

08-1636  
AUDIT- INCOME  
SIGNED 03-04-2010

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BEFORE THE UTAH STATE TAX COMMISSION

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<p>PETITIONER,</p> <p style="text-align: center;">Petitioner,</p> <p>vs.</p> <p>AUDITING DIVISION OF THE UTAH STATE TAX COMMISSION,</p> <p style="text-align: center;">Respondent.</p>	<p><b>FINDINGS OF FACT, CONCLUSIONS OF LAW, AND FINAL DECISION</b></p> <p>Appeal No: 08-1636</p> <p>Tax Type: Income Tax Tax Period: 2004</p> <p>Judge: Jensen</p>
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**Presiding:**

Michael J. Cragun, Commissioner  
Clinton Jensen, Administrative Law Judge

**Appearances:**

For Petitioner: PETITIONER, Taxpayer  
For Respondent: RESPONDENT REP 1, Assistant Attorney General  
RESPONDENT REP 2, Income Tax Manager, Auditing Division

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission for a Formal Hearing on December 2, 2009.

Based upon the evidence and testimony presented at the hearing the Tax Commission makes its:

FINDINGS OF FACT

1. The issue before the Commission in this matter is an appeal by the above-named Petitioner (the "Taxpayer") of an assessment of income tax and interest issued by the Auditing Division of the Utah State Tax Commission (the "Division"). On July 2, 2008, the Division issued a Statutory Notice of Deficiency and Audit Change informing the Taxpayer of the assessment.

2. The amount of the deficiency at issue is as follows:

<u>Year</u>	<u>Tax</u>	<u>Penalty</u>	<u>Interest</u> <sup>1</sup>
2004	\$\$\$\$\$	none	\$\$\$\$\$

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<sup>1</sup> To the extent that any deficiency remained unpaid after the notice date, interest continues to accrue on the unpaid balance.

3. The Division claims that the Taxpayer owes income tax as a result of the cancellation of a debt from a foreclosure sale of the Taxpayer's home in STATE on November 2, 2004. The parties agree that the Taxpayer left his STATE home prior to the date of the November 2, 2004 sale.

4. The Taxpayer agreed that under applicable law, the cancellation of the debt at issue resulted in taxable income. The Taxpayer has paid an IRS assessment for federal income tax for the income. However, the Taxpayer argued that the income came while he was a resident of STATE and thus has no connection to his residency in Utah.

5. For the 2004 tax year, the Taxpayer filed a Utah state tax return as a part-year Utah resident. On that return, the Taxpayer declared May 1, 2004 as the date he began Utah residency. The Division did not dispute this date or that the Taxpayer was a STATE resident before that date. The Division relied and continues to rely on the Taxpayer's May 1, 2004 declaration of Utah residency.

6. At hearing, the Taxpayer indicated that his move from STATE to Utah took place over a period of several months from May 2004 to September 2004. In April 2004, the Taxpayer's marriage ended, as did his employment in STATE. In May 2004, he put his personal goods in storage, put his STATE home on the market and began searching for employment in Utah. He accepted Utah employment in September 2004. Between May 2004 and September 2004, the Taxpayer's time was fairly evenly split between STATE and Utah. While in STATE, the Taxpayer stayed with friends. While in Utah, he stayed with friends or at the home of his ex wife's father. He received his mail at the home of his ex wife's father in Utah.

7. The Taxpayer obtained a Utah driver license and established utility services in September 2004.

8. Although the Taxpayer made a declaration on his 2004 Utah tax return that his Utah residency began May 1, 2004, he argued at hearing that this was somewhat of an arbitrary choice when completing his tax return and that the facts supported a later residency date for Utah tax purposes.

#### APPLICABLE LAW<sup>2</sup>

Utah imposes income tax on individuals who are residents of the state, in Utah Code Sec. 59-10-104 as follows:

...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 Sec. 59-10-103(q)(i) as:

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<sup>2</sup> Unless indicated otherwise, all citations to applicable rules and statutes

- (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.

For purposes of determining whether an individual is domiciled in this state the Commission has defined "domicile" in Utah Administrative Rule R865-9I-2(A) as follows:

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.

The Utah Legislature has provided that the taxpayer bears the burden of proof in proceedings before the Tax Commission. Utah Code Sec. 59-1-1417 (2009) provides that for most cases before the Tax Commission, "the burden of proof is on the petitioner."

#### ANALYSIS

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are for the tax year at issue.

Utah law provides support for the Taxpayer's request to determine his residency by placing greater emphasis on the facts of his move to Utah than his declaration of residency on his Utah tax return. Utah Administrative Rule R865-9I-2(A)(2) provides that "[f]or 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." As discussed by the courts, the fact finder may accord the party's activities greater weight than his or her declaration of intent.<sup>3</sup> Applying Utah law, it is necessary for the Commission to make a determination regarding the Taxpayer's date of Utah residency notwithstanding the Taxpayer's statement that he became a Utah resident in May 1, 2004.

In this case, it is clear that the Taxpayer abandoned his previous domicile in STATE as early as May 1, 2004. He moved out of his home, began looking for work in another state, and spent at least some time in Utah over the months that followed. However, under Utah law, a change in domicile is not complete until there has been an abandonment of a former domicile, physical presence at a new domicile, and "the intent to remain in the new domicile permanently." Utah Administrative Rule R865-9I-2(A)(3). That intent must be evident from a person's actions. Utah Administrative Rule R865-9I-2(A)(2). Applying these principles, the Taxpayer began taking steps to make a new domicile in Utah in May of 2004. He was looking for work and spending time in Utah. However, his steps toward Utah were somewhat tentative until September 2004 when he accepted Utah employment, obtained a Utah driver license, and had Utah housing and utility service. On that basis, the facts support a finding that the Taxpayer's domicile changed to Utah in September 2004 rather than May 2004 as the Taxpayer had declared on his return.

Because the Taxpayer retained STATE domicile and therefore STATE residence until September 2004, it is necessary to consider the timing of the Taxpayer's income attributable to cancellation of debt. The Taxpayer argued that this occurred in July or August of 2004 because that is when he lost the home.

The Division argues that the earliest date that the foreclosure could have triggered income was the date of the foreclosure sale. It relies on *Helvering v. Hammel*, 311 U.S. 504 (1941), in support of its position. In *Hammel*, the Court considered a taxpayer's argument that "the definitive event fixing [a taxpayer's] loss was not the foreclosure sale but the decree of foreclosure which ordered the sale and preceded it." *Id.* at 512. The Court rejected this argument, finding that "since the foreclosure contemplated by the decree was foreclosure by sale and the foreclosed property had value which was conclusively established by the sale for the purposes of the foreclosure proceeding, the sale was the definitive event establishing the loss." *Id.* See also, *Derby Realty Corp. v. Commissioner of Internal Revenue*, 35 B.T.A. 335, 340 (1937) (finding identifiable event to fix date

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<sup>3</sup> 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);

of mortgagor's loss would be at date of foreclosure sale or later). The Division argued that it would not be possible to say that a taxpayer had income flowing from cancellation of a debt unless and until there had been sale to determine whether there was debt remaining after sale, and if so, in what amount.

Considering the parties' arguments on the timing of the Taxpayer's income from cancellation of debt, the Taxpayer has not provided legal or factual basis to support the use of any date before November 2, 2004 as the time he received the benefit of cancellation of debt. The Division has provided both legal and logical support for its position. Because the Taxpayer has not provided support for any earlier date, November 2, 2004 is the earliest date for the Taxpayer to have received the benefit of the income at issue in this case. As of that date, he was a Utah resident.

CONCLUSIONS OF LAW

1. The Taxpayer was domiciled in Utah beginning in September 2004. For this reason, the Taxpayer is liable for Utah individual income tax on state taxable income after that date in accordance with Utah Code Sec. 59-10-104.

2. The Taxpayer realized income, for purposes of state income tax, for cancellation of the debt at issue in this case no earlier than November 2, 2004. As he was a Utah resident at this time, he is liable for Utah income tax on that income.

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Clinton Jensen  
Administrative Law Judge

Appeal No. 08-1636

DECISION AND ORDER

On the basis of the foregoing, the Tax Commission sustains the audit of additional income tax and interest from cancellation of debt as alleged by the Division for tax year 2004. 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:** Failure to pay within thirty days the balance that results from this order may result in additional penalties and interest. 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 Sec. 63-46b-13. 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. & 63-46b-13 et seq.

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