

09-1907
AUDIT
SIGNED 07-22-2010

BEFORE THE UTAH STATE TAX COMMISSION

<p>PETITIONER,</p> <p style="text-align: center;">Petitioner,</p> <p>v.</p> <p>AUDITING DIVISION OF THE UTAH STATE TAX COMMISSION,</p> <p style="text-align: center;">Respondent.</p>	<p>INITIAL HEARING ORDER</p> <p>Appeal No. 09-1707</p> <p>Account No. #####</p> <p>Tax Type: Income Tax</p> <p>Tax Year: 2005</p> <p>Judge: Phan</p>
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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 April 26, 2010. Petitioner (the Taxpayer) is appealing an audit deficiency of Utah individual income tax for the year 2005. The Statutory Notices of Deficiency and Audit Change had been issued on April 9, 2009. The Taxpayer timely appealed the audit. The amount of the audit deficiency listed on the statutory notice is as follows:

	Tax	Penalty	Interest	Total as of Notice Date ¹
2005	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$

APPLICABLE LAW

Utah imposes an income tax on income from Utah sources of a nonresident individual in Utah Code Sec. 59-10-116(2)(2005)² as follows:

¹ Interest continues to accrue on any unpaid balance.

Except as provided in Subsection (3), a tax is imposed on a nonresident individual in an amount equal to the product of the nonresident individual: (a) an apportioned state tax; and (b) state income tax percentage.

The tax on nonresident individuals is defined further at Utah Code Sec. 59-10-117 (1) & (2)(c) (2005) as follows:

- (1) For the purposes of Section 59-10-116, 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)(c) Salaries, wages, commissions and compensation for personal services rendered outside this state shall not be considered to be derived from Utah sources.

The Tax Commission has adopted a rule that further clarifies the statutory provisions which is at Utah Admin. Rule R865-9I-7(C)(2005)

The Utah portion of a part-year resident's FAGI shall be determined as follows: 1. Income from wages, salaries, tips and other compensation earned while in a resident status and included in the total FAGI shall be included in the Utah portion of the FAGI.

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 Taxpayer had filed a Utah Individual Income Tax Return as a part year resident for the 2005 year. At the hearing the Division no longer contested that the Taxpayer had moved to the State of STATE 1 on May 16, 2005 and had in fact changed his domicile to STATE 1, so that he was no longer a resident of Utah from that date forward. It was the Division's position, however, that the income he had received as wages from COMPANY A was Utah source income and, therefore, the entire amount of that income was subject to Utah income tax. The Division based this position on the fact that the Taxpayer had received a W-2 from COMPANY A that listed all the wages as income as sourced to Utah.

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

Prior to the hearing and shortly after the appeal had been filed, the Division asserted that if the income had been earned while in STATE 1, the Taxpayer should go back to his employer and request a corrected W-2 that showed which portion had been earned for Utah and which for STATE 1. The Taxpayer had reported prior to the hearing that he had made this request of his employer and the employer refused to correct the W-2 unless the Division requested that he do so. The Division argued that it could not request that the employer make the correction and also that this was the Taxpayer's responsibility. The Taxpayer continues to work for the same employer and did not think he could do anything to change his employer's mind unless he had a letter from the Division telling the employer he needed to make the correction. The Taxpayer was able to obtain a letter from his employer that said for 2005 "All income he made was not for Utah income."

The Taxpayer had not included all of the income listed on the COMPANY A W-2 as Utah income as it was his position that he had earned a portion of that income after he had moved to STATE 1 in May 2005. In STATE 1 he worked as a manager of a music store, which was owned by the same owner as COMPANY A. His paychecks continued to be issued by COMPANY A. The Taxpayer included on his Utah part year resident return the portion of the COMPANY A income he had earned while working in Utah before he moved to STATE 1. He did not include as Utah income the portion of the income he had earned after he moved to STATE 1 in May of 2005. After the move he represents that he worked only in the STATE 1 store. The Taxpayer did provide documentation to support that he was living and domiciled in STATE 1 beginning in May 2005.

The Division did not refute that the Taxpayer had moved to STATE 1, nor that the Taxpayer had changed his domicile in May 2005. Nor did the Division provide information, other than the W-2, to challenge the Taxpayer's assertion that the Taxpayer had earned a portion of the COMPANY A income while working in STATE 1 for a music store with the same owner as COMPANY A. It was the Division's position that the W-2 was controlling and it would not consider the other evidence that the Taxpayer had provided to show he was actually working in STATE 1 after May 2005. The Division cited to no statutory provision or rule that supported its contention that what was reported on the W-2 would be controlling.

In fact upon review of the facts in this case and applicable statute and rules, there is nothing that supports the Division's position that the W-2 would be the controlling factor. The statutory provisions are clear. Utah Code Sec. 59-10-117(2)(c) provides specifically that wages for services rendered outside this state shall not be

issues.

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considered to be derived from Utah sources. Utah Admin. Rule R865-91-7(C)(2005) further clarifies that the income from wages earned while in a resident status in Utah are Utah source income. The evidence provided indicates that the Taxpayer was not in a resident status in Utah when he earned the portion of the wages that were at issue. In addition there is evidence that outweighs the W-2 that the services were rendered outside the state. Further, significantly prior to the hearing the Taxpayer had requested the Division's help to obtain from a difficult employer a corrected W-2 and the Division had placed the responsibility back on the Taxpayer. The Division had the ability to subpoena the Taxpayer's employer or other records to obtain information to refute the Taxpayer's contention that he was working in STATE 1, but the Division did not take any of these actions.

After consideration of the evidence that was submitted and the applicable law, the audit should be abated in its entirety.

Jane Phan
Administrative Law Judge

DECISION AND ORDER

Based upon the forgoing, the Commission abates the audit deficiency in its entirety 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

D'Arcy Dixon Pignanelli
Commissioner

Michael J. Cragun
Commissioner

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