

08-1108  
INCOME TAX  
TAX YEAR: 2005  
SIGNED: 06-29-2009  
COMMISSIONERS: P. HENDRICKSON, R. JOHNSON, D. DIXON  
EXCUSED: M. JOHNSON  
GUIDING DECISION

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BEFORE THE UTAH STATE TAX COMMISSION

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PETITIONER 1 & PETITIONER 2,	<b>INITIAL HEARING ORDER</b>
Petitioner,	Appeal No. 08-1108
v.	Account No. #####
AUDITING DIVISION OF THE UTAH STATE TAX COMMISSION,	Tax Type: Income Tax
Respondent.	Tax Year: 2005
	Judge: Marshall

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**Presiding:**

Jan Marshall, Administrative Law Judge

**Appearances:**

For Petitioner: PETITIONER 2, *Pro Se*

For Respondent: RESPONDENT REP. 1, Assistant Attorney General  
RESPONDENT REP. 2, Income Tax Audit Manager

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 April 21, 2009. Taxpayer is appealing an audit deficiency of Utah individual income tax and interest for the 2005 tax year. Taxpayer was assessed additional tax in the amount of \$\$\$\$ and interest, which continues to accrue. As of the hearing date, Taxpayer had an outstanding balance of \$\$\$\$.

APPLICABLE LAW

Tax is imposed on the state taxable income of every "resident individual." *See* Utah Code Ann. §59-10-104(1) (2005).

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

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

Utah Code Ann. §59-10-103(1)(s) (2005).

Further guidance on the determination of resident individual status is provided in Rule R865-9I-2, 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:
  - c) A specific intent to abandon the former domicile;
  - d) The actual physical presence in a new domicile; and
  - e) 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.

Utah Admin. Code R865-9I-2 (2005).

Tax is imposed on the income of nonresident individuals as set forth in Utah Code Ann. §59-10-116, below in pertinent part:

(1) For purposes of this section:

(c) "state income tax percentage" means a percentage equal to a nonresident individual's federal adjusted gross income for the taxable year received from Utah sources, as determined under Section 59-10-117, divided by the difference between:

(i) the nonresident individual's total deferral adjusted gross income for that taxable year; and

(ii) if the nonresident individual described in Subsection (1)(c)(i) is a servicemember, the compensation the servicemember receives for military service if the servicemember is serving in compliance with military orders; and

(d) "unapportioned state tax" means the product of the:

(i) difference between:

(A) a nonresident individual's federal taxable income, as defined in Section 59-10-111, with the modifications, subtractions, and adjustments provided for in Section 59-10-114; and

(B) if the nonresident individual described in Subsection (1)(d)(i)(A) is a servicemember, compensation the servicemember receives for military service if the servicemember is serving in compliance with military orders; and

- (ii) tax rate imposed under Section 59-10-104.
- (2) Except as provided in Subsection (3), a tax is imposed on a nonresident individual in an amount equal to the product of the nonresident individual's:
  - (a) Unapportioned state tax; and
  - (b) state income tax percentage.
- (3) This section does not apply to a nonresident individual exempt from taxation under Section 59-10-104.1.

Utah Code Ann. §59-10-116 (2005).

The state taxable income derived from Utah sources is set forth in Utah Code Ann. §59-10-117, below:

- (1) For purposes of Section 59-10-116, federal adjusted gross income derived from Utah sources shall include those items includable in federal "adjusted gross income" (as defined by Section 62 of the Internal Revenue Code) attributable to or resulting from:
  - (a) the ownership in this state of any interest in real or tangible personal property (including real property or property rights from which "gross income from mining" as defined by Section 613(c), Internal Revenue Code is derived); or
  - (b) the carrying on of a business, trade, profession, or occupation in this state.
- (2) For the purposes of Subsection (1):
  - (a) Income from intangible personal property, including annuities, dividends, interest, and gains from the disposition of intangible personal property shall constitute income derived from Utah sources only to the extent that the income is from property employed in a trade, business, profession, or occupation carried on in this state;
  - (b) Deductions with respect to capital loss, net long-term capital gains, and net operating losses shall be based solely on income, gain, loss, and deduction connected with Utah sources, under rules prescribed by the commission, but otherwise shall be determined in the same manner as the corresponding federal deductions.
  - (c) Salaries, wages, commissions, and compensation for personal services rendered outside this state shall not be considered to be derived from Utah sources.
  - (d) A nonresident shareholder's distributive share of ordinary income, gain, loss, and deduction derived

- from or connected with Utah sources shall be determined under Section 59-10-118.
- (e) A nonresident, other than a dealer holding property primarily for sale to customers in the ordinary course of his trade or business, shall not be considered to carry on a trade, business, profession, or occupation in this state solely by reason of the purchase or sale of property for his own account.
  - (f) If a trade, business, profession, or occupation is carried on partly within and partly without this state, items of income, gain, loss, and deductions derived from or connected with Utah sources shall be determined in accordance with the provisions of Section 59-10-118.
  - (g) A nonresident partner's distributive share of partnership income, gain, loss, and deduction derived from or connected with Utah sources shall be determined under Section 59-10-303.
  - (h) The share of a nonresident estate or trust and nonresident beneficiaries of any estate or trust in income, gain, loss, and deduction derived from or connected with Utah sources shall be determined under Section 59-10-207.
  - (i) Any dividend, interest, or distributive share of income, gain, or loss from a real estate investment trust, as defined in Section 59-7-116.5, distributed or allocated to a nonresident investor in the trust, including any shareholder, beneficiary, or owner of a beneficial interest in the trust, shall be income from intangible personal property under Subsection (20(a)), and shall constitute income derived from Utah sources only to the extent the nonresident investor is employing its beneficial interest in the trust in a trade, business, profession, or occupation carried on by the investor in this state.

Utah Code Ann. §59-10-117 (2005).

The Utah Legislature has specifically provided that the taxpayer bears the burden of proof in proceedings before the Tax Commission, see Utah Code Ann. §59-10-543, below, in pertinent part:

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

Utah Code Ann. §59-10-543 (2005).

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(11) (2005).

### DISCUSSION

It is undisputed that PETITIONER 1 was a Utah resident and domiciled in Utah for the 2005 tax year. PETITIONER 2 maintains that in 2005, he was domiciled in STATE 1 attending UNIVERSITY. PETITIONER 2. and PETITIONER 1 married in August of 2005, and resided in Utah. PETITIONER 2 testified that he maintains an STATE 1 driver license and intends to return to STATE 1 once he completes his education. The Division proffered that while PETITIONER 2 was attending UNIVERSITY, he lived in CITY 1, and rented a home from January through May and then again from August through December. It is the Division’s position, and the Taxpayer did not refute, that he was in the State of Utah more than 183 days during 2005.

The Taxpayers filed their federal return as married filing jointly with a federal adjusted gross income of \$\$\$\$\$. Taxpayers filed Utah returns using the special instructions in Publication 49. On or about March 16, 2006, the Commission issued a letter revising the exemption deduction on PETITIONER 1’s return. PETITIONER 1 filed an amended married filing joint return, but included only her income, not PETITIONER 2’s. A notice was issued to the Taxpayers dated July 18, 2006 that indicated the correct tax rate schedule was not used, or that Utah income tax was miscalculated and an additional refund of \$\$\$\$\$ was issued.

PETITIONER 1’s amended return was audited, and is the subject of this appeal. Taxpayers were confused because they had originally filed married separate returns, each claiming their own income. After receiving notification from the Tax Commission, Taxpayers amended PETITIONER 1’s return. There is no record before the Commission to show that PETITIONER 2’s return was ever amended or audited. Taxpayers argued that they are being taxed twice on PETITIONER 2’s income. Taxpayers stated that when they received notice of the audit, they contacted EMPLOYEE and explained the situation. Taxpayers testified that EMPLOYEE told them that she would take care of it, and would call within a week if there were any problems.

The Division’s representative stated that it appeared the Taxpayers had been acting in good faith in filing and amending the returns, and so no penalties were assessed. It is the Division’s position that PETITIONER 2’s income is Utah-sourced and taxable under Utah Code Ann. §59-10-116 and §59-10-117, regardless of PETITIONER 2’s place of domicile. In addition, the Division’s representative argued that if the Commission finds domicile to be an issue, that PETITIONER 2 maintained a permanent abode and was in Utah more than 183 days in 2005, and was therefore a “resident individual” under Utah Code Ann. §59-10-103.

It is not contested that PETITIONER 2's 2005 wages were Utah sourced, and therefore taxable under Utah Code Ann. §59-10-116 and §59-10-117. What is the issue is whether the Taxpayers were eligible to file under the Special Instructions of Publication 49 for the 2005 tax year. Thus, the determination must be made whether PETITIONER 2 was a "resident individual" as defined in Utah Code Ann. §59-10-103.

A "resident individual" is someone who either maintains a permanent place of abode and who spends more than 183 days per year in the State of Utah, or someone who is "domiciled" in the state for any period of time. The Taxpayer maintains, and the Division does not dispute, that he was domiciled in STATE 1 in 2005. Rather, the Division maintains that the Taxpayer maintained a permanent place of abode and was present in the State of Utah for more than 183 days in 2005. Administrative Rule R865-9I-2B provides that a "[p]ermanent place of abode does not include a dwelling place maintained only during a temporary stay for the accomplishment of a particular purpose." In the past, the Commission found that a college student domiciled in another state, who rents an apartment or house for those years he or she attends college in Utah, has not necessarily maintained a "permanent place of abode" in Utah, and as a result, is not necessarily a Utah resident for income tax purposes. The Commission finds the current appeal distinguishable from the prior decision. PETITIONER 2 acknowledged that he maintained a residence and was in the State of Utah for more than 183 days in 2005. Absent any evidence or testimony to the contrary, the Commission finds it reasonable that when PETITIONER 2 and PETITIONER 1 got married, his permanent place of abode became the home he shared with his wife, not his parent's home in STATE 1. It is not disputed that PETITIONER 1 was a Utah resident who maintained a permanent place of abode in Utah. Further, Taxpayers remained in Utah until moving to STATE 2 for school. The Commission finds that PETITIONER 2 maintained a permanent place of abode and was in the State of Utah more than 183 days in 2005.

Therefore, PETITIONER 2 was a Utah resident for tax purposes in 2005, and his income was taxable under Utah Code Ann. §59-10-104. Taxpayers were not eligible to file under the special instructions set forth in Publication 49, because both were resident individuals for income tax purposes. Taxpayers should have filed a married filing joint return that included both of their incomes. Therefore, the Commission sustains the Division's audit.

The Commission finds that there is reasonable cause for a waiver of the assessed interest. The Commission has issued Tax Commission Publication 17, available at <http://tax.utah.gov/forms/pubs>, which sets forth the factors the Commission may consider in determining whether "reasonable cause" exists for the waiver of penalties or interest. Publication 17 provides, "[g]rounds for waiving interest are more stringent than for penalty. To be granted a

waiver of interest, you must prove that the Tax Commission gave you erroneous information or took inappropriate action that contributed to the error.” Taxpayer’s testified that they originally filed using the Publication 49 special instructions. Publication 49 is not clear, and does not provide an explanation of “resident individual.” Further, Taxpayer’s worked with the Division, and specifically with EMPLOYEE to try and correct the filings, and received notice of the audit after working with EMPLOYEE. Under the circumstances, the Commission finds that Taxpayers were provided erroneous information that warrants a waiver of interest.

DECISION AND ORDER

Based upon the information presented at the hearing, the Commission sustains the audit tax deficiency and waives the assessed interest. The Division is ordered to verify that any tax liability paid under PETITIONER 2’s return filed under the special instructions was credited as part of the audit. 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.

\_\_\_\_\_  
Jan Marshall  
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

D’Arcy Dixon Pignanelli

Appeal No. 08-1108

Commissioner

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.

*JM08-1108.int*