

09-1930  
AUDIT  
SIGNED 05-06-2010

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BEFORE THE UTAH STATE TAX COMMISSION

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PETITIONER,  Petitioner,  v.  AUDITING DIVISION OF THE UTAH STATE TAX COMMISSION,  Respondent.	<b>INITIAL HEARING ORDER</b>  Appeal No.    09-1930  Account No.    ##### Tax Type:    Income Tax Tax Year:    2006  Judge:        Chapman
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**Presiding:**

Kerry R. Chapman, Administrative Law Judge

**Appearances:**

For Petitioner:    PETITIONER REP., Attorney and CPA  
                    PETITIONER SPOUSE, Taxpayer's Wife  
For Respondent:    RESPONDENT REP. 1, Assistant Attorney General  
                    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 Sec. 59-1-502.5, on April 20, 2010.

PETITIONER ("Petitioner" or "taxpayer") is appealing Auditing Division's (the "Division") assessment of individual income tax for the 2006 tax year. On May 7, 2009, the Division issued a Notice of Deficiency and Estimated Income Tax ("Statutory Notice") to the taxpayer, in which it imposed additional tax, a 10% penalty for failure to timely file an appeal, a 10% penalty for failure to timely pay tax, and interest (calculated through June 6, 2009), as follows:

<u>Year</u>	<u>Tax</u>	<u>Penalty</u>	<u>Interest</u>	<u>Total</u>
2006	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$

For the 2006 tax year, PETITIONER and PETITIONER SPOUSE filed a federal married joint return. In addition, PETITIONER SPOUSE filed a Utah married filing separate return on the basis that she was a Utah resident individual and that PETITIONER was a not a Utah resident individual. PETITIONER claims that he was domiciled in STATE 1 during 2006 and that the income he earned in STATE 1 was not subject to Utah taxation. The Division, however, determined that PETITIONER was a Utah domiciliary for the 2006 tax year. As a result, the Division imposed Utah tax on all income that PETITIONER earned in 2006 and gave him credit for taxes he paid to STATE 1.

PETITIONER asks the Commission to find that he was not domiciled in Utah during 2006 and to reverse the Division’s assessment. The Division asks the Commission to find that PETITIONER was domiciled in Utah in 2006 and to sustain its assessment.

APPLICABLE LAW

1. Under Utah Code Ann. §59-10-104(1)<sup>1</sup>, “a tax is imposed on the state taxable income . . . of every resident individual[.]”
2. For purposes of Utah income taxation, a “resident individual” is defined in UCA §59-10-103(1)(t), 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.
3. Utah Admin. Rule R865-9I-2 (“Rule 2”) provides guidance concerning the determination of “domicile,” as follows in pertinent part:

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1 All citations are to the 2006 version of the Utah Code and the Utah Administrative Code, unless

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.

4. Utah Admin. Rule R884-24P-52 ("Rule 52") sets forth a non-exhaustive list of factors

or objective evidence that may be determinative of domicile, as follows:

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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;

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otherwise indicated.

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.

....

5. UCA §59-1-401(13) (2009) provides that “[u]pon 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.”

6. UCA §59-1-1417 (2009) 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

At issue is whether PETITIONER was a Utah resident individual for the 2006 tax year. Section 59-10-103(1)(t)(i)(A) provides that a person is a Utah resident individual if the person is “domiciled” in Utah. If the Commission finds that PETITIONER was domiciled in Utah, and not STATE 1, during 2006, all of his income is subject to Utah taxation, regardless of whether it was earned while he was living and working in another state. However, if the Commission finds that PETITIONER was domiciled in STATE 1, not Utah, during 2006, the Division’s assessment will be reversed.

PETITIONER and his wife moved from STATE 1 to Utah in 1993 and became Utah domiciliaries. They purchased a home in CITY, Utah and continue to own that home as of the date of the hearing. PETITIONER SPOUSE explained that they had lived in STATE 1 for a number of years, but wanted to move to Utah because they believed it would be a better environment in which to raise their 10-year old daughter. Although PETITIONER SPOUSE was able to obtain a job in Utah, PETITIONER was unable to obtain a job in his field, even after completing his degree in Utah. In 1999, PETITIONER took a job with his prior employer in STATE 1 and continues to work for that employer as of the date of the hearing. PETITIONER has not looked for a job in Utah since accepting the STATE 1 job in 1999.

PETITIONER rented a one-bedroom apartment in STATE 1 upon moving there in 1999 and continues to rent the same apartment. PETITIONER himself pays the rent for the apartment in STATE 1. However, the telephone bill for the STATE 1 apartment is mailed to the couple's Utah home because PETITIONER SPOUSE almost solely handles the couple's other finances.

PETITIONER SPOUSE stated that upon her husband moving to STATE 1 in 1999, they knew he would live and work there until his retirement, which will occur in approximately 2023. She also stated that once he retires, they intend to move to STATE 2. PETITIONER, however, returns to the couple's Utah home two weekends a month and spends vacations there as well. PETITIONER estimates that he spends between 70 and 80 days a year in Utah.

PETITIONER receives two magazines at the STATE 1 apartment, specifically *Reader's Digest* and *National Geographic*. Renewal notices for the magazines were sent to the STATE 1 apartment. PETITIONER also received retirement plan statements and other work-related documents at his STATE 1 apartment in 2006. In addition, PETITIONER received his 2006 W-2 from his employer at his STATE 1 apartment. The couple's 1098 and 1099 forms were mailed to their Utah address. The taxpayers filed a 2006 joint STATE 1 return consistent with PETITIONER being a STATE 1 resident and PETITIONER SPOUSE being a Utah resident. The taxpayers have had PETITIONER REP., a Utah attorney and accountant, prepare their tax returns for more than a decade, including the 2006 tax year.

PETITIONER has his wages from the job in STATE 1 deposited directly into the couple's joint account at a BANK. In addition to their home in CITY, Utah, the PETITIONER & PETITIONER SPOUSE own rental property in Utah near UNIVERSITY. PETITIONER's medical doctors are located in STATE 1, where he has had several surgeries.

PETITIONER retained a Utah driver's license until 2008, when he obtained a STATE 1

license. As a result, PETITIONER renewed his Utah driver's license at least once while living and working in STATE 1. The only evidence of PETITIONER voting since 1998 is his voting in the Utah general election of 2008. PETITIONER registered to vote in STATE 1 in 2009. Although PETITIONER has had at least one vehicle with him in STATE 1 since 1999, he did not register any vehicle in STATE 1 until August 2006. As of the hearing date, however, PETITIONER continues to have at least one vehicle located in Utah and registered in Utah in his name only.

The Division also points out that the Commission found PETITIONER to be domiciled in Utah, not STATE 1, for the 2004 and 2005 tax years in *USTC Appeal No. 07-1180* (Initial Hearing Order June 23, 2008). The Division contends that the evidence proffered at the hearing does not show that PETITIONER changed his domicile from Utah to STATE 1 in 2006. PETITIONER, however, does not believe that the Commission had all the pertinent facts when it made its decision for the 2004 and 2005 tax years. For this reason, PETITIONER SPOUSE appeared at the hearing for this appeal to provide additional facts and information not proffered at the prior appeal.

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.”

PETITIONER rented an apartment in STATE 1 and lived there in 2006. As a result, PETITIONER meets the second of the three criteria necessary to have changed his domicile from Utah to

STATE 1. Specifically, PETITIONER established an “actual physical presence in a new domicile” pursuant to Rule 2(A)(3)(b).

The other two 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).

The taxpayers claim that PETITIONER intended to live in STATE 1 until approximately 2023 when he moved there in 1999 and that he does not intend to return to Utah when he does retire. Utah appellate courts have addressed whether a person is domiciled in Utah for state income tax purposes<sup>2</sup> and have determined that a person’s actions may be accorded greater weight in determining his or her domicile than a declaration of intent.<sup>3</sup>

A number of facts support PETITIONER’s contention that he changed his domicile from Utah to STATE 1. Specifically, he accepted a job in STATE 1 with the intent to work there for more than 20 years. So far, he has worked there for approximately 11 years. He also rented an apartment in STATE 1 and has not moved from that apartment in over a decade. He also received mail at his STATE 1 apartment and has developed professional relationships with various medical doctors in STATE 1. He has also filed tax returns

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<sup>2</sup> 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).

<sup>3</sup> 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).



consistent with his position that he is a resident of STATE 1, not Utah. Beginning in August 2006, he has registered at least one vehicle in STATE 1.

However, other facts support the Division's contention that Utah continued to be PETITIONER's permanent home to which he intended to return when absent through, at least, the 2006 tax year and that he was present in STATE 1 for a special or temporary purpose. PETITIONER's family lives in Utah, and throughout the period he has been employed in STATE 1, he returned to Utah every other weekend and on vacations. The only property he owns is in Utah. In addition, while living and working in STATE 1, he continued to avail himself of privileges reserved for Utah residents. Specifically, he continued to maintain and, even, renew his Utah driver's license until 2008. He voted in Utah in 2008. In addition, he continued to register vehicles in Utah that he had with him in STATE 1 through at least August 2006.

PETITIONER has the burden of proof in this matter. The information proffered at the Initial Hearing suggests that PETITIONER did not have a specific intent to abandon Utah and to remain in STATE 1 permanently. It appears that PETITIONER was in STATE 1 for the special purpose of work. For these reasons, PETITIONER was a Utah domiciliary for the 2006 tax year, and the Division's assessment should be sustained.

Penalties. The Division imposed 10% penalties for failure to timely file and failure to timely pay. The Commission is authorized to waive penalties for reasonable cause and often waives penalties in domicile cases, due to the difficulty in determining whether a person has changed domicile. Accordingly, reasonable cause exists to waive all penalties imposed by the Division.

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Kerry R. Chapman  
Administrative Law Judge

Appeal No. 09-1930

DECISION AND ORDER

Based upon the foregoing, the Commission finds that PETITIONER was domiciled in Utah and, as a result, was a Utah resident individual for the 2006 tax year. Accordingly, the Division's assessment should be sustained, with the exception of the penalties that were imposed. The Commission finds that reasonable cause exists to waive all penalties in this matter. 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 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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