

08-0499
AUDIT- INCOME TAX
TAX YEARS: 2004 & 2005
SIGNED: 04-07-2010
COMMISSIONERS: R. JOHNSON, M. JOHNSON, D. DIXON
EXCUSED: M. CRAGUN
GUIDING DECISION

BEFORE THE UTAH STATE TAX COMMISSION

<p>PETITIONER, Petitioner, vs. AUDITING DIVISION OF THE UTAH STATE TAX COMMISSION, Respondent.</p>	<p>FINDINGS OF FACT, CONCLUSIONS OF LAW, AND FINAL DECISION</p> <p>Appeal No. 08-0499</p> <p>Tax Type: Income Tax Tax Years: 2004-2005</p> <p>Judge: Marshall</p>
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Presiding:

R. Bruce Johnson, Commission Chair
Jan Marshall, Administrative Law Judge

Appearances:

For Petitioner: PETITIONER, *Pro Se*
PETITIONER REP.
For Respondent: RESPONDENT REP. 1, Assistant Attorney General
RESPONDENT REP. 2, Manager, Auditing Division

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission for a Formal Hearing on October 22, 2009. Based upon the evidence and testimony presented at the hearing, the Tax Commission hereby makes its:

FINDINGS OF FACT

1. The issue before the Utah State Tax Commission in this matter is Taxpayer's appeal of income tax and interest assessed under audit for the 2004 and 2005 tax years. (Exhibits 56-64 and 69-78).
2. For the 2004 and 2005 tax years, Taxpayer and her husband filed joint federal tax returns.
3. For the 2004 tax year, Taxpayer and her husband filed a joint Utah resident tax return. Taxpayer took an equitable adjustment on Line 13, in the amount of \$\$\$\$\$. Submitted with the return, was the following explanation for the equitable adjustment, "[t]he income

- on schedule C for PETITIONER, piano teaching, was earned by a military spouse residing in STATE 1. This income will be paid on a STATE 1 Income Tax Form.” (Exhibits 37-40).
4. On February 12, 2008, the Division issued a Notice of Deficiency for the 2004 tax year, disallowing the equitable adjustment made on Line 13. Taxpayer was assessed \$\$\$\$ in additional tax, and \$\$\$\$ in interest through March 13, 2008. (Exhibits 2-4).
 5. Taxpayer’s information indicates that she filed a 2004 STATE 1 State Tax Return, but could not locate a copy of it. (Exhibit 15).
 6. For the 2005 tax year, Taxpayer and her husband filed a joint Utah resident return. Taxpayer took an equitable adjustment on Line 13, in the amount of \$\$\$\$\$. Submitted with the return was the following explanation for Line 13, “I have attached Schedule C from our Federal income taxes. This income is income earned by an active duty military spouse. The income was earned in STATE 1 and taxes for it will be paid in STATE 1.” (Exhibits 44-50),
 7. On February 12, 2008, the Division issued a Notice of Deficiency for the 2005 tax year, disallowing the equitable adjustment made on Line 13, and reducing the Federal Tax Deduction. Taxpayer was assessed \$\$\$\$ in additional tax, and \$\$\$\$ in interest through March 13, 2008. (Exhibits 5-7).
 8. Taxpayer’s husband is in the United States Air Force, and has been stationed in the State of STATE 1 on active duty since 1999. (Exhibit 25).
 9. Taxpayer’s husband is a statutory resident of Utah, and pays Utah income tax on his military income.
 10. Taxpayer is a civilian, who is self-employed in the State of STATE 1, teaching Piano lessons.
 11. Taxpayer and her husband own a home in Utah, which they rent to another family.
 12. Taxpayer testified that she would like to return to Utah when Taxpayer’s husband’s military career is over.
 13. Taxpayer and her husband spoke with the Judge Advocate General at AIRFORCE BASE, and were told that if Taxpayer earned income in the State of STATE 1, she would need to become a resident of STATE 1, and be subject to STATE 1 state income tax. (Exhibit 9).
 14. Taxpayer testified that for the 2003 tax year, she determined that she was a STATE 1 resident based on the income that she earned, the instructions on the STATE 1 tax form, and Utah Publication 49. (Exhibits 11 and 12).
 15. Taxpayer first filed a STATE 1 resident return for the 2003 tax year. (Exhibit 18).

16. Taxpayer and her husband purchased a home in STATE 1 in 1999. (Exhibit 20).
17. Taxpayer provided copies of their mortgage statements on the STATE 1 home from 2001, 2004, and 2005. (Exhibits 27, 29, 33, 34).
18. Taxpayer provided copies of their homeowner's insurance policy and the settlement statement from the refinancing of the STATE 1 home. (Exhibits 31 and 32).
19. Taxpayer and her husband used the STATE 1 address on all of their tax filings for the years at issue.
20. Taxpayer's vehicles remain registered in the State of Utah. Taxpayer's husband provides a letter from the Air Force verifying his active duty status in order to continue registering his vehicles in the State of Utah. (Exhibit 17). However, Taxpayer and her husband insured their vehicles in STATE 1, starting when they moved to STATE 1 in 1999. (Exhibit 26).
21. When Taxpayer's Utah driver license expired, she obtained a STATE 1 driver license. (Exhibit 14).
22. Taxpayer is registered to vote in STATE 1.
23. Taxpayer's medical providers are located in STATE 1.
24. Taxpayer and her husband do their banking in STATE 1, with the exception of a small savings account in a federal credit union. (Exhibit 28, 36).
25. Taxpayer provided a copy of a 2005 cellular phone bill sent to her STATE 1 address. (Exhibit 35).
26. During the years at issue, Taxpayer's school-aged children attended school in STATE 1.

APPLICABLE LAW

Utah Code Ann. §59-10-104 provides for the imposition of tax as follows, in pertinent part:

[A] tax is imposed on the state taxable income, as defined in Section 59-10-112, of every resident individual...

“Resident individual” is defined in Utah Code Ann. §59-10-103as follows:

(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...

The Commission has promulgated Administrative Rule R865-9I-2 to provide additional guidance on domicile, set forth below:

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, and 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.
- C. Determination of resident individual status for military servicepersons.
1. The status of a military serviceperson as a resident individual is determined as follows, based on the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C. 574.
 - a) A resident individual in active military service does not lose his status as a resident individual if the resident individual's absence from the state is a result of military orders.
 - b) A nonresident individual in active military service who is stationed in Utah does not become a resident individual for income tax purposes if the nonresident individual's presence in Utah is due solely to military orders.
 2. Subject to federal law, an individual in active military service may change from a resident to a nonresident individual or from a nonresident individual to a resident individual if he establishes that he satisfies the conditions of A.3.
 3. A nonresident individual serviceperson is exempt from Utah income tax only on his active service pay. All other Utah source income received by the nonresident individual serviceperson is subject to Utah income tax as provided by Section 59-10-116.
 4. The spouse of an individual in active military service generally is considered to have the same residency status as that individual for purposes of Utah income tax.

The Servicemembers Civil Relief Act also governs the state of residency for active members of the military, as follows:

A servicemember shall neither lose nor acquire a residence or domicile for purposes of taxation with respect to the person, personal property, or income of the servicemember by reason of being absent or present in any tax jurisdiction of the United States solely in compliance with military orders.

Section 59-1-501 of the Utah Code provides that a taxpayer may file a petition for a redetermination of a deficiency:

Any taxpayer may file a request for agency action, petitioning the commission for redetermination of a deficiency.

“In a proceeding before the commission, the burden of proof is on the petitioner...”, as provided in Utah Code Ann. §59-1-1417.

DISCUSSION

Taxpayer contends that though her husband is a statutory resident of the State of Utah, she is a resident of the State of STATE 1. She stated that Rule R865-9I-2C.4. provides that the spouse of an active member of the military is *generally* considered to have the same state of residency as the spouse in the military (emphasis added). Taxpayer argued that the facts and circumstances support a finding that she has abandoned Utah as her domicile, and established a domicile in STATE 1.

The Taxpayer argued that her circumstances were different than those in the three Tax Commission decisions cited to by the Division. She argued that the taxpayer in Appeal No. 02-1487 acquired a mobile home, and only claimed residency outside of Utah for one year before returning to Utah. She stated that appeared to be for a temporary purpose; while she has been living and working in STATE 1 for ten years, and does not consider it to be temporary. The Taxpayer argued that the issue in Appeal No. 98-1185 was not one of domicile, but claiming dependency exemptions. Taxpayer also distinguished her situation from that in Appeal No. 04-1482, where taxpayers did not purchase a home outside of Utah, and expected to relocate every two or three years. Taxpayer stated that she and her husband purchased their home in STATE 1, have been there for ten years, and have not returned to Utah. She stated that at some point, she would like to return to Utah, but that it is unclear when, if ever, that could occur. She argued that it is unreasonable to wait until the end of her husband’s career to determine whether she has changed her domicile.

The Division’s representative argued that based on the Commission’s prior decisions and Rule R865-9I-2, that Taxpayer is domiciled in Utah for tax purposes. The Division relies on Appeal No. 02-1487, which found that the spouse of an active duty member of the military had

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not changed her domicile and was located in the other state for a temporary purpose. Appeal No. 04-1482 also found that the spouse of an active duty military member had not changed her domicile, but that Rule R865-9I-2 created a rebuttable presumption of the spouse's domicile. Appeal No. 98-1185 held that the spouse of an active duty member of the military was not a resident of the State of Utah for tax purposes, although his wife was stationed in Utah.

The Division focuses specifically on subsections A.2. and C.4. of Rule R865-9I-2, which address the spouse of an individual in active military service and the criteria for establishing domicile. It is the Division's position that the Taxpayer is in STATE 1 for a special or temporary purpose, which is her husband being stationed in STATE 1. The Division argued that the Taxpayer intends to return to Utah when her husband completes his military service, and maintains her ties to Utah. The Division pointed to the fact that Taxpayer kept her Utah driver license until it expired, that Taxpayer and her husband own a home in Utah, that their vehicles are registered in Utah, and that they maintain a savings account in Utah.

CONCLUSIONS OF LAW

Tax is imposed on the "state taxable income" of every "resident individual" under Utah Code Ann. §59-10-104. 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. There is no dispute that Taxpayer did not spend 183 days in the State of Utah. The question then is whether Taxpayer was "domiciled" in the state of Utah during the 2004 and 2005 tax years.

Taxpayer's husband is a member of the Air Force on active duty. Under the Servicemembers Civil Relief Act, his domicile for tax purposes is Utah. The Servicemembers Civil Relief Act creates a legal fiction, deeming a servicemember's income earned in the home state, even though the servicemember works in another state. For the years at issue, the Servicemembers Civil Relief Act did not address the domicile of the spouse of a member of the military on active duty. However, Administrative Rule R865-9I-2C.4. provides that "the spouse of an individual in active military service generally is considered to have the same residency status as that individual for purposes of Utah income tax." This rule is not dispositive. The rule indicates that "generally" the spouse of a person in active military service has the same domicile as the person in the military. In the past, the Commission has interpreted this to create a presumption that the spouse may rebut by providing information or evidence showing otherwise. *See* Appeal Nos. 04-1482 and 02-0790. The Commission will consider the information and evidence presented as it relates to the "domicile" criteria set forth in R865-9I-2A.

The question of whether one establishes or maintains a domicile in Utah is a question of fact.¹ 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-2A.1. (2004-2005). 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-2A.3. Utah law requires that a person have a “permanent home” to claim a domicile. The Utah Supreme Court has held that “[d]omicile is based on residence and intent to remain for an indefinite time. The intention need not be to remain for all time, it being sufficient if the intention is to remain for an indefinite period.” *Allen v. Greyhound Lines, Inc.*, 583 P.2d 613, 615 (Utah 1978). Further, in *Clements v. Utah State Tax Comm’n*, 893 P.2d 1078 (Ct. App. Utah 1995), the Court determined that a person’s actions may be accorded greater weight in determining his or her domicile than a declaration of intent.

The Division has argued that the Taxpayer is in STATE 1 for a special or temporary purpose, as provided in Subsection B. of Rule R865-9I-2, specifically because her husband is in the military and stationed in STATE 1. Thus, it is the Division’s position that while the Taxpayer does have a physical presence in STATE 1, she has not abandoned Utah as her domicile, and does not have the intent to remain in STATE 1 permanently. The Division also pointed to Taxpayer’s continued ties to the State of Utah; including owning a home, retaining a Utah driver license until its expiration, registering vehicles in Utah, and maintaining a savings account at a federal credit union in Utah. Subsection A.4. of Rule 865-9I-2 provides that “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.” Taxpayer has significant ties to the State of STATE 1; she resides there, she owns a home, her children attend schools, she is registered to vote, owns and operates a business, does her primary banking in STATE 1, her healthcare providers are in STATE 1, and she has a STATE 1 driver license that she obtained once her Utah driver license expired. Though the

¹ 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).

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Taxpayer expressed a desire to return to Utah in the future, she testified that it is unclear when, if ever, that could occur. The totality of the circumstances indicate that Taxpayer has abandoned Utah as her domicile, has a physical presence in STATE 1, and has the intention to remain in STATE 1 indefinitely.

Jan Marshall
Administrative Law Judge

DECISION AND ORDER

Based on the foregoing, the Commission finds the Taxpayer was not domiciled in the State of Utah during the 2004 and 2005 tax years. The Division is ordered to adjust the audits of the 2004 and 2005 tax years accordingly. It is so ordered.

DATED this _____ day of _____, 2010.

R. Bruce Johnson
Commission Chair

Marc B. Johnson
Commissioner

D'Arcy Dixon Pignanelli
Commissioner

Michael J. Cragun
Commissioner

Notice of Appeal Rights: You have twenty (20) days after the date of this order to file a Request for Reconsideration with the Tax Commission Appeals Unit pursuant to Utah Code Ann. Sec. 63G-4-302. A Request for Reconsideration must allege newly discovered evidence or a mistake of law or fact. If you do not file a Request for Reconsideration with the Commission, this order constitutes final agency action. You have thirty (30) days after the date of this order to pursue judicial review of this order in accordance with Utah Code Sec. 59-1-601 et seq. and 63G-4-401 et seq.

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