

08-0478
AUDIT – INCOME TAX
08-11-2009

BEFORE THE UTAH STATE TAX COMMISSION

PETITIONER 1 & PETITIONER 2, Petitioners, v. AUDITING DIVISION OF THE UTAH STATE TAX COMMISSION, Respondent.	INITIAL HEARING ORDER Appeal No. 08-0478 Account No. ##### Tax Type: Individual Income Tax Years: 2004, 2005 & 2006 Judge: Chapman
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Presiding:

Kerry R. Chapman, Administrative Law Judge

Appearances:

For Petitioner: PETITIONER REP, Representative
PETITIONER 1, Taxpayer
For Respondent: RESPONDENT REP 1, Assistant Attorney General
RESPONDENT REP 2, from the Auditing Division

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission for an Initial Hearing on May 27, 2009.

PETITIONER 1 & PETITIONER 2 (the “Petitioners” or “taxpayers”) are appealing Auditing Division’s (the “Division”) assessment of additional individual income tax for the 2004, 2005 and 2006 tax years. In February and March 2008, the Division issued Notices of Deficiency and Estimated Income Tax (“Statutory Notices”) to the taxpayers, in which it imposed additional tax, a 10% failure to timely file penalty, a 10% failure to timely pay tax penalty and interest for each year at issue, as follows:

<u>Year</u>	<u>Tax</u>	<u>Penalties</u>	<u>Interest</u>	<u>Total</u>
2004	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$
2005	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$
2006	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$	<u>\$\$\$\$\$</u>
				S <u>\$\$\$\$\$</u>

For each year at issue, the taxpayers filed a joint federal return and separate Utah returns using special instructions on the basis that PETITIONER 2 was a Utah resident individual while PETITIONER 1 was not. The Division, however, has determined that PETITIONER 1 was domiciled in Utah for the three years at issue and, thus, was a Utah resident individual as well. The Division's assessments reflect the taxpayers' Utah tax liability on the basis that both of them were Utah resident individuals for the 2004, 2005 and 2006 tax years. The Division asks the Commission to find that PETITIONER 1 was a Utah resident individual and to uphold its assessment of tax and interest for each year at issue. The Division takes no position on whether reasonable cause exists for the Commission to waive the penalties it imposed.

The taxpayers assert that the information proffered at the Initial Hearing shows that PETITIONER 1 changed his domicile from Utah to STATE 1 in November 2002 and that he did not change his domicile back to Utah until January 2007. If the Commission finds that PETITIONER 1 was not a Utah resident individual during the years at issue, the Division confirms that the taxpayers properly filed their Utah taxes and that they do not owe the amounts imposed in its assessments. The taxpayers ask the Commission to find that PETITIONER 1 was not a Utah resident individual for the years at issue and to reverse the audit assessments for all three years.

APPLICABLE LAW

1. Under Utah Code Ann. §59-10-104(1)¹, “a tax is imposed on the state taxable income . . . of every resident individual[.]”

2. For purposes of Utah income taxation, a “resident individual” is defined in UCA §59-10-103(1)(q), as follows in pertinent part:

¹ All citations are to the 2004 versions of the Utah Code and the Utah Administrative Code, unless otherwise indicated.

- (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.

3. Utah Admin. Rule R865-9I-2 (“Rule 2”) provides guidance for determining a person’s domicile for Utah income tax purposes, 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 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.

4. Utah Admin. Rule R884-24P-52 (“Rule 52”) sets forth a non-exhaustive list of factors or objective evidence that is determinative of domicile, as follows:

- E. Factors or objective evidence determinative of domicile include:
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) driver's 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.
5. In individual income tax proceedings before the Tax Commission, UCA §59-10-543

provides, as follows:

In any proceeding before the commission under this chapter, the burden of proof shall be upon the petitioner except for the following issues, as to which the burden of proof shall be upon the commission:

- (1) whether the petitioner has been guilty of fraud with intent to evade tax;
- (2) whether the petitioner is liable as the transferee of property of a taxpayer, but not to show that the taxpayer was liable for the tax; and
- (3) whether the petitioner is liable for any increase in a deficiency where such increase is asserted initially after a notice of deficiency was mailed and a petition under Title 59, Chapter 1, Part 5 is filed, unless such increase in deficiency is the result of a change or correction of federal taxable income required to be reported, and of which change or correction the commission had no notice at the time it mailed the notice of deficiency.

6. UCA §59-1-401(11) authorizes the Commission, upon a showing of reasonable cause, to waive, reduce or compromise penalties and interest.

DISCUSSION

Pursuant to Section 59-10-103(1)(q), a person is a Utah resident individual: 1) if he or she is domiciled in Utah; or 2) if he or she maintains a permanent place of abode in Utah and is present in Utah for 183 or more days in a calendar year. At issue in this case is whether PETITIONER 1 was domiciled in Utah during the 2004, 2005 and 2006 tax years. PETITIONER 1 admits that he was domiciled in Utah until November 2002 and that he was once again domiciled in Utah beginning in January 2007. In the interim, however, he claims that he was domiciled first in STATE 1 and then in STATE 2. The Division contends that PETITIONER 1 never changed his domicile from Utah to STATE 1 or STATE 2 and that he remained domiciled in Utah for all years at issue.

PETITIONER 1 & 2 lived in and were clearly domiciled in Utah until November 2002, when PETITIONER 1 accepted a job in CITY 1, STATE 1. PETITIONER 1, an engineer and manager, explained that work opportunities were better for him outside of Utah. The taxpayers and their two young children moved to CITY 1, STATE 1 in November 2002, where they leased a home. However, they kept their Utah house, which they had built the year before. PETITIONER 1 proffered at the Initial Hearing that he and his wife did not attempt to sell the Utah home because he was concerned that he would lose a significant portion of

their investment in it. However, he also admitted that he did not consult any real estate professionals to determine the price at which the home might have sold and to confirm his concern.

Upon moving to STATE 1, the taxpayers allowed PETITIONER 2' brother to live in the home rent-free. PETITIONER 1 claims that he and his wife intended their move to STATE 1 to be permanent and that at the time of the move, they had no intent to return to Utah. However, in a letter attached to their Petition for Redetermination, PETITIONER 1 further explained that “[i]n 2002, we did not think we would move back to Utah but just to be safe we kept the home.” There was no evidence or testimony to show whether the taxpayers moved their furniture and other personal belongings out of their Utah home upon moving to STATE 1.

PETITIONER 1 proffered that he and his wife began experiencing marital difficulties in mid-2003 and that PETITIONER 2 and their two children moved back to their Utah home in November 2003, where they have lived ever since. The taxpayers have lived apart since November 2003 and began divorce proceedings in December 2007.

In November 2003, PETITIONER 1 accepted a job with COMPANY A in CITY 2, STATE 1, where he moved and rented an apartment. PETITIONER 1 worked for this company until February 2005, when he accepted a job with COMPANY B in SAN DIEGO, STATE 2. PETITIONER 1 rented an apartment in SAN DIEGO and worked for that company until he resigned and moved back to Utah in January 2007. PETITIONER 1 also explained that he received relocation expenses from COMPANY C when he moved from Utah to STATE 1, as well as relocation expenses when he moved from STATE 1 to STATE 2.

PETITIONER 1 explained that during the year he and his wife both lived in STATE 1, they visited Utah only occasionally. After his wife and children moved back to Utah, PETITIONER 1 explained that he flew to Utah every weekend or every other weekend to visit his children. However, he never stayed at the taxpayers' home, where his wife and children lived. Instead, he would stay at his grandfather's house.

PETITIONER 1 further explained that he decided to move back to Utah in 2007 to be closer to his children, even though he would have fewer job opportunities in Utah.

Both taxpayers retained their Utah driver's licenses when they moved to STATE 1 in 2002. PETITIONER 1 never obtained a STATE 1 or STATE 2 driver's license, explaining that his Utah driver's license did not expire in the period from 2002 through 2007. He stated that he did not know that it was a requirement to change licenses and that he would have applied for a STATE 1 or STATE 2 license had his Utah license expired while he lived in these two states. In addition, there is no evidence to show that PETITIONER 1 was registered to vote in any jurisdiction during the years at issue.

When the taxpayers moved to STATE 1 in November 2002, they took a motorcycle and two motor vehicles that were registered in Utah with them. They did not register the vehicles in STATE 1. When PETITIONER 2 moved back to Utah in November 2003, the taxpayers took all three vehicles back to Utah. PETITIONER 1 explained that he needed a vehicle in Utah when he visited his children and that he did not need a vehicle in CITY 2 because his office was across the street from the apartment he had rented. When PETITIONER 1 moved to STATE 2, he traded in one of the vehicles he had kept in Utah to purchase a Jeep, which he registered and insured in STATE 2. Initially, PETITIONER 1 financed the Jeep through FINANCIAL INSTITUTION 1. However, he refinanced it through FINANCIAL INSTITUTION 2 in Utah because it offered a lower interest rate.

The record does not contain copies of the original tax returns that were filed by the taxpayers for the 2002 and 2003 years.² The taxpayers' 2004 joint federal return and separate Utah returns, which were prepared in March 2005, show both taxpayers' addresses to be in CITY 3, Utah. The 2005 federal, STATE 2

² The taxpayers provided copies of all their tax returns for these years. However, these copies all show a preparation date of June 11, 2008. Without copies of the returns that were filed in 2003 and 2004, respectively, the Commission cannot determine the addresses used by the taxpayers at those times.

Appeal No. 08-0478

and Utah returns, which were prepared in February 2006, also show both taxpayers' addresses to be in CITY 3, Utah. PETITIONER 1 claimed to be a Utah non-resident on all Utah returns. The taxpayers continued to use a Utah tax preparer to prepare their tax returns for all years during which PETITIONER 1 worked in STATE 1 and STATE 2.

The taxpayers had their 2002 W-2's sent to their CITY 1, STATE 1 address in early 2003. For the 2003 and 2004 tax years, PETITIONER 1 W-2's were sent to him in STATE 1, and PETITIONER 2's were sent to her in Utah. For the 2005 tax year, most of Mr. Tippet's W-2's were sent to him in STATE 2. PETITIONER 2's 2005 W-2's and one of PETITIONER 1's 2005 W-2's were sent to their house in CITY 3, Utah.

From November 2002 to January 2007, PETITIONER 1 indicated that he did not have a doctor or dentist in Utah. He provided evidence to show that he had seen doctors in both STATE 1 and STATE 2 during this period and had surgery in STATE 2 in January 2006.

PETITIONER 1 retained an account at FINANCIAL INSTITUTION 2 in Utah while working in STATE 1 and STATE 2. Upon moving to STATE 1, the taxpayers had the address on their checks changed to their STATE 1 address. He stated that after his wife and children returned to Utah, he retained the Utah account to deposit money for child support. PETITIONER 1 did not open any banking accounts in STATE 1, but opened accounts in SAN DIEGO once he moved there.

PETITIONER 1 received most, if not all, of his mail at his addresses in STATE 1 and STATE 2, including statements from banks and investment companies. Utility bills for the house and apartments he rented in STATE 1 and STATE 2 were sent to his addresses in those states, as was the *Wall Street Journal* to which he subscribed.

Throughout the years at issue, PETITIONER 1 was a member of the LDS church. He never had his church records moved to STATE 1 or STATE 2, but states that he attended church in these states, in

addition to attending in Utah when he was in Utah visiting. PETITIONER 1 stated that he continued to submit tithing to a ward in Utah while living outside of Utah. In STATE 2, PETITIONER 1 was a member of a “(X)” club and a (X).

It is undisputed that PETITIONER 1 was domiciled in Utah until November 2002, when he and his family moved to STATE 1. Once domicile is established, Rule 2(A)(3) provides that domicile “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.”

Move to CITY 1, STATE 1 in November 2002. The taxpayers rented a house in STATE 1 when they moved there in November 2002. Accordingly, PETITIONER 1 established a physical presence in STATE 1 and satisfied the second condition of Rule 2(A)(3). However, further analysis is needed to determine if PETITIONER 1 met the other two conditions that would be necessary for him to have changed his Utah domicile to STATE 1 in November 2002.

Although PETITIONER 1 asserts that he intended STATE 1 to be his permanent home upon accepting a job and moving there, his stated intent is only one factor to consider in deciding whether he changed his domicile from Utah to STATE 1. Utah appellate courts have addressed whether a person is domiciled in Utah for state income tax purposes³ and have determined that a person’s actions may be accorded greater weight in determining his or her domicile than a declaration of intent.⁴ Accordingly, the Commission must also look at PETITIONER 1’s actions to determine whether the intent required by Rule 2(A)(3) exists.

3 The issue of domicile for Utah individual income tax purposes has been considered by the Utah Supreme Court and the Court of Appeals. See *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. Greyhound Lines, Inc.*, 583 P.2d 613, 614 (Utah 1978).

PETITIONER 1 retained a number of Utah contacts once he and his family moved to STATE 1 in November 2002. He retained his Utah driver's license and continued to have all of his vehicles registered in Utah. In addition, he purposefully chose not to sell his Utah home "just to be safe." Nor did PETITIONER 1 retain the Utah home as an investment. Instead, he allowed a relative to live in rent-free. These arrangements suggest that the relative may have been acting as a caretaker of the home for a temporary period that PETITIONER 1 and his family were living in a different state. Furthermore, PETITIONER 1 also did not move his church records to STATE 1, and he continued to use a Utah tax preparer.

These facts suggest that PETITIONER 1 did not have an intent to abandon his Utah domicile when he moved to STATE 1 in November 2002. The Commission recognizes that a number of other facts suggest that PETITIONER 1 abandoned Utah and established a new domicile in STATE 1. The Commission notes, however, that the taxpayers have the burden of proof in this matter. Based on the totality of the information provided at the Initial Hearing, the Commission is not convinced that the taxpayers have shown that PETITIONER 1 abandoned his Utah domicile upon moving to CITY 1, STATE 1 in November 2002.

Move to CITY 2, STATE 1 in November 2003. In November 2003, however, PETITIONER 1's family situation substantially changed. His wife and children moved back to Utah, yet PETITIONER 1 accepted another job in STATE 1 and moved to CITY 2. PETITIONER 1 maintained a physical presence in STATE 1 and satisfied the second condition of Rule 2(A)(3). The Commission also believes that at this time, PETITIONER 1 demonstrated an intent not only to abandon Utah but also to establish a new domicile in STATE 1, thus satisfying the remaining two conditions of Rule 2(A)(3) that are required to change domicile.

The Commission believes that the facts show that PETITIONER 1 abandoned his Utah domicile at this point because he chose not to return to Utah when his wife and family did. It is unlikely that PETITIONER 1 would chose to work in a state different from that in which his family lived at this point had he not intended to abandon Utah. Furthermore, the Commission believes that his actions at this time show that

he intended to establish a permanent domicile in STATE 1, separate from the Utah domicile of his family. The Commission believes that the fact that he returned to Utah every weekend or every other weekend does not negate his changing his domicile to STATE 1 under these specific circumstances. As a result, the Commission finds that PETITIONER 1 satisfied all three conditions of Rule 2(A)(3) in November 2003. Furthermore, the Commission sees no evidence that he established a new domicile in Utah until January 2007, which is after the audit period. For these reasons, the Commission finds that PETITIONER 1 was not domiciled in Utah and was not a Utah resident individual for the 2004, 2005 and 2006 tax years. Accordingly, the Division's audit assessments for all three years are reversed.

DECISION AND ORDER

Based upon the foregoing, the Commission finds that PETITIONER 1 was not domiciled in Utah and was not a Utah resident individual for tax purposes for the 2004, 2005 and 2006 tax years.⁵ As a result, the Commission grants the taxpayers' appeal and reverses the Division's assessments for all three years. 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:

⁵ Two of the Commissioners have found that PETITIONER 1 changed his Utah domicile to another state in November 2003, while the other two have found that he changed his Utah domicile to another state in February 2005. Pursuant to Utah Code Ann. §59-1-205(2)(c), if a Commission vote results in a tie, the position of the taxpayer is considered to have prevailed. Finding that PETITIONER 1 changed his domicile in November 2003 results in a complete abatement of Division's assessments, while finding that PETITIONER 1 changed his domicile in February 2005 would only result in a partial abatement of the assessments. Accordingly, the position that PETITIONER 1' domicile changed in November 2003 is more reflective of the taxpayers' position and, pursuant to Section 59-1-205(2)(c), is the Commission's ruling.

Appeal No. 08-0478

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.

BY ORDER OF THE UTAH STATE TAX COMMISSION.

DATED this _____ day of _____, 2009.

R. Bruce Johnson
Commissioner

D'Arcy Dixon Pignanelli
Commissioner

CONCURRENCE IN PART AND DISSENT IN PART

We respectively concur in part and dissent in part from our colleagues' majority decision. We believe that PETITIONER 1' actions demonstrated an intent to abandon Utah and establish a new domicile in STATE 2 in February 2005. However, we disagree with our colleagues and do not believe that he either abandoned his Utah domicile or established a new domicile in STATE 1 for those years he worked in STATE 1.

When PETITIONER 1' wife and children moved back to their Utah home in November 2003, PETITIONER 1 rented an apartment across the street from his employer's office in CITY 2. Furthermore, PETITIONER 1 did not keep a motor vehicle in STATE 1, even though it appears that he was a (X) enthusiast. Until he moved to STATE 2, he kept his (X) in Utah. These facts, when coupled with the significant contacts he maintained with Utah, suggest to us that PETITIONER 1 never had an intent to remain in STATE 1 permanently. Without additional evidence to convince us otherwise, we would find that the

Appeal No. 08-0478

taxpayers did not meet their burden of proof in showing that PETITIONER 1 changed his domicile from Utah to STATE 1.

However, we would find that the facts show that he changed his domicile from Utah to STATE 2 upon moving there in February 2005. He bought a vehicle in and registered it in STATE 2 at this time. It also appears that he may have brought his (X) from Utah to STATE 2, as he joined a (X) there. Furthermore, he joined a “(X)”(X) in STATE 2. These additional contacts that did not exist in STATE 1 are critical in our estimation. They demonstrate to us that PETITIONER 1 had an intent to establish more permanent contacts with STATE 2 than he ever established in STATE 1. For these reasons, we would find that PETITIONER 1 remained a Utah resident individual and that the taxpayers are liable for the Division’s tax assessments through and including January 2005. However, we would reverse those portions of the tax assessments beginning in February 2005. We would also waive all remaining penalties due to the taxpayers’ reliance on a competent tax advisor and due to “domicile” being a complex and subjective matter that is often difficult to determine.

Pam Hendrickson
Commission Chair

Marc B. Johnson
Commissioner

Notice: If a Formal Hearing is not requested as discussed above, failure to pay the balance resulting from this order within thirty (30) days from the date of this order may result in a late payment penalty.

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