

**09-2322**  
**AUDIT**  
**SIGNED 02-23-2010**

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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.    09-2322  Account No.   1001 Tax Type:    Individual Income Tax Years:    2006  Judge:        Chapman
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**Presiding:**

Kerry R. Chapman, Administrative Law Judge

**Appearances:**

For Petitioner:    PETITIONER, Taxpayer  
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 on January 27, 2010.

PETITIONER (the “Petitioner” or “taxpayer”) is appealing Auditing Division’s (the “Division”) assessment of additional Utah individual income tax for the 2006 tax year. On June 16, 2009, the Division issued a Notice of Deficiency and Estimated Income Tax (“Statutory Notice”) to PETITIONER, in which it imposed additional tax, a 10% failure to timely file penalty, a 10% failure to timely pay penalty and interest (calculated through July 16, 2009), as follows:

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

For the 2006 tax year, PETITIONER filed a Utah married filing separate return on the basis that she was a Utah resident individual and that her husband, PETITIONER SPOUSE, was a not a Utah resident individual. PETITIONER asserts that her husband was domiciled in STATE during 2006 and that his income was not subject to Utah taxation. The Division, however, determined that both PETITIONER SPOUSE and PETITIONER (collectively referred to as the “PETITIONERS” or the “taxpayers”) were Utah domiciliaries for the entirety of 2006. As a result, the Division changed PETITIONER’s married filing separate return to a married joint return and added PETITIONER SPOUSE’s income to the return. The PETITIONERS ask the Commission to find that PETITIONER SPOUSE was not domiciled in Utah during 2006 and to reverse the Division’s audit. The Division asks the Commission to find that PETITIONER SPOUSE was domiciled in Utah in 2006 and to sustain its audit.

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.

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<sup>1</sup> All citations are to the 2006 version of the Utah Code and the Utah Administrative Code, unless otherwise indicated.

3. Utah Admin. Rule R865-9I-2 (“Rule 2”) provides guidance concerning the determination of “domicile,” 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.

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;
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

There is no dispute that PETITIONER was a full-year Utah resident individual for the 2006 tax year. At issue is whether PETITIONER SPOUSE was a Utah resident individual in 2006. Section 59-10-103(1)(t) provides that a person is a Utah resident individual for those periods during which a person is “domiciled” in Utah. If the Commission finds that PETITIONER SPOUSE was domiciled in Utah instead of STATE 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 SPOUSE was domiciled in STATE instead of Utah during 2006, the Division’s assessment will be reversed.

There is no dispute that PETITIONER SPOUSE was domiciled in Utah prior to October 2005, when he started working as an independent contractor for a company in CITY 1, STATE. There is also no dispute that he was also domiciled in Utah after March 2007, when he started working as an independent contractor with a company in CITY 2, Utah. At issue is whether he changed his domicile to STATE during the interim and was a STATE domiciliary for the 2006 tax year.

PETITIONER SPOUSE was raised in Utah. At some time prior to 2003, the taxpayers met in CITY 3, STATE 2, where PETITIONER SPOUSE was stationed in the military. The PETITIONERS moved to CITY 2, Utah in 2003, where they lived by themselves in a home owned by PETITIONER SPOUSE's parents (the "CITY 2 home"). Although they did not pay rent, they paid the utilities, maintenance and taxes associated with the home.

PETITIONER SPOUSE worked at a motor vehicle dealership in CITY 2 upon moving there in 2003. Around October 2005, the PETITIONERS purchased a semi-truck and started a sole proprietorship trucking company known as C M Trucking, at which time PETITIONER SPOUSE started working as an independent contractor with G&J Hot Oiling ("G&J") in CITY 1, STATE. PETITIONER SPOUSE used the semi-truck to haul water to various oil drilling sites operated by G&J. PETITIONER SPOUSE worked six or seven days per week for G&J until March 2007, when he stopped working for G&J and starting hauling materials for another company located in CITY 2. In March 2007, he moved back into the CITY 2 home.

From 2004 through the present, PETITIONER has worked for the CITY 4 Municipal Corporation in CITY 4, Utah. She continued to live in the CITY 2 home during the period that her husband worked in STATE. However, she would visit PETITIONER SPOUSE in STATE nearly every weekend, as he worked most weekends and she did not. PETITIONER estimates that her husband spent between 20 and 30 days in Utah in 2006.

From October 2005 through April 2006, PETITIONER SPOUSE lived in the sleeper compartment of his semi-truck, which he parked on G&J's CITY 1 property when he wasn't working. PETITIONER explains that her husband would either rent a hotel room or use truck stop facilities to shower. She also states that they would rent a hotel room on weekends when she came to visit her husband.

On April 13, 2006, the taxpayers purchased a previously-owned mobile home that was already situated in a mobile home park in CITY 1. The taxpayers paid approximately \$\$\$\$\$ for the mobile home and

Appeal No. 09-2322

paid \$\$\$\$\$ per month to rent the lot on which it was located. The taxpayers also paid the gas and electric utilities associated with the mobile home. PETITIONER indicated that they bought the mobile home “through” their trucking company. The taxpayers sold the mobile home when PETITIONER SPOUSE moved back to Utah in March 2007.

The mobile home was 1,216 square feet in size (16 feet by 76 feet) and was unfurnished at the time of purchase. The taxpayers brought some furnishings from their CITY 2 home to the mobile home and bought second-hand furniture in CITY 1 to furnish the mobile home. The taxpayers made a number of improvements to the mobile home during the time they owned it, including repairing the skirting and fences, cleaning debris from past owners and planting landscaping. They also built a new deck and stairs to the front porch. In December 2006, the taxpayers prepaid the rent for the lot for all 12 months of 2007, even though they could have paid the rent on a month-to-month basis. The taxpayers did not obtain insurance on the mobile home and its contents during the time they owned it.

PETITIONER became pregnant in 2006, and the taxpayers had their first child in March 2007, near the time PETITIONER SPOUSE moved back to Utah. PETITIONER takes care of most of the taxpayers’ financial matters, including those associated with their trucking company. As a result, most of the couple’s mail was delivered to their CITY 2 address during the time PETITIONER SPOUSE worked in STATE, even though they had a post office box in CITY 1. The couple’s CPA, who prepared all returns due during the audit period, was located in Utah. All of the taxpayers’ bank accounts were in CITY 2. PETITIONER SPOUSE’S 2006 Form 1099-MISC from G&J was mailed to the taxpayers’ CITY 2 address in early 2007 while PETITIONER SPOUSE was still working and living in STATE.

The PETITIONERS purchased a vacant residential lot in CITY 2 in 2004 for \$\$\$\$\$. In 2008, they built a home on the lot. PETITIONER proffered that they never listed the lot for sale after purchasing it. She stated, however, that the “CITY 2 community” knew that they might sell the lot because PETITIONER

SPOUSE was living and working in STATE. She stated that they accepted an unsolicited offer to sell the lot, but explained that the deal fell through. PETITIONER did not remember when they contracted to sell the lot and proffered no documents concerning the failed sale.

From 2003 through 2009, PETITIONER SPOUSE has bought at least one Utah resident hunting or fishing license. On June 16, 2006, during the audit period, PETITIONER SPOUSE bought a Utah resident hunting license in CITY 4, Utah. PETITIONER explained that she and her husband thought they were both Utah residents until early 2007, when they discussed their 2006 tax filings with their CPA. She states at this time, their CPA informed them that PETITIONER SPOUSE was a resident of STATE, not Utah, during 2006 and that his 2006 income was not subject to Utah taxation.

The semi-truck used in the taxpayers' trucking company was registered in STATE during the time PETITIONER SPOUSE worked there. They also registered in STATE a 2007 Dodge pick-up truck that PETITIONER SPOUSE purchased in December 2006 from a dealership in CITY 5, Utah. PETITIONER states that he used this vehicle as his personal vehicle in STATE. It is noted that the taxpayers depreciated the 2007 Dodge truck on their 2006 federal return as a business expense.

The taxpayers also owned and kept a number of other vehicles in Utah during the audit period, all of which were registered in Utah. The taxpayers registered a 2004 Honda and two Toyotas in Utah, as well as two snowmobiles and a trailer to haul the snowmobiles. PETITIONER stated that she used the Honda and one of the Toyotas as her personal vehicles. Except for the semi-trailer, all of the taxpayers' vehicles were insured through an insurance company in CITY 2.

PETITIONER SPOUSE maintained a Utah driver's license throughout the period he lived and worked in STATE. In fact, he was issued a Utah commercial driver's license on September 21, 2005, near the time the taxpayers purchased the semi-truck and PETITIONER SPOUSE agreed to work for the company in



STATE. The taxpayers did not proffer that PETITIONER SPOUSE was looking for work in Utah when he obtained the commercial license.

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 SPOUSE started working in STATE in October 2005 and continued to work there until March 2007, when he moved back to Utah. He worked in STATE six or seven days of most weeks and was in Utah for less than 30 days in 2006. Based on these facts, PETITIONER SPOUSE meets the second of the three criteria necessary to change his domicile from Utah to STATE. Specifically, PETITIONER SPOUSE 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 until their child was born in March 2007, PETITIONER SPOUSE had intended to remain in STATE indefinitely. On the other hand, PETITIONER stated at the Initial Hearing that her husband believed that he was still a Utah resident when he purchased a Utah hunting license in June 2006 and that they did not know he was a STATE resident until they discussed their 2006 taxes with their CPA

in early 2007. 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>

The taxpayers claim their PETITIONER SPOUSE's intent to remain permanently in STATE is demonstrated by the fact that they bought a mobile home in STATE and pre-paid their mobile home lot rent for all of 2007, as well as the fact that they registered in STATE the Dodge truck they purchased in December 2006. Although PETITIONER gave no details, she also stated that she searched for a job in STATE.

These facts, however, are outweighed by other statements and facts. PETITIONER stated that her husband thought he was a Utah resident until early 2007. In addition, the taxpayers did not list the lot they owned in CITY 2 for sale during the period PETITIONER SPOUSE worked in STATE. Such an action may have suggested that PETITIONER SPOUSE's move to STATE was intended to be more of a permanent move than a temporary one. Furthermore, PETITIONER SPOUSE obtained a Utah commercial driver's license around the time he accepted the position in STATE and maintained his Utah license during the entire period he lived and worked in STATE. The taxpayers also kept their recreational vehicles in Utah, not STATE. In addition, PETITIONER SPOUSE worked six or seven days a week in STATE. If he worked six days for half of the weeks in 2006 and seven days for the remaining 26 weeks of 2006, he would have had 26 days off from work during 2006. The taxpayers indicate that PETITIONER SPOUSE was in Utah for 20 to 30 days in 2006. As a result, it appears that he spent most of his days off from work not in STATE, but in Utah.

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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).

No evidence was proffered to show that PETITIONER SPOUSE purchased STATE resident hunting licenses. However, it is undisputed that he purchased a Utah resident hunting license in 2006. PETITIONER SPOUSE did not open bank accounts in STATE and had very little of his mail delivered to STATE. It was explained that PETITIONER took care of the taxpayers' business and financial matters and that all mail was delivered to her in CITY 2. Nevertheless, few contacts were established with STATE that would have shown PETITIONER SPOUSE's intent for his move to STATE to be more of a permanent move instead of a temporary one. Given the statements and facts proffered at the Initial Hearing, it does not appear that PETITIONER SPOUSE had the requisite intent to abandon his Utah domicile and to remain in STATE permanently, as required in Rule 2(3) to change domicile. For these reasons, the Division's assessment should be sustained, with the following exception.

The Division imposed 10% penalties for failure to timely file and failure to timely pay. Given that PETITIONER timely filed a 2006 return, it is questionable whether the penalties were properly imposed. Regardless, however, 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. In addition, the Division stated that it had no objection to the Commission waiving penalties in this case. Accordingly, reasonable cause exists to waive all penalties imposed by the Division. The Commission does not waive interest unless it arose because of Tax Commission error, which is not present in this case.

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Kerry R. Chapman  
Administrative Law Judge

DECISION AND ORDER

Based upon the foregoing, the Commission finds that PETITIONER SPOUSE was domiciled in Utah for all of 2006 and, as a result, was a Utah resident individual for the entirety of the 2006 tax year.

Appeal No. 09-2322

Accordingly, the Commission sustains the Division's assessment with the exception of the penalties it imposed. The Commission waives the 10% penalty for failure to timely file and the 10% penalty for failure to timely pay. 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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