

BEFORE THE UTAH STATE TAX COMMISSION

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PETITIONER,  Petitioner,  v.  AUDITING DIVISION OF THE UTAH STATE TAX COMMISSION,  Respondent.	<b>INITIAL HEARING ORDER</b>  Appeal No. 07-1390  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, Taxpayer

For Respondent: RESPONDENT REP 1, from the Auditing Division  
RESPONDENT REP 2, from the Auditing Division

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission on August 26, 2009 for an Initial Hearing in accordance with Utah Code Sec. 59-1-502.5. On October 18, 2007, the Auditing Division of the Utah State Tax Commission (the "Division") sent a Notice of Deficiency and Estimated Income Tax (the "Statutory Notice") to the Taxpayer. In the Statutory Notice, the Division indicated that the Taxpayer owed \$\$\$\$\$ in Utah income tax, \$\$\$\$\$ in interest<sup>1</sup>, and \$\$\$\$\$ in penalties.

APPLICABLE LAW

Tax is imposed on the state taxable income of every "resident individual." *See* Utah Code Ann. §59-10-104(1) (2004).

Utah Code Ann. §59-10-103(q) (2004) defines "resident individual" as follows:

(i) "Resident individual" means:

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<sup>1</sup>The Statutory Notice indicated interest as of its due date. Interest continues to accrue on any balance unpaid after the due date.

- (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.
- (i) For purposes of Subsection (1)(q)(i)(B), a fraction of a calendar day shall be counted as a whole day.

Utah Administrative Rule R865-9I-2 (2004), provides additional guidance regarding domicile as set forth below, in relevant 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 voluntarily fixed his habitation, not for a special or temporary purpose, but with the intent of making a permanent home.
  2. For the 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 with few exceptions the taxpayer bears the burden of proof in proceedings before the Tax Commission:

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

See Utah Code Ann. §59-1-1417 (2009).

The Commission has the authority to waive penalties or interest for good cause. “Upon making a record of its actions, and upon reasonable cause shown, the commission may waive, reduce, or compromise any of the penalties or interest imposed under this part.” Utah Code Ann. §59-1-401(11) (2004).

#### DISCUSSION

The Division completed its audit on the basis of its finding that the Taxpayer was a resident of Utah for the 2004 tax year. The Taxpayer disputes this finding because he moved to STATE 1 in 2003 and remained there until 2005. The parties agree that before his move in 2003, the Taxpayer was a Utah resident. The issue before the Commission is whether the Taxpayer was a "resident individual" of Utah for the purposes of Utah Code Sec. 59-10-103(q) for the 2004 tax year. A “resident individual” is one who is in the State of Utah for more than 183 days per year, or one who is “domiciled” in the state for any period of time. From the information presented, it is clear Petitioner did not spend in the aggregate more than 183 days in Utah during 2004. The question is whether the Taxpayer was “domiciled” in the state of Utah during the 2004 tax year.

The question of whether one establishes or maintains a domicile in Utah is a question of fact. See *Clements v. Utah State Tax Comm’n*, 893 P.2d 1078, 1081 (Ct. App. Utah 1995), *Lassche v. Utah State Tax Comm’n*, 866 P.2d 618, 621 (Ct. App. Utah 1993), *Orton v. Utah State Tax Comm’n*, 864 P.2d 904, 907 (Ct. App. Utah 1993). Domicile is defined as “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.” Utah Admin. Code R865-9I-2(A)(1) (2004). Further, the rule provides that once domicile has been established, it is not lost until there is a concurrence of the following: “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.” Utah Admin. Code R865-9I-2(3).

In 2003, the Utah credit and finance company with whom the Taxpayer had been employed since 2000 opened a new office in CITY 1. In July of that year, the Taxpayer moved to CITY 1 to manage the new office. As part of that move, the Taxpayer received certification by the state of STATE 1 as a collections manager. He obtained a driver's license in STATE 1 and registered his car there. He stayed with a friend for the first two months, but rented an apartment thereafter. His first lease was for six months. He did not specify whether he was on lease or month-to-month tenancy after that.

As of the 2004 tax year, the Taxpayer was divorced and a non-custodial parent of four children, aged 5, 7, 11, and 14. His ex-wife and children remained in Utah when he moved. The Taxpayer hoped to return to Utah to be more available for his children at some point but, as of 2003 or 2004, did not know when or if that would occur.

In September 2004, the Taxpayer remarried. Although he originally met his new wife in Utah, the wedding took place in STATE 1. The Taxpayer and his new wife remained in STATE 1 where she found and accepted employment.

From the time of his July 2003 move to STATE 1, the Taxpayer traveled to Utah every other weekend to spend time with his children. He had anticipated that the move would give him a substantial pay increase that would allow him to fly home on these weekends or to fly his children to see him. As 2003 turned into 2004, the Taxpayer did not see the commissions or bonus pay that he had anticipated. He still traveled to Utah to see his children, but by car rather than by airplane as he had anticipated. On the weekends he traveled to Utah, he generally left CITY 1 on Friday after work and returned to CITY 1 late on Sunday night. While in Utah, he stayed at his mother-in-law's home.

In early 2005, the Taxpayer was approaching two years of employment in STATE 1. He determined that the pay at the STATE 1 job was unlikely to ever live up to the expectations he had when he had accepted it. He realized that he was wearing out his car driving to and from Utah and found himself fatigued from the driving. The stress and time of driving affected his work performance, further diminishing his hope for commissions or bonuses. In March 2005, the Taxpayer left STATE 1 and returned to Utah.

Considering these facts under Utah law, the Commission notes that when the Taxpayer moved to STATE 1, his children remained in Utah. The Division argues that in previous cases, the Commission has found that the place where a taxpayer's children reside can be a strong indicator of domicile. In many cases, this may be true. But in this case, the Taxpayer's children remained in Utah not through the Taxpayer's choice, but through custodial arrangements in a decree of divorce. That the Taxpayer moved to STATE 1 in the face of a divorce decree

requiring his children to stay in Utah seems to underscore that the Taxpayer demonstrated a strong inclination to making a home in STATE 1. Considering the totality of all of the facts presented, the Commission finds that as of 2004, the Taxpayer had sufficient intent to remain indefinitely in STATE 1 to support a finding that he was domiciled there for the 2004 tax year.

DECISION AND ORDER

On the basis of the information presented at the hearing, the Commission reverses the audit deficiencies of additional individual income tax and interest for the 2004 tax year. 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 \_\_\_\_\_, 2009.

\_\_\_\_\_  
Clinton Jensen  
Administrative Law Judge

BY ORDER OF THE UTAH STATE TAX COMMISSION.

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 2009.

Pam Hendrickson  
Commission Chair

R. Bruce Johnson  
Commissioner

Marc B. Johnson  
Commissioner

D'Arcy Dixon Pignanelli  
Commissioner