
BEFORE THE UTAH STATE TAX COMMISSION

<p>PETITIONER 1 & PETITIONER 2, Petitioners, v. AUDITING DIVISION OF THE UTAH STATE TAX COMMISSION, Respondent.</p>	<p>INITIAL HEARING ORDER</p> <p>Appeal No. 08-2767</p> <p>Account No. #####</p> <p>Tax Type: Individual Income</p> <p>Tax Years: 2004</p> <p>Judge: Chapman</p>
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Presiding:

Kerry R. Chapman, Administrative Law Judge

Appearances:

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

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission for an Initial Hearing on November 4, 2009.

PETITIONER 1 and PETITIONER 2 (“Petitioners” or “taxpayers”) are appealing Auditing Division’s (the “Division”) assessment of additional individual income tax for the 2004 tax year. On November 24, 2008, the Division issued a Notice of Deficiency and Estimated Income Tax (“Statutory Notice”) to the taxpayers, in which it imposed additional tax and interest, as follows:

<u>Year</u>	<u>Tax</u>	<u>Penalties</u>	<u>Interest</u>	<u>Total</u>
2004	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$

The taxpayers did not file a 2004 Utah tax return. The Division determined that the taxpayers were domiciled in Utah for the 2004 tax year and imposed Utah tax on their 2004 income. The taxpayers

claim that they moved away from Utah in July 2003 and that they did not move back until April 2005. As a result, they do not believe that they were domiciled in Utah in 2004. The taxpayers ask the Commission to find that they were not Utah resident individuals in 2004 and that they do not owe the amounts assessed by the Division. The Division, on the other hand, asks the Commission to find that the taxpayers were domiciled in Utah in 2004 and to sustain its assessment.

APPLICABLE LAW

Under Utah Code Ann. §59-10-104(1)¹, “a tax is imposed on the state taxable income . . . of every resident individual[.]”

For purposes of Utah income taxation, a “resident individual” is defined in UCA §59-10-103(1)(q), as follows in pertinent part:

- (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.

Utah Admin. Rule R865-9I-2 (“Rule 2”) provides guidance concerning when a person is “domiciled” in Utah for income tax purposes, as follows in pertinent 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 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

¹ All citations are to the 2004 versions of the Utah Code and the Utah Administrative Code, unless otherwise indicated.

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.

Utah Admin. Rule R884-24P-52 ("Rule 52") sets forth a non-exhaustive list of factors or objective evidence that is determinative of domicile, as follows:

E. Factors or objective evidence determinative of domicile include:

1. whether or not the individual voted in the place he claims to be domiciled;

2. the length of any continuous residency in the location claimed as domicile;

3. the nature and quality of the living accommodations that an individual has in the location claimed as domicile as opposed to any other location;

4. the presence of family members in a given location;

5. the place of residency of the individual's spouse or the state of any divorce of the individual and his spouse;

6. the physical location of the individual's place of business or sources of income;

7. the use of local bank facilities or foreign bank institutions;

8. the location of registration of vehicles, boats, and RVs;

9. membership in clubs, churches, and other social organizations;

10. the addresses used by the individual on such things as:

a) telephone listings;

b) mail;

c) state and federal tax returns;

d) listings in official government publications or other correspondence;

e) driver's license;

- f) voter registration; and
- g) tax rolls;
- 11. location of public schools attended by the individual; or the individual's dependents;
- 12. the nature and payment of taxes in other states;
- 13. declarations of the individual:
 - a) communicated to third parties;
 - b) contained in deeds;
 - c) contained in insurance policies;
 - d) contained in wills;
 - e) contained in letters;
 - f) contained in registers;
 - g) contained in mortgages; and
 - h) contained in leases.
- 14. the exercise of civil or political rights in a given location;
- 15. any failure to obtain permits and licenses normally required of a resident;
- 16. the purchase of a burial plot in a particular location;
- 17. the acquisition of a new residence in a different location.

UCA §59-1-1417 provides that the burden of proof is upon the petitioner in proceedings

before the Commission, with limited exceptions as follows:

In a proceeding before the commission, the burden of proof is on the petitioner except for determining the following, in which the burden of proof is on the commission:

- (1) whether the petitioner committed fraud with intent to evade a tax, fee, or charge;
- (2) whether the petitioner is obligated as the transferee of property of the person that originally owes a liability or a preceding transferee, but not to show that the person that originally owes a liability is obligated for the liability; and
- (3) whether the petitioner is liable for an increase in a deficiency if the increase is asserted initially after a notice of deficiency is mailed in accordance with Section 59-1-1405 and a petition under Part 5, Petitions for Redetermination of Deficiencies, is filed, unless the increase in the deficiency is the result of a change or correction of federal taxable income:
 - (a) required to be reported; and
 - (b) of which the commission has no notice at the time the commission mails the notice of deficiency.

UCA §59-1-401(13) provides that the Commission may upon reasonable cause shown, waive, reduce or compromise penalties and interest.

DISCUSSION

Section 59-10-103(1)(q)(i)(A) provides that a person is a Utah resident individual if that person is domiciled in Utah. There is no question that the taxpayers were domiciled in Utah until July 2003 and that they were again domiciled in Utah no later April 2005. At issue is whether the taxpayers changed their domicile from Utah to another state and were not domiciled in Utah for any portion of 2004.

PETITIONER 1's profession is in the (X) field. PETITIONER 1 worked for COMPANY A in CITY 1, Utah until May 2003, when he was laid off. As of May 2003, the taxpayers and their children had lived in an apartment in Utah for a number of years. After being laid off, PETITIONER 1 accepted contract work in various other states for a couple of months while his family remained at their Utah apartment. In July 2003, PETITIONER 1 obtained a full-time position as a senior network technician for COMPANY B in CITY 2, STATE 1. At this time, the taxpayers gave up their Utah apartment, moved themselves and their possessions to STATE 1 and rented an apartment in STATE 1.

The taxpayers were in STATE 1 approximately five months. In November 2003, PETITIONER 1 resigned from his job in STATE 1 and obtained another position with COMPANY B in COMPANY C, STATE 2. In December 2003, the taxpayers gave up their STATE 1 apartment, moved their family and possessions to STATE 2 and rented an apartment in STATE 2. PETITIONER 1 stated that he worked for COMPANY B in STATE 2 until April 2005, when he received an e-mail from COMPANY A indicating that it was "recalling" laid-off employees for jobs in Utah. PETITIONER 1 indicated that he resigned from COMPANY B and moved back to Utah at this time.

In early 2004, PETITIONER 2 became pregnant. During her pregnancy, she traveled to Utah to see her Utah obstetrician. PETITIONER 2 would stay at her sister's home in Utah during these visits. PETITIONER 1 indicated that his wife spent at least a couple of months of her pregnancy with her sister in Utah and that she gave birth to their third child on November 4, 2004 at HOSPITAL in CITY 4, Utah.

PETITIONER 2 continued to live in Utah after the birth of the taxpayers' third child. PETITIONER 1 indicated that their older son attended school in STATE 1 in 2003. However, it is not known where the taxpayers' older son attended school when PETITIONER 2 was in Utah in 2004.

PETITIONER 1 initially indicated that he and his wife rented an apartment in Taylorsville, Utah once he was rehired in Utah in April 2005. However, a W-2 Form concerning PETITIONER 1's wages from a company named Radiant Systems, Inc. ("Radiant") was mailed to the Taylorsville apartment in January 2005, three months prior to the time that PETITIONER 1 was rehired in Utah. Once this fact was pointed out, PETITIONER 1 clarified that they had rented the Utah apartment sometime in 2004. Although he could not recall exactly when they rented the apartment, he believed it was sometime after the November 4, 2004 date on which his wife gave birth.

The W-2 Form from Radiant indicates that PETITIONER 1 earned \$\$\$\$\$ of income in Utah in 2004. PETITIONER 1 proffered that he accepted a "standby" position to work for Radiant in Utah in 2004. He explains that in 2004, it was unknown if employees of COMPANY A were going on strike and that he was paid the income from Radiant to be available to fill in for striking workers. He further stated, however, that he was never called up and that the income he received from Radiant was merely consideration in exchange for him being available to work if called. He stated that had Radiant called him to work in Utah in 2004, he would have quit his job in STATE 2 at that time and come to Utah.

During the time the taxpayers were in STATE 1 and STATE 2, most, if not all, of their mail was sent to their STATE 1 and STATE 2 addresses. They also used the STATE 2 address for their 2003 federal return and the 2003 Utah joint full-year resident return that they filed in April 2004. In 2006, the taxpayers filed a 2005 Utah joint full-year resident return.

The taxpayers closed their Utah bank accounts upon moving to STATE 1 and opened new accounts at a bank in STATE 1 that had branches in STATE 2. As a result, they did not change bank accounts

upon moving to STATE 2. The taxpayers reopened bank accounts in Utah after returning. However, PETITIONER 1 could not remember when they reopened the Utah accounts.

The taxpayers kept their Utah driver's licenses for the entire period they were in STATE 1 and STATE 2. In addition, PETITIONER 1 renewed his Utah driver's license in July 2004, during the tax year at issue in this appeal. Neither party indicated at the hearing whether PETITIONER 1 used his STATE 2 address or a Utah address to renew his Utah driver's license.

Before moving to STATE 1, the taxpayers had two motor vehicles that were registered in Utah. They took the vehicles with them first to STATE 1 and then to STATE 2. PETITIONER 1 indicated that he never registered the vehicles in STATE 1. However, he did not assert that he registered them in STATE 2. If he did not, he would have had to reregister them in Utah sometime in 2004, as their registrations would have expired at least once between July 2003 and April 2005. Although there is no evidence that the taxpayers' registered their vehicles in a state other than Utah, PETITIONER 1 indicated that they obtained a new INSURANCE agent once they moved to STATE 1.

PETITIONER 1 stated that from the time they moved to STATE 1, he was looking for a job in Utah so that he and his family could return to Utah. However, he stated that he would have remained in STATE 2 had he not been able to get employment in Utah in 2005.

There is no question that the taxpayers were domiciled in Utah until they moved to STATE 1 in July 2003. Once domicile is established, Rule 2(A)(3) provides that domicile "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."

The taxpayers rented an apartment in STATE 1 in July 2003 and another apartment in STATE 2 in December 2003. The taxpayers moved their entire family and their possessions to these locations. Accordingly, the taxpayers established a physical presence in both STATE 1 and STATE 2 and satisfied the

second condition of Rule 2(A)(3). However, further analysis is needed to determine if the taxpayers met the other two conditions that would be necessary for them to have changed his Utah domicile to either STATE 1 or STATE 2.

PETITIONER 1 indicated that from the time they moved away from Utah, he was looking for a job in Utah so that he and his family could move back. However, he also stated that they would have remained in STATE 2 had no job become available in Utah. The taxpayers' stated intent is only one factor to consider in deciding whether they changed their domicile from Utah to another state. Utah appellate courts have addressed whether a person is domiciled in Utah for state income tax purposes² and have determined that a person's actions may be accorded greater weight in determining his or her domicile than a declaration of intent.³ Accordingly, the Commission must also look at the taxpayers' actions to determine whether the intent required by Rule 2(A)(3) exists.

The taxpayers physically moved away from Utah and took their possessions with them. They opened new bank accounts in STATE 1. Until sometime in 2004, they appear to have used the STATE 1 and STATE 2 addresses for purposes of receiving mail and to file taxes. Nevertheless, the facts, when considered as a whole, suggest that the taxpayers' moves to STATE 1 and STATE 2 were intended to be temporary and that they always considered Utah to be the place to which they intended to return. From the time they moved to STATE 1, PETITIONER 1 continued to look for job opportunities in Utah so that they could return to Utah. He even took a "standby" position sometime in 2004 in hopes of obtaining a job in Utah. In addition, the taxpayers continued to retain a number of ties with Utah. No evidence or testimony was proffered to suggest

2 The issue of domicile for Utah individual income tax purposes has been considered by the Utah Supreme Court and the Court of Appeals. See *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).

3 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).

that their vehicles were registered in any state other than Utah during 2004. PETITIONER 1 renewed his Utah driver's license in July 2004. In early 2004 when PETITIONER 2 became pregnant, she returned to Utah at least periodically to visit her Utah obstetrician. In addition, she gave birth to their third child in Utah in November 2004 and was present in Utah for at least two months prior to and after the birth. Sometime in 2004, the taxpayers rented an apartment in Utah. It is also not clear whether the taxpayers' oldest child attended school in Utah in 2004 during those periods PETITIONER 2 was in Utah.

The taxpayers have the burden of proof to show that they changed their domicile from Utah to STATE 1 or STATE 2. When the facts proffered at the Initial Hearing are looked at as a whole, the Commission finds that the evidence does not show that the taxpayer had an intent to establish a new domicile in either of these states. As a result, the Commission finds that the taxpayers did not meet all of the conditions set forth in Rule 2(A)(3) to change their domicile. Accordingly, the Commission finds that the taxpayers remained domiciled in Utah during 2004 and were Utah resident individuals for 2004. For these reasons, the Commission sustains the Division's assessment of additional tax and interest.

The Commission has often waived penalties in domicile cases because of the difficulty in determining whether a person has changed his or her domicile. This matter is sufficiently complex to warrant similar treatment. The Division indicated that it would not oppose the Commission waiving the penalties that it imposed in this matter. For these reasons, the Commission finds that reasonable cause exists to waive all penalties in this matter.

DECISION AND ORDER

Based upon the foregoing, the Commission finds that the taxpayers were Utah resident individuals for the 2004 tax year and that all of their 2004 income was subject to Utah taxation. Accordingly, the Commission sustains the Division's assessment of additional tax and interest. The Commission, however, waives all penalties that were assessed. It is so ordered.

Appeal No. 08-2767

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
CITY 1, Utah 84134

Failure to request a Formal Hearing will preclude any further appeal rights in this matter.

DATED this _____ day of _____, 2009.

Kerry R. Chapman
Administrative Law Judge

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 as discussed above, failure to pay the balance resulting from this order within thirty (30) days from the date of this order may result in a late payment penalty.

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