

09-0618
AUDIT
SIGNED 11-05-2009

BEFORE THE UTAH STATE 1 TAX COMMISSION

PETITIONER 1 & PETITIONER 2, Petitioners, v. AUDITING DIVISION OF THE UTAH STATE 1 TAX COMMISSION, Respondent.	INITIAL HEARING ORDER Appeal No. 09-0618 Account No. ##### Tax Type: Individual Income Tax Years: 2005 Judge: Chapman
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Presiding:
Kerry R. Chapman, Administrative Law Judge

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

STATE 1MENT OF THE CASE

This matter came before the Utah STATE 1 Tax Commission for an Initial Hearing on November 3, 2009.

PETITIONER 1 & PETITIONER 2 (the “taxpayers”) are appealing Auditing Division’s (the “Division”) assessment of additional individual income tax for the 2005 tax year. On January 21, 2009, the Division issued a Notice of Deficiency and Audit Change (“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>
2005	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$

For the 2005 tax year, the taxpayers filed a joint Utah resident return. On the return, the taxpayers claimed a “non-resident active duty military pay deduction” for the \$\$\$\$ of income that PETITIONER 1 earned in 2005 while working in COUNTRY for COMPANY A (“COMPANY A”). COMPANY A is a company that is headquartered in CITY 1, Texas. The Division determined that the taxpayers did not qualify for the deduction and assessed tax on the \$\$\$\$ of income.

The taxpayers admit that they do not qualify for the “non-resident active duty military pay deduction” because PETITIONER 1 was not a military service member in 2005. PETITIONER 1 worked for a company that provided security services for (X). Nevertheless, the taxpayers contend that PETITIONER 1’s COMPANY A income is not subject to Utah taxation because he was not a Utah resident during 2005. He claims that he was domiciled in COUNTRY, where he had worked since July 2003. For these reasons, the taxpayers ask the Commission to find that PETITIONER 1 was not a Utah resident individual for 2005 and that the income he earned while working outside of Utah is not subject to Utah taxation. The Division, on the other hand, asks the Commission to find that PETITIONER 1 was domiciled in Utah in 2005 and to sustain its assessment.

APPLICABLE LAW

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

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

(i) “Resident individual” means:

¹ All citations are to the 2005 versions of the Utah Code and the Utah Administrative Code, unless otherwise indicated.

- (A) an individual who is domiciled in this STATE 1 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 1; or
- (B) an individual who is not domiciled in this STATE 1 but:
 - (I) maintains a permanent place of abode in this STATE 1; and
 - (II) spends in the aggregate 183 or more days of the taxable year in this STATE 1.

3. 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 STATE 1 ment, 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 STATE 1s.
- 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.

4. 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 1 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 1 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 STATE 1s;
 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.

5. 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.

DISCUSSION

Section 59-10-103(1)(s)(i)(A) provides that a person is a Utah resident individual if that person is domiciled in Utah. There is no question that PETITIONER 2 was domiciled in Utah in 2005 and, as a result, was a Utah resident individual for 2005. At issue is whether PETITIONER 1 was domiciled in Utah during 2005, as the Division claims, or whether PETITIONER 1 was domiciled in COUNTRY, as the taxpayers claim.

PETITIONER 1 moved to Utah in 1998 to teach at the UNIVERSITY. The taxpayers married while PETITIONER 1 was living in Utah, and they purchased a home in CITY 2, Utah (“Utah home”). The Utah home was titled in both taxpayers’ names. In 2003, PETITIONER 1 accepted civilian employment with COMPANY A for a position as a security manager in COUNTRY. PETITIONER 1 worked in COUNTRY from July 2003 until December 2006. During the 3½ years that PETITIONER 1 worked in COUNTRY, his employer provided him a trailer to live in that was located in a military compound. While PETITIONER 1 worked in COUNTRY, PETITIONER 2 lived at their Utah home. PETITIONER 1 visited the Utah home occasionally when he was on vacation. However, the taxpayers often met in other STATE 1s or countries during PETITIONER 1’s vacations.

PETITIONER 1 STATE 1d that he used the address of the trailer provided by COMPANY A when he obtained security clearance from the (X) in COUNTRY. In addition, PETITIONER 1 was required to take a driver's education class from COMPANY A in COUNTRY and obtain a driver's license issued by COMPANY A, in accordance with a contract between COMPANY A and the (X). PETITIONER 1, however, was not required to obtain a visa to work in COUNTRY. After PETITIONER 1 ceased working in COUNTRY in December 2006, the taxpayers sold their Utah home and, in February 2007, moved to STATE 2.

The taxpayers contend that PETITIONER 2 could not move to COUNTRY to be with her husband. As a result, they claim that they had to maintain their Utah home for PETITIONER 2 to live in. Otherwise, they would have had to sell the Utah home and buy a home in another STATE 1. Although the taxpayers decided to maintain their Utah home while PETITIONER 1 worked in COUNTRY, they do not believe that he should be considered a Utah domiciliary based on this decision.

Although PETITIONER 1 lived and worked in COUNTRY from July 2003 to December 2006, including the 2005 tax year at issue, he maintained a number of Utah ties during the period. As described above, his wife continued to live in the home they owned in Utah. They did not own or rent property in any other jurisdiction. In addition, PETITIONER 1 retained his Utah driver's license until he surrendered it to STATE 2 in 2007. PETITIONER 1 was registered to vote in Utah during 2005. While in COUNTRY, PETITIONER 1 kept a vehicle that was registered in Utah. The taxpayers claim that he stored his vehicle in Utah and did not use it during the period he worked in COUNTRY.

The taxpayers also used their Utah address to file joint income tax returns until they moved to STATE 2 in 2007. PETITIONER 1 also used the Utah home as his "point of origin" for his employment contract with COMPANY A. PETITIONER 1's employment contract with COMPANY A was an "at will" contract that either party could cancel at any time. During the time he worked in COUNTRY, PETITIONER

1's financial STATE 1ments, including his W-2's associated with his employment in COUNTRY, were mailed to the Utah home.

There is no question that PETITIONER 1 was domiciled in Utah until he moved to COUNTRY for work 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."

It is uncontested that PETITIONER 1 moved to COUNTRY for employment and that he continued to work in COUNTRY for 3 ½ years. It is also uncontested that he rarely returned to Utah during these years. Accordingly, PETITIONER 1 established a physical presence in COUNTRY and satisfied the second condition of Rule 2(A)(3). However, further analysis is needed to determine if PETITIONER 1 met the other two conditions that would be necessary for him to have changed his Utah domicile to COUNTRY.

Although PETITIONER 1 STATE 1d that he had no specific intent to return to Utah after he ceased working in COUNTRY, he did not STATE 1 that he intended to abandon his Utah domicile and establish a new one in COUNTRY. Nevertheless, PETITIONER 1's STATE 1d intent is only one factor to consider in deciding whether he changed his domicile from Utah to COUNTRY. Utah appellate courts have addressed whether a person is domiciled in Utah for STATE 1 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

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).

intent.³ Accordingly, the Commission must also look at PETITIONER 1's actions to determine whether the intent required by Rule 2(A)(3) exists.

Although PETITIONER 1 accepted a job in COUNTRY and was provided housing by his employer, the Commission finds that few of his actions show that his intent was to abandon Utah and establish a new domicile in COUNTRY. The job in COUNTRY appeared to be temporary, given that PETITIONER 1 or his employer could cancel his contract at will. In addition, PETITIONER 1 continued to own a home in Utah, and his wife resided in Utah. Most of his tax and financial matters were mailed to his Utah home, not COUNTRY. In addition, he retained his Utah driver's license and was registered to vote in Utah while employed in COUNTRY. PETITIONER 1's motor vehicle was stored in Utah. It was not relocated to and registered in another jurisdiction until he and his wife sold the Utah home and moved to STATE 2 in early 2007.

The taxpayers have the burden of proof to show that PETITIONER 1 changed his domicile from Utah to COUNTRY. When the facts proffered at the Initial Hearing are looked at as a whole, the Commission finds that the evidence does not show that PETITIONER 1 had an intent to abandon Utah and establish a new domicile in COUNTRY. As a result, the Commission finds that PETITIONER 1 did not meet all of the conditions set forth in Rule 2(A)(3) to change his domicile. Accordingly, the Commission finds that PETITIONER 1 remained domiciled in Utah during 2005 and was a Utah resident individual for 2005. For these reasons, the Commission sustains the Division's assessment.

DECISION AND ORDER

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).

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Based upon the foregoing, the Commission finds that PETITIONER 1 was a Utah resident individual for the 2005 tax year and that all of his 2005 income was subject to Utah taxation. Accordingly, the Commission sustains the Division's assessment. 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 1 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.

Kerry R. Chapman
Administrative Law Judge

BY ORDER OF THE UTAH STATE 1 TAX COMMISSION.

DATED this _____ day of _____, 2009.

Pam Hendrickson
Commission Chair

R. Bruce Johnson
Commissioner

Marc B. Johnson
Commissioner

D'Arcy Dixon Pignanelli
Commissioner

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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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