

09-0279
AUDIT
SIGNED 03-04-2010

BEFORE THE UTAH STATE TAX COMMISSION

PETITIONER, Petitioner, v. AUDITING DIVISION OF THE UTAH STATE TAX COMMISSION, Respondent.	INITIAL HEARING ORDER Appeal No. 09-0279 Account No. ##### Tax Type: Income Tax Tax Year: 2001-2004 Judge: Phan
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Presiding:

Jane Phan, Administrative Law Judge

Appearances:

For Petitioner: PETITIONER
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 January 12, 2010. Petitioner (the "Taxpayer") is appealing an audit deficiency of Utah individual income tax for the years 2001 through 2004. The Statutory Notices of Deficiency and Estimated Income Tax had been issued on September 13, 2007. Petitioner filed his appeal on January 27, 2009. Respondent (the "Division") did not argue that this appeal was untimely or file a Motion to Dismiss. The amounts of the audit deficiencies listed on the statutory notices at issue are as follows:

	Tax	Penalty	Interest	Total as of Notice Date ¹
2001	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$
2002	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$
2003	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$
2004	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$

¹ Interest continues to accrue on the unpaid balance.

APPLICABLE LAW

Utah imposes income tax on individuals who are residents of the state, in Utah Code Sec. 59-10-104 (2002)² 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(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.

For purposes of determining whether an individual is domiciled in this state the Commission has defined "domicile" in Utah Administrative Rule R865-9I-2(D) (2002) as follows:

“Domicile” means the place where an individual has a true, fixed, permanent home and principal establishment, and to which place he has (whenever he is absent) the intention of returning. It is the place in which a person has voluntarily fixed the habitation of himself or herself and family, not for a mere special or temporary purpose, but with the present intention of making a permanent home. After domicile has been established, two things are necessary to create a new domicile: first, an abandonment of the old domicile; and second, the intention and establishment of a new domicile. The mere intention to abandon a domicile once established is not of itself sufficient to create a new domicile; for before a person can be said to have changed his or her domicile, a new domicile must be shown.

The rule defining “domicile” was revised in 2003. For tax year 2003 and subsequent years “domicile” is defined at Utah Administrative Rule R865-9I-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 The Utah Individual Income Tax Act has been revised and provisions renumbered subsequent to the audit period. The Commission cites to and applies the provisions that were in effect during the audit period on substantive legal issues.

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.

The applicable statutes specifically provide that the taxpayer bears the burden of proof in proceedings before the Tax Commission. Utah Code Sec. 59-1-1417 provides:

In a proceeding before the commission, the burden of proof is on the petitioner. . .

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 Sec. 59-1-401(13).)

DISCUSSION

The Division based its audit on the assertion that the Taxpayer was a resident of Utah for tax purposes during the years 2001 through 2004. The Taxpayer had been a Utah resident and filed Utah returns prior to 2000. It was the Taxpayer's contention that he was a resident of STATE during these years. The issue in this appeal is whether the Taxpayer was a "resident individual" in the State of Utah for the purposes of Utah Code Sec. 59-10-103(1)(k) during the audit years. Pursuant to the statute, an individual may be a resident if they spend in the aggregate more than 183 days per year in Utah during the period in question and maintain a place of abode. Or, in the alternative, a resident individual 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.³ As discussed by the courts in considering this issue, the fact finder may accord the party's activities greater weight than his or her declaration of intent.⁴ With the Taxpayer being a Utah resident in 2000, there were three things necessary to show he changed his domicile in 2001 under the rule applicable at that time. The Taxpayer needs to show an abandonment of the old domicile and the intention and establishment of a new domicile.

The Taxpayer explained that he had moved to STATE in September of 2000 with his two children who were both minors at that time. He states that he rented an apartment in STATE and his children started attending middle school or high school in September 2000. One child attended school there until April 2002. His second child stayed with him until sometime in 2001 when he gave up custody of the child to the state of Utah in 2001. The Taxpayer had a Utah driver's license when he moved to STATE. However, the state of STATE took the license away from him in 2001 and he states he has not had a driver license in any state since that time. It was his representation that he resided in STATE through April 2002.

There was no indication that the Taxpayer maintained a domicile in Utah during this period from September 2000 through April 2002. He did not have a Utah Drivers License, register a vehicle in Utah or work in Utah during this period of time and the Division provided nothing that would refute these representations. Therefore, the facts tend to support the Taxpayer's contention that he did, in fact, establish domicile in STATE during this period.

However, in May 2002 the Taxpayer moved to Utah and began working for a Utah Company until July 2002. The Taxpayer states that when his employment ended in July, he moved back to STATE until August 2003, leaving his minor son in Utah. He indicates that this son, who was only 16 at the time, maintained a residence by himself in CITY, Utah, while the Taxpayer lived in STATE at a friend's apartment. There was a letter submitted by an PERSON A that stated the Taxpayer did live with him during this period. However, the Taxpayer did receive Utah unemployment compensation during the period that he was out of work. He states that he had all his mail sent to his son's residence because it was safer that way. He states he

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, Inc.,

never obtained a state identification card or driver's license in STATE. He did not register to vote in that state.

The Taxpayer found employment in August 2003 in Utah. The Taxpayer had provided a list of all his employers during the audit years. Beginning in August 2003 he started working in Utah for COMPANY A until October 2003. In November 2003 and through June 2006, he worked for another Utah employer, COMPANY B. He had listed COMPANY B as a Utah Company with its address in CITY 2. He states that while he was working for COMPANY B, he was living in STATE, again at the friend's residence, from November 2003 through June 2006. He states that much of the employment with COMPANY B was for projects located in STATE. In the meantime, mail was addressed to the Utah residence, which he stated was maintained by his son. The son would have turned 18 during 2004.

The Taxpayer has the burden of proof in this matter and has provided very little evidence to support his assertions. For the period from May 2002 through the end of 2004, the facts conflict with the Taxpayer's assertions that he was domiciled in STATE. He was working in Utah. When he was not working in Utah, he was receiving Utah unemployment compensation. The Division argues this would be Utah source income regardless. When in Utah he states he resided with his son, a minor, at his son's place. All his mail was sent there, whether he was in Utah or STATE. Based on the fact that the son would have been 16 at the time, it would have been difficult for him to own or lease a residence by himself. The Taxpayer provided no evidence that the lease or title to the property was in the son's name and not the Taxpayer's. When in STATE, he did not rent an apartment in his own name; he resided there with a friend. He states he was not on the lease or the utilities, but the cable bill was in his name. The Taxpayer did not provide a copy of the cable bill. There was no information from COMPANY B to show that he was working out of state for the entire period and no W-2 to show the state to which they sourced the income. There simply was not enough evidence provided by the Taxpayer to support his contention that he was domiciled in STATE.

Penalties were assessed with the audit. The Commission has waived penalties in some domicile cases where the facts would reasonably be confusing to a taxpayer to determine if they would be required to file in the state of Utah. In this matter, based on the little information available, there is cause for waiver of penalties in 2002. After that time, the Taxpayer was employed in Utah and should have filed Utah returns.

Jane Phan
Administrative Law Judge

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

DECISION AND ORDER

Based upon the forgoing, the Commission finds that the Taxpayer was not domiciled in Utah for the period of January 1, 2001 through the end of April 2002. In May 2002 he became domiciled in Utah and remained so domiciled through the end of the audit period. The penalties for 2002 are to be waived. The audit is to be adjusted accordingly. 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 _____, 2010.

R. Bruce Johnson
Commission Chair

Marc B. Johnson
Commissioner

D'Arcy Dixon Pignanelli
Commissioner

Michael J. Cragun
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.