimed an equitable adjustment on their Utah returns. 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 he 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

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).

considering this issue, the factfinder may accord the party's activities greater weight than his or her declaration of intent.³

Both PETITIONER 1 and PETITIONER 2 had been residents of Utah prior to the audit period. According to their representatives they had moved to Utah with their daughter in approximately 1998. They purchased a home in CITY, Utah. They filed Utah resident returns, even up through the audit period. However, for the years at issue they had subsequently amended the Utah returns. Petitioners registered to vote in Utah, obtained drivers license, registered vehicles and took the steps typical of establishing domicile.

The Commission notes that once domicile in Utah has been established Utah Admin. Rule R865-9I-2(A) specifies that domicile is not lost until three factors have been met: 1) an intent to abandon the Utah domicile; 2) physical presence in the new domicile; and 3) an intent to remain in the new domicile permanently. Applying these factors to the facts and evidence before the Commission, the Commission does not find PETITIONER 1 abandoned the Utah domicile or intended to remain the new domicile permanently.

Not long after moving to Utah, both PETITIONER 1 and PETITIONER 2 became unemployed. PETITIONER 1 was able to obtain employment with his former employer in STATE. The wife and daughter remained at the Utah property. PETITIONER 1 started working full time in STATE. He rented an apartment there. His medical treatment took place in STATE. However, he did not take some of the typical steps that one would in establishing a permanent domicile. He did not obtain a STATE Drives license, he did not register to vote there and it appears that even his vehicle was registered in Utah. The Commission notes that the PETITIONER'S, who did not attend the hearing, had answered on the Division's questionnaire that they each had one car and PETITIONER 2's was registered in Utah while PETITIONER 1's was registered in STATE. However, the Utah motor vehicle records indicate PETITIONER 1 as the primary driver of at least

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).

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two cars registered in Utah at any given time during the period at issue. They did not provide STATE motor vehicle records to support their contention that PETITIONER 1 did register a vehicle in that state. Additionally, much of the Petitioners' financial mail was sent to the Utah address.

The Petitioners have the burden of proof and the information presented indicates that PETITIONER 1 was in STATE for the purpose of work, but he did not have the specific intent to abandon Utah, nor intend to remain in STATE permanently.

DECISION AND ORDER

Based upon the information presented at the hearing, the Commission finds that PETITIONER 1 was domiciled in Utah during 2004 and 2005. Respondent is to give Petitioners credit for taxes paid to STATE. With that adjustment the audit 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 _____, 2008.

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.

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DATED this _____ day of _____, 2008.

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. Petitioner may contact Taxpayer Services at (801) 297-7703 to make payment arrangements.

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