
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. 08-1045

Account No. #####

Tax Type: Income Tax

Tax Year: 2005

Judge: Phan

Presiding:

Jane Phan, Administrative Law Judge

Appearances:

For Petitioner: PETITIONER REP, Accountant

PETITIONER 1

PETITIONER 2

For Respondent: RESPONDENT REP 1, Assistant Attorney General

RESPONDENT REP 2, Manager, Income Tax Auditing

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 December 10, 2009. Petitioners (the "Taxpayers") are appealing an audit deficiency of Utah individual income tax, penalty and interest for the years 2004 and 2005. Respondent (the "Division") had issued the Statutory Notice of Deficiency and Estimated Income Tax on April 24, 2008. The Taxpayers 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
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 fats 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.

1 Interest continues to accrue on the unpaid balance.

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. . .

Penalties for failure to file and failure to pay taxes are set out at Utah Code Sec. 59-1-401(1) & (2), which provide:

The penalty for failure to file a tax return within the time prescribed by law including extensions is the greater of \$20 or 10% of the unpaid tax due on the return. (b) This Subsection (1) does not apply to amended returns. Utah Code Sec. 59-1-401(1).

The penalty for failure to pay tax due shall be the greater of \$20 or 10% of the unpaid tax for (a) failure to pay any tax, as reported on a timely filed return; (b) failure to pay any tax within 90 days of the due date of the return, if there was a late filed return subject to the penalty provided under Subsection (1)(a). Utah Code Sec. 59-1-401(2).

The Commission has been granted the discretion to waive penalties and interest. Section 59-1-401(11) of the Utah Code provides, "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(13).

DISCUSSION

The Division based its audit on the assertion that both Taxpayers were residents of Utah for tax purposes during 2005. The Taxpayers assert that although PETITIONER 2 was a Utah resident, PETITIONER 1 was no longer a resident of Utah; that he had moved to STATE in 2003. 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, PETITIONER 1 did not spend in the aggregate more than 183 days per year in Utah during 2005. 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 considering this issue, the factfinder may accord the party's activities greater weight than his or her declaration of intent.³

The Taxpayers had moved to Utah in 1995. They moved to Utah because PETITIONER 1 obtained employment in this state working on a superfund clean-up site. PETITIONER 1 is a heavy equipment field mechanic and to obtain employment in this field he has had to travel around to where the jobs are located. The Taxpayers purchased a residence in 1995 at ADDRESS, in CITY 1, Utah. They obtained drivers licenses in Utah, registered vehicles, registered to vote and established domicile in this state.

In 2002, PETITIONER 1 was able to obtain employment in STATE and then later, in mid 2003, he began working for COMPANY A, a company located in CITY 2, STATE. He has worked for this company full time up through the present time. The job requires that he live on or near the remote mine reclamation sites. Additionally all of the sites were located within the state of STATE. Further, this was not a job where he could return to Utah to visit his family every weekend due to the fact that there were times when they were unable to shut down the equipment.

When PETITIONER 1 moved to STATE he resided in various parts of the state staying in mobile homes or other rentals. PETITIONER 1 had worked and resided in CITY 2, STATE during the winter of 2005. He indicated that later he had rented a trailer in a mobile home park in CITY 3 from April through

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: (X)v. State Tax Comm'n, 866 P.2d 618 (Utah Ct. App. 1993); (X)v. State Tax Comm'n, 839 P.2d 1078 (Utah Ct. App. 1995), (X)v. State Tax Comm'n, 830 P.2d 230 (Utah 1992), and (X)v. State Tax Comm'n, 864 P.2d 904 (Utah Ct. App. 1993).

3 See (X)v. Utah State Tax Comm'n 893 P.2d 1078 (Ct. App. 1995); and (X)v. Greyhound Lines.

November of 2005. In 2006 he purchased a pull trailer and primarily resides in that trailer in a mobile home park near CITY 3.

After taking the job in STATE and up through the end of the 2005 tax year, PETITIONER 1 had not obtained a STATE Drivers license, registered a vehicle in STATE or registered to vote in STATE. STATE does not have a state income tax, so he would not have been required to file returns in that state.

The Taxpayers had kept their residence in Utah where PETITIONER 2 continued to reside with their children. She worked in Utah during these years and filed Utah tax returns. All the couple's financial statements and bills were mailed to the Utah address, as she was the one that handled the family's bookkeeping tasks. One of the children attended public school in Utah during the audit period.

For 2005, PETITIONER 2 had taken the family's tax information to their accountant at COMPANY B to have him prepare the returns. PETITIONER REP, the accountant, attended the hearing. He explained that he was unsure on how the Pfeifers should be filing their state returns and so he called the Tax Commission. PETITIONER REP indicates that he explained the family's situation with PETITIONER 2 a resident of the state and PETITIONER 1 living and working in STATE. PETITIONER REP testified that he was told that they should file using the special instructions for married couples where one spouse was a non-resident. The Tax Commission employee sent Publication 49 to PETITIONER REP. PETITIONER REP explained that he followed the instructions on the publication in preparing a return for PETITIONER 2. The Taxpayers explained that they were trying to follow the instructions as they were explained by the Tax Commission employee over the telephone and in Publication 49.

Regarding the penalties in this matter, the representative for the Division explained that the reason there were both late payments and late filing penalties was that the Division had rejected PETITIONER 2's

Inc., 583 P.2d 613, 614 (Utah 1978);

return as filed rather than accept the return and then make audit modifications. The Division's representative explained that when a return is rejected, penalties are automatically assessed.

Upon review of the information and evidence, the weight of the evidence does not establish that PETITIONER 1 actually intended to abandon his Utah domicile or that he intended to remain in the new domicile permanently during the tax year 2005. Domicile is defined by Utah Admin. Rule R865-9I-2(A). The rule requires that once a domicile has been established in Utah, the Utah domicile is not lost until there has been a showing by the taxpayer of three factors: 1) a specific intent to abandon the Utah domicile; 2) the actual physical presence in a new domicile; and 3) the intent to remain in the new domicile permanently. PETITIONER 1 did not take common steps that would show intent to abandon Utah as a domicile. The only residence he owned was in Utah. He retained a Utah driver's license, registered vehicles in this state, his financial and tax related mail was sent to the Utah address. He did not own a residence in STATE during the tax year. He did not obtain a STATE Drivers License, register vehicles, register to vote in STATE. After the audit years he did begin to take some of these steps, but not during the tax year at issue.

Therefore, the Commission finds that PETITIONER 1 remained domiciled in Utah and was a Utah resident individual for tax purposes pursuant to Utah Code Sec. 59-10-104. Regarding the penalties, however, the Commission finds cause for waiver, due to the fact that the Taxpayers were relying on their accountant and their account was relying on advice from a Tax Commission employee.

Interest is generally waived only in the event of a Tax Commission employee error. Typically verbal advise from a Tax Commission employee during a telephone conversation is not basis to waive interest because it is difficult to know what information the taxpayer actually provided during such a conversation. The facts and circumstances in this case are different from the normal conversation and support waiver of interest. In this case it was not the Taxpayers who asked for the advice it was their tax preparer, PETITIONER REP. A

professional taxpreparer generally would better understand the relevant factors to explain to the Commission employee, as well as a better understanding of the response. PETITIONER REP attended the hearing and states that he did explain the facts regarding the Taxpayers' living and working arrangements to the Tax Commission employee and was told to file pursuant to Publication 49. A copy of Publication 49 was sent to PETITIONER REP as a follow up to the telephone conversation. In this context the publication becomes misleading because the instructions contained therein are for when one spouse is a nonresident for income tax purposes pursuant to Utah Code Sec. 59-10-103, and not to explain how one would determine domicile, and therefore residency, for state tax purposes.

If PETITIONER 1 had, in fact, been a resident of STATE for income tax purposes pursuant to Utah Code Sec. 59-10-103, the returns should have been filed pursuant to the Special Instructions as set out in Publication 49. However, as he remained domiciled in Utah he was still a resident of Utah for income tax purposes, the Special Instructions do not apply. From all the circumstances in this matter, the Commission concludes that the Taxpayers were given misleading, or at the least incomplete, advice from a Tax Commission employee and finds cause for waiver of the interest.

DECISION AND ORDER

Based upon the information presented at the hearing, the Commission finds that PETITIONER 1 was domiciled in Utah during 2005. The audit deficiency of tax is sustained. However, all penalties and interest are hereby waived. It is so ordered. The Taxpayers have thirty days from the date hereon to pay the tax balance. After which, late payment penalties may be assessed and interest will begin to accrue from that date until the balance is paid in full.

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

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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.

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.

DATED this _____ day of _____, 2009.

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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