

09-0957
INCOME - DOMICILE
TAX YEAR: 2005
SIGNED: 03-16-2011
COMMISSIONERS: R. JOHNSON, M. JOHNSON, M. CRAGUN
EXCUSED: D. DIXON

BEFORE THE UTAH STATE TAX COMMISSION

<p>PETITIONER,</p> <p style="padding-left: 40px;">Petitioner,</p> <p>v.</p> <p>AUDITING DIVISION OF THE UTAH STATE TAX COMMISSION,</p> <p style="padding-left: 40px;">Respondent.</p>	<p>INITIAL HEARING ORDER</p> <p>Appeal No. 09-0957</p> <p>Account No. #####-1 Tax Type: Income Tax Year: 2005</p> <p>Judge: Chapman</p>
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Presiding:
Kerry R. Chapman, Administrative Law Judge

Appearances:
For Petitioner: PETITIONER, Taxpayer
For Respondent: RESPONDENT REP. 1, from Auditing Division
RESPONDENT REP. 2, from Auditing Division

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission for an Initial Hearing pursuant to the provisions of Utah Code Ann. §59-1-502.5, on February 16, 2011. Both parties submitted post-hearing information.

PETITIONER (“Petitioner” or “taxpayer”) is appealing Auditing Division’s (the “Division”) assessment of Utah individual income tax for the 2005 tax year. On February 26, 2009, the Division issued a Notice of Deficiency and Estimated Income Tax for 2005 tax year, in which it imposed additional taxes, penalties and interest (calculated through March 28, 2009), as follows:

<u>Year</u>	<u>Tax</u>	<u>Penalties</u>	<u>Interest</u>	<u>Total</u>
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2005 \$\$\$\$\$ \$\$\$\$\$ \$\$\$\$\$ \$\$\$\$\$

The taxpayer did not file a 2005 Utah return. The Division assessed the taxpayer as a full-year Utah resident for 2005 and imposed tax on all income that the taxpayer earned in 2005, as determined by the Internal Revenue Service (“IRS”). The taxpayer admitted that he lived and worked in Utah until March 24, 2005, at which time he moved to CITY 1, STATE 1 for a new job. The taxpayer claims that he changed his domicile to STATE 1 and that he did not work in Utah in 2005 after this date. The taxpayer asks the Commission to find that he does not owe Utah tax on the 2005 income that he earned after March 24, 2005.

The Division asks the Commission to sustain its assessment in its entirety by either finding: 1) that the taxpayer remained a Utah domiciliary for all of 2005 (i.e., that the taxpayer did not change his Utah domicile when he moved to STATE 1); or 2) in case the Commission finds that the taxpayer changed his domicile to STATE 1, that the 2005 income the taxpayer earned after March 24, 2005 was Utah source income.

APPLICABLE LAW

Utah Resident Individual and Domicile.

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)(s), 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.

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

Utah Admin. Rule R865-9I-2 (“Rule 2”) provides guidance concerning “domicile” and “permanent place of abode,” 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 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.

Utah Source Income.

For purpose of determining a nonresident individual's state taxable income, UCA §59-10-117 provides, as follows in pertinent part:

(1) . . . , federal adjusted gross income derived from Utah sources shall include those items includable in federal "adjusted gross income" (as defined by Section 62 of the Internal Revenue Code) attributable to or resulting from:

....

(b) the carrying on of a business, trade, profession, or occupation in this state.

....

(2) For the purposes of Subsection (1):

....

(c) Salaries, wages, commissions, and compensation for personal services rendered outside this state shall not be considered to be derived from Utah sources.

....

Burden of Proof.

UCA §59-1-1417 (2010) 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

PETITIONER lived and worked in Utah until March 24, 2005, at which time he moved to CITY 1, STATE 1 for work. There is no question that the income he earned between January 1, 2005 and March 24, 2005 is subject to Utah taxation. Still at issue is whether the income he earned beginning March 24, 2005 and for the remainder of 2005 is subject to Utah taxation.

Section 59-10-104(1) provides that the income earned by a Utah resident individual is subject to Utah taxation. Section 59-10-103(1)(s) provides that a person is a Utah resident individual for periods during which a person is domiciled in Utah. The first issue concerns the Division's claim that PETITIONER was domiciled in Utah for the entirety of the 2005 tax year. The Division contends that PETITIONER did not have sufficient intent and did not take sufficient steps to change his Utah domicile when he moved to STATE 1 on March 24, 2005. If the Commission decides that PETITIONER remained domiciled in Utah for all of 2005, the

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Division's assessment will be sustained in its entirety because all income earned in 2005 would be subject to Utah taxation regardless of where earned.

If PETITIONER is found to have been domiciled in Utah for all of 2005, the second issue concerning Utah source income is moot, as the income is already subject to taxation. If, on the other hand, PETITIONER is found to have changed his domicile from Utah to another state, the Commission will need to address the second issue and determine whether or not the 2005 income PETITIONER earned beginning on March 24, 2005 and for the remainder of 2005 is Utah source income subject to Utah taxation.

PETITIONER was born in 1980 and grew up in Utah. He moved from Utah to CITY 1, STATE 1 on March 24, 2005 for a new job. Prior to moving to STATE 1, PETITIONER had worked for COMPANY 1 in CITY 2, Utah for four or five years. PETITIONER stated that before the move to STATE 1, he had always lived at his parents' home in CITY 2 or lived at friends' homes in Utah and that he had never owned or rented real property.

PETITIONER stated that a friend who was working at COMPANY 2 ("COMPANY 2") in CITY 1, STATE 1 helped him get a job there as well. COMPANY 2 is headquartered in Utah and has offices (called "OFFICES") in various Western states. Upon moving to STATE 1, PETITIONER worked out of the OFFICE in CITY 1. PETITIONER stated that his job with COMPANY 2 consisted of assembling and installing (X) at retail establishments through the Northwest, but never in Utah. He explained that COMPANY 2 would send a "work order" to the CITY 1 OFFICE, after which he would report to the OFFICE to get the work order and the items needed to complete the job. He explained that he would then drive to the location where the work was to be performed. Jobs could take anywhere from one hour to three days to complete. PETITIONER explained that during the period he worked for COMPANY 2, he usually spent six nights a week in hotels.

PETITIONER stated that the same friend who helped him get the job at COMPANY 2 also let him use a room in a house he was renting in CITY 1. PETITIONER explained that there was no "official" rent

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arrangement between his friend and himself, but that he “helped out” with expenses when he could. PETITIONER stated that he brought all of the personal property he owned in Utah (couch, bed, etc.) with him to STATE 1 and that he moved the personal property into his friend’s house.

PETITIONER stated that upon moving to STATE 1, he intended to work for COMPANY 2 in STATE 1 indefinitely. After moving to STATE 1, however, PETITIONER met his future wife while he was performing a job for COMPANY 2 in STATE 2. PETITIONER eventually quit his job with COMPANY 2 and moved to CITY 3, STATE 2 around Thanksgiving 2005 to live with his future wife. The PETITIONERS were married in March 2007 and moved to Utah in 2007, where they have since lived. PETITIONER stated that upon moving to STATE 1 in March 2005, he only returned to Utah twice during 2005, once for Christmas and once to attend his brother’s mission farewell.

PETITIONER stated that he never owned a motor vehicle until he moved to STATE 1 in March 2005, at which time his father gave him a truck and transferred the title to him. PETITIONER initially claimed that he registered the vehicle in STATE 1 shortly after moving there. Later in the hearing, however, PETITIONER claimed that he did not register the vehicle in STATE 1, as the registration had not run out during the seven to eight months he lived in STATE 1. Instead, he claimed that upon leaving Utah, he first registered the vehicle in STATE 2 after the registration had expired. PETITIONER stated that he insured the vehicle through COMPANY 2 while he worked for the company, as he used his truck as his work vehicle.

PETITIONER had a Utah driver’s license when he moved to STATE 1 and never obtained an STATE 1 or a STATE 2 driver’s license. PETITIONER stated that he saw doctors and dentists in STATE 1 and STATE 2 for the two-year period he lived outside of Utah. PETITIONER claimed that after moving to STATE 1, he received all mail at the OFFICE in CITY 1. PETITIONER claimed that COMPANY 2 sent his paychecks to the CITY 1 OFFICE for him to pick up. He also stated that he thought that COMPANY 2 sent his 2005 1099 Form to the OFFICE, as well, which would have occurred in early 2006 after he had moved to

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STATE 2. The Division proffered PETITIONER's 2005 1099 Form from COMPANY 2, which was mailed to his previous CITY 2, Utah address. PETITIONER claimed that COMPANY 2 would have sent this document to his parents' home in Utah because he did not have a different "permanent address" to give COMPANY 2 when he began to work for the company.

The Division claimed that the 2005 1099 documents from COMPANY 2 (and COMPANY 3, a company related to COMPANY 2) show that COMPANY 2 did not consider PETITIONER to be an employee, but instead considered him to be an independent contractor. PETITIONER stated that he had thought he was an employee of COMPANY 2 until the end of 2005, when he found out that he was an independent contractor. PETITIONER stated that COMPANY 2 gave him a "lump sum" of money to move from Utah to STATE 1.

PETITIONER proffered a log of all the mileage he incurred while completing the jobs for COMPANY 2. PETITIONER stated that that he kept the log for federal tax purposes. He calculated his mileage to jobs from the COMPANY 2 OFFICE in CITY 1, not from his friend's home in CITY 1 and not from his parents' home in Utah. The log does not appear to contain any mileage for personal trips. PETITIONER indicated that the IRS accepted the mileage he calculated from the CITY 1 OFFICE when it determined his 2005 federal tax liability. PETITIONER's mileage log appears to show that his jobs were only performed in STATE 1, STATE 2, STATE 3 and STATE 4. It also shows that he began working for COMPANY 2 in late March 2005 and continued to work for it until early September 2005.

Rule 2(A)(1) provides that "[d]omicile 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." 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.”

Two of the criteria that must be present for a person to change domicile involve a person’s intent. For domicile to change, Rule 2(3)(a),(c) requires “a specific intent to abandon the former domicile” and “the intent to remain in the new domicile permanently.” In addition, Rule 2(A)(1) provides that “[d]omicile 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” (emphasis added).

PETITIONER claimed that when he moved to STATE 1, he had no intention to move again. He stated that he would still be there had he not met his girlfriend, which prompted his move to STATE 2. 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

When the facts are looked at as a whole, they show that PETITIONER never established a new domicile in STATE 1. PETITIONER did not obtain an STATE 1 driver’s license upon moving to STATE 1. In addition, PETITIONER’s testimony concerning his vehicle registration appears to be inconsistent. Based on the evidence proffered at the Initial Hearing, it appears that PETITIONER’s truck was registered in Utah for the entire period he lived in STATE 1. In addition, PETITIONER continued to receive some mail, including a 1099 Form, at his parent’s address in Utah, admitting that he did not have a different “permanent address” to give to COMPANY 2 when he moved to STATE 1. Furthermore, PETITIONER never rented real property in

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).

STATE 1 and was “on the road” for most of the days while he was working from STATE 1. While these facts suggest that PETITIONER abandoned his Utah domicile, they do not convincingly show that he established a new domicile in STATE 1.

On the other hand, once PETITIONER moved to STATE 2, he took additional steps to establish a domicile in STATE 2 that he had not taken while in STATE 1. For example, PETITIONER registered his vehicle in STATE 2. In addition, he and his girlfriend rented an apartment and resided in it until they married and moved back to Utah. For these reasons, PETITIONER is considered to have changed his Utah domicile to STATE 2 when he moved there around Thanksgiving 2005. In conclusion, for the 2005 tax year, PETITIONER is considered to be a Utah resident individual from January 1, 2005 until Thanksgiving 2005. PETITIONER is not considered to be a Utah resident individual between Thanksgiving 2005 and December 31, 2005. Contrary to the Division’s argument, the income that PETITIONER earned while working in STATE 1 is not Utah source income pursuant to Section 59-10-117. It is subject to Utah taxation solely because PETITIONER was a Utah resident individual when he earned the income. Had PETITIONER properly filed a 2005 STATE 1 tax return and paid income tax to STATE 1, he would have been entitled to a credit against his Utah tax liability for the taxes paid to STATE 1. But he did not. For these reasons, the Division’s assessment of tax on income that PETITIONER earned prior to Thanksgiving 2005 is sustained. There is no evidence to show that any income PETITIONER may have earned in STATE 2 after Thanksgiving 2005 is Utah source income. Accordingly, any portion of the assessment relating to income that PETITIONER earned after moving to STATE 2 on Thanksgiving 2005 is overturned.

Kerry R. Chapman
Administrative Law Judge

DECISION AND ORDER

Based on the foregoing, the Commission orders the Division to revise its assessment to reflect that PETITIONER was a Utah resident individual until Thanksgiving 2005 and that he was not a Utah resident individual beginning on Thanksgiving 2005 and for the remainder of 2005. The Commission also finds that none of the income that PETITIONER earned after moving away from Utah on March 24, 2005 is Utah source income. 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 _____, 2011.

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 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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