
BEFORE THE UTAH STATE TAX COMMISSION

PETITIONER, Petitioner, v. AUDITING DIVISION OF THE UTAH STATE TAX COMMISSION, Respondent.	INITIAL HEARING ORDER Appeal No. 08-1675 Account No. ##### Tax Type: Income Audit Period: 2005 Judge: Jensen
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Presiding:

Clinton Jensen, Administrative Law Judge

Appearances:

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

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission on May 6, 2009 for an Initial Hearing in accordance with Utah Code Ann. §59-1-502.5. On July 7, 2008, the Auditing Division of the Utah State Tax Commission (the “Division”) issued a Notice of Deficiency and Audit Change (the “Statutory Notice”) to PETITIONER (the “Taxpayer”). The amount of the audit deficiency listed on the Statutory Notice at issue is as follows:

<u>Year</u>	<u>Tax</u>	<u>Penalty</u>	<u>Interest</u> ¹	<u>Total as of Notice Date</u>
2005	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$

The Division assessed its audit on the basis of its determination that the Taxpayer was a resident of Utah for tax purposes for all of 2005. The Taxpayer disagreed with the Division’s audit, indicating that he did not become a Utah resident until August 2005. From January 1, 2005 through the end of August 2005, the Taxpayer claimed STATE 1 as his state of residency for tax purposes.

APPLICABLE LAW

1 Interest continues to accrue on the unpaid balance.

A tax is imposed on the state taxable income of every resident individual for each taxable year. (Utah Code Ann. §59-10-104).²

Utah Code Ann §59-10-103(s) defines resident individual as 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; 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.

For military servicepersons, the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C. 574, governs residence for tax purposes:

§574. Residence for tax purposes

(1) For the purposes of taxation in respect of any person, or of his personal property, income, or gross income, by any State, Territory, possession, or political subdivision of any of the foregoing, or by the District of Columbia, such person shall not be deemed to have lost a residence or domicile in any State, Territory, possession, or political subdivision of any of the foregoing, or in the District of Columbia, solely by reason of being absent therefrom in compliance with military or naval orders, or to have acquired a residence or domicile in, or to have become resident in or a resident of, any other State, Territory, possession, or political subdivision of any of the foregoing, or the District of Columbia, while, and solely by reason of being, so absent. For the purposes of taxation in respect of the personal property, income, or gross income of any such person by any State, Territory, possession, or political subdivision of any of the foregoing, or the District of Columbia, of which such person is not a resident or in which he is not domiciled, compensation for military or naval service shall not be deemed income for services performed within, or from sources within, such State, Territory, possession, political subdivision, or District, and personal property shall not be deemed to be located or present in or to have a situs for taxation in such State, Territory, possession, or political subdivision, or district. Where the owner of personal property is absent from his residence or domicile solely by reason of compliance with military or naval orders, this section applies with respect to personal property, or the use thereof, within any tax jurisdiction other than

² Unless otherwise noted, statutory citations are to the laws in effect in 2005

such place of residence or domicile, regardless of where the owner may be serving in compliance with such orders. Nothing contained in this section shall prevent taxation by any State, Territory, possession, or political subdivision of any of the foregoing, or the District of Columbia in respect of personal property used in or arising from a trade or business, if it otherwise has jurisdiction. This section shall be effective as of September 8, 1939, except that it shall not require the crediting or refunding of any tax paid prior to October 6, 1942.

(2) When used in this section, (a) the term "personal property" shall include tangible and intangible property (including motor vehicles), and (b) the term "taxation" shall include but not be limited to licenses, fees, or excises imposed in respect to motor vehicles or the use thereof, but only if a license, fee, or excise required by the State or territory, possession, or District of Columbia of which the person is a resident or in which the person is domiciled has been paid.

Utah Administrative Rule R865-9I-2 defines domicile 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 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.

A separate subsection of Utah Administrative Rule R865-9I-2 provides additional direction regarding domicile for military servicepersons:

C. Determination of resident individual status for military servicepersons.

1. The status of a military serviceperson as a resident individual or a nonresident 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 individual 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 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. . .

DISCUSSION

The Taxpayer is a serviceperson who was stationed in STATE 1 in 2005. For most of 2004, he agrees that he had a Utah domicile. On or just before October 15, 2004, the Taxpayer completed forms requesting that the United States Air Force recognize STATE 1 as his tax domicile. The Taxpayer appropriately filed these forms and the Defense Finance and Accounting Service withheld taxes accordingly. Beginning October 15, 2005, the Taxpayer's military records were coded in a way that indicates that the Air Force accepted STATE 1 as his state of residence. The Taxpayer maintains that because he elected STATE 1 as his state of residence for the period from October 15, 2004 through August 31, 2005 and because military officials accepted that election, Utah is bound by this election of residence.

The Division agrees that to the extent that federal legislation addresses domicile for state tax purposes, it preempts state law. Nevertheless, the Division's position is that under both federal and state law, the Taxpayer's domicile remained in Utah through 2005.

For the 2005 period at issue, the Taxpayer lived in military barracks in STATE 1. He was not married and had no prior marriage or children. His parents were separated and both lived in Utah. He had two bank accounts in STATE 1 and one in Utah. He had a motor vehicle that he registered in Utah at a parent's address. He explained that his father was a part owner in the car and required that he keep the car in Utah until the Taxpayer completed full payment for it. The Taxpayer indicated that he did not attend church or school in 2005. Throughout 2005, he carried a STATE 2 driver's license. His only telephone service was through a cell phone, which was billed to a parent's address in Utah. During the 2005 period at issue, the Taxpayer had mail sent to both Utah and STATE 1. Military service kept the Taxpayer in STATE 1 five days a week and that he also spent weekends in STATE 1. The Taxpayer testified that he planned to stay in STATE 1 indefinitely. But in August 2008, his father suffered illness to a point that the Taxpayer made a decision to return to Utah to be with his father.

The Division cites the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C. 574 (the "Act") and Utah statutes in furtherance of the Act for the proposition that a serviceperson does not lose a tax domicile merely by reason of leaving that domicile upon military orders. The Division also cited *Fatt v. State Tax Comm'n*, 884 P.2d 1233 (Utah 1994) as a Utah case enforcing that proposition. However, as the Utah Supreme Court explains in *Fatt*, "a court must read the Act 'with an eye friendly to those who dropped their affairs to answer their country's call.'" *Fatt*, 884 P.2d at 1235 (quoting *California v. Buzard*, 382 U.S. 386,

393 (1966) and *Le Maistre v. Leffers*, 333 U.S. 1, 6 (1948). Thus, the holding in *Fatt* that the taxpayer in that case had not abandoned a previous tax domicile was done to further the Taxpayer's interests. *Fatt* 884 P.2d at 1236.

In light of the purposes of the Act as dictated by courts reviewing this issue, the Commission is persuaded that the purpose of the Act is to aid, not hinder, servicepersons. Thus, if a serviceperson wishes to avail themselves of the protection of the Act, the Commission will do so by construing the Act broadly. However, if a serviceperson does not wish to use the Act to preserve a domicile when entering military service, the Commission will not use the Act to create or preserve a domicile that would not normally be applicable to the serviceperson.

In this case, the Taxpayer has indicated that he does not wish to avail himself of the protections of the Act to preserve his Utah domicile upon his move to STATE 1 for military service. If he had, the Act would have been a protection to him. Because the Taxpayer has not used the Act, the Commission decides this case on the basis of the same Utah domicile law that would be available to any taxpayer. The Commission will not use the Act against the Taxpayer to preserve a domicile that the facts do not otherwise support.

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.³ 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.⁴

The Taxpayer requests that the Commission consider his declaration to the United States Air Force as determinative of his domicile. In accordance with Utah law, the Commission will consider that declaration, but will give greater weight to the facts. Facts supporting a continued domicile in Utah include a motor vehicle registration, one bank account, parents in Utah, and receiving some of his correspondence in Utah, including his cell phone bill. Facts supporting a STATE 1 domicile include two bank accounts, weekdays spent in military service and weekends spent in leisure. The Commission accords less weight to the Taxpayer's vehicle

3 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: *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*,

in Utah, because that appears to be a parent’s choice rather than a choice the Taxpayer made. In a similar way, the Taxpayer’s weekdays spent in military service represents a choice by the Taxpayer’s commanding officers. Factors such as bank accounts and correspondence weigh equally in favor of Utah and STATE 1. Accordingly, the Commission is left with the Taxpayer’s declarations and the Taxpayer’s choice to spend social free time on weekends in STATE 1. The Commission is aware that this is little evidence on which to base a finding regarding domicile. However, as a single person with few established ties in any one state, the Taxpayer is a person who has the ability to abandon one domicile and create another with greater ease than would be expected of a person with more ties to a given state. Under the facts of this case, it appears that the Taxpayer made that change for the period at issue in this case.

DECISION AND ORDER

On the basis of the information presented at the hearing, the Commission that the Taxpayer did not have a domicile in Utah from January 1, 2005 to August 31, 2005. 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.

Clinton Jensen
Administrative Law Judge

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

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BY ORDER OF THE UTAH STATE TAX COMMISSION.

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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