

09-0603  
AUDIT - DOMICILE  
TAX YEAR: 2005  
SIGNED: 03-22-2010  
COMMISSIONERS: R. JOHNSON, M. JOHNSON, D. DIXON, M. CRAGUN  
GUIDING DECISION

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BEFORE THE UTAH STATE TAX COMMISSION

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<p>PETITIONER,</p> <p>Petitioner,</p> <p>v.</p> <p>AUDITING DIVISION OF THE UTAH STATE TAX COMMISSION,</p> <p>Respondent.</p>	<p><b>INITIAL HEARING ORDER</b></p> <p>Appeal No. 09-0603</p> <p>Account No. #####</p> <p>Tax Type: Income Tax</p> <p>Tax Year: 2005</p> <p>Judge: Marshall</p>
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**Presiding:**

Jan Marshall, Administrative Law Judge

**Appearances:**

For Petitioner: PETITIONER, *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 November 4, 2009. Taxpayer is appealing an audit deficiency of Utah individual income tax and interest for the 2005 tax year. Through March 12, 2009, Taxpayer was assessed \$\$\$\$ in tax, and \$\$\$\$ in interest. Interest continues to accrue on the unpaid balance.

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) "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)(s)(ii), a fraction of a calendar day shall be counted as a whole day.

Utah Code Ann. §59-10-103 (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:
  - 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. Code R865-9I-2 (2005).

The Servicemembers Civil Relief Act also governs the state of residency for active members of the military, as follows:

A servicemember shall neither lose nor acquire a residence or domicile for purposes of taxation with respect to the person, personal property, or income of the servicemember by reason of being absent or present in any tax jurisdiction of the United States solely in compliance with military orders.

50 U.S.C. 571(a).

The Utah Legislature has specifically provided that the taxpayer bears the burden of proof in proceedings before the Tax Commission, see Utah Code Ann. §59-1-1417, 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. §59-1-1417 (2009).

The Commission has been granted the discretion to waive penalties and interest. Section 59-1-401(13) 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(13) (2009).

#### DISCUSSION

On February 10, 2009, the Division issued a Notice of Deficiency and Estimated Income Tax for the 2005 tax year. Taxpayer and his wife had filed a non-resident Utah state tax return for the 2005 tax year. It is the Division's position that Taxpayer was a resident of the State of Utah for income tax purposes in 2005. The Division audited the Taxpayer's return to reflect a resident married joint filing status. Taxpayer maintains that he changed his state of residency to STATE 3 in February of 2005.

Taxpayer was a resident of Utah when he joined the military, and Utah was identified as his home of record. He was stationed first in STATE 1, then STATE 2, and STATE 3. While in STATE 3, Taxpayer testified that he changed his residency by filling out the required paperwork,

presumably DD Form 2058, "State of Legal Residence Certificate". He stated that he did everything required by the military in order to change his residency; including the registration of his vehicles and registering to vote in STATE 3. Taxpayer did not change his driver's license from Utah to STATE 3, and retained his FINANCIAL INSTITUTION bank account. Taxpayer was subsequently stationed in STATE 4. Taxpayer remained in STATE 4 until 2007, when he was discharged from the military for medical reasons. Taxpayer testified that he wanted to do government contract work, but that there was a hiring freeze at the time of his discharge. He remained in STATE 4 for a period of two months looking for work. Taxpayer testified that it was not his intention to return to Utah, but that he and his wife returned to Utah to stay with extended family while looking for employment.

The Division does not contest that the Taxpayer did not spend 183 days in the state of Utah. Rather, the Division argues that in 2005, the Taxpayer continued to be domiciled in Utah for tax purposes. The Division's representative argued that Taxpayer's residency during the period at issue was for a special or temporary purpose under Administrative Rule R865-9I-2, and therefore, he retained his status as a Utah domiciliary.

The question of whether one establishes or maintains a domicile in Utah is a question of fact. See *Clements v. Utah State Tax Comm'n*, 893 P.2d 1078, 1081 (Ct. App. Utah 1995), *Lassche v. Utah State Tax Comm'n*, 866 P.2d 618, 621 (Ct. App. Utah 1993), *Orton v. Utah State Tax Comm'n*, 864 P.2d 904, 907 (Ct. App. Utah 1993). Domicile is defined as "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." Utah Admin. Code R865-9I-2(A)(1) (2005). Utah law requires that a person have a "permanent home" to claim a domicile. The Utah Supreme Court has held that "[d]omicile is based on residence and intent to remain for an indefinite time. The intention need not be to remain for all time, it being sufficient if the intention is to remain for an indefinite period." *Allen v. Greyhound Lines, Inc.*, 583 P.2d 613, 615 (Utah 1978). Further, in *Clements v. Utah State Tax Comm'n*, 893 P.2d 1078 (Ct. App. Utah 1995), the Court determined that a person's actions may be accorded greater weight in determining his or her domicile than a declaration of intent.

It is undisputed that Taxpayer was domiciled in Utah at the time he joined the military. Under Rule R865-9I-2(3), three elements must occur to change domicile once established: a specific intent to abandon the former domicile, physical presence in a new domicile, and intent to remain in the new domicile permanently. It is undisputed that Taxpayer filed paperwork with the military to change his residency from Utah to STATE 3, and that Taxpayer was physically

present in STATE 3 at the time. The question is whether Taxpayer intended to remain indefinitely. Taxpayer has the burden of proof in this matter. He testified that he had no intentions of returning to Utah at the end of his military career. The Servicemembers Civil Relief Act provides that a servicemember “shall neither lose nor acquire a residence or domicile...by reason of being absent or present in any tax jurisdiction...*solely in compliance with military orders*”. Taxpayer was in STATE 3 because of his military orders. This matter is similar to that in Appeal No. 98-1161, where the Commission found that a member of the military had established domicile in a different state. Taxpayer declared to the military that his domicile was STATE 3. Further, Taxpayer took steps to establish a new domicile in STATE 3, including moving his wife from Utah to STATE 3, registering to vote, and registering his vehicles in STATE 3. However, Taxpayer’s testimony at the hearing was that he changed his domicile from Utah to STATE 3 in February of 2005. Thus, he was a part-year resident of the State of Utah, and is liable for tax attributable to the income earned while he remained a resident of Utah.

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Jan Marshall  
Administrative Law Judge

#### DECISION AND ORDER

Based upon the foregoing, the Commission finds the Taxpayer established a new domicile in STATE 3 in February 2005, and was a part-year resident of Utah for the 2005 tax year. 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

Appeal No. 09-0603

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.  
*JM/09-0603.int*