09-2723
AUDIT-INCOME TAX
SIGNED 04-13-2010

BEFORE THE UTAH STATE TAX COMMISSION

PETITIONER 1 & PETITIONER 2, Petitioners, v. AUDITING DIVISION OF THE UTAH STATE TAX COMMISSION, Respondent.	**INITIAL HEARING ORDER** Appeal No. 09-2723 Account No. ##### Tax Type: Individual Income Tax Years: 2004 Judge: Chapman

Presiding:
Kerry R. Chapman, Administrative Law Judge

Appearances:

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

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission for an Initial Hearing on March 31, 2010.

PETITIONER 1 & PETITIONER 2 ("Petitioners" or "taxpayers") are appealing Auditing Division's (the "Division") assessment of additional individual income tax for the 2004 tax year. On August 19, 2009, the Division issued a Notice of Deficiency and Estimated Income Tax ("Statutory Notice") to the taxpayers, in which it imposed additional tax, 10% penalties for failure to timely file and failure to timely pay, and interest (calculated through September 18, 2009), as follows:

Year	Tax	Penalties	Interest	Total
2004	P $$$$$	$$$$$	$$$$$	$$$$$

The taxpayers lived and worked in the State of STATE 1 from January 1, 2004 through October 30, 2004, at which time they moved back to their home in CITY 1, Utah. The taxpayers did not file a 2004 Utah return because they earned most of their 2004 income while living and working in STATE 1 and did not think they would have any Utah tax liability.

The Division, however, has determined that the taxpayers were domiciled in Utah for all of 2004, including the portion during which they lived and worked in STATE 1. As a result, the Division assessed the taxpayers as full-year Utah resident individuals for 2004. The Division asks the Commission to find that the taxpayers were domiciled in Utah for all of 2004 and to sustain its assessment.

The taxpayers ask the Commission to find that they were not domiciled in Utah from January 1, 2004 through October 30, 2004, which would result in the assessment being reversed. In the alternative, if it is determined that the taxpayers were domiciled in Utah for the entirety of 2004, they assert that they would be entitled to deduct work-related and moving expenses associated with the move to STATE 1 from their 2004 federal adjusted gross income ("FAGI"). This reduction to FAGI would reduce the Division's assessment.

APPLICABLE LAW

1. Under Utah Code Ann.§59-10-104(1)[1], "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)(q), 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

1 All citations are to the 2004 versions of the Utah Code and the Utah Administrative Code, unless otherwise indicated.

> (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 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 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(E) ("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.

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
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> (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

First, it will be determined whether the taxpayers were domiciled in Utah between January 1, 2004 and October 30, 2004, when they were living and working in STATE 1. If it is determined that they were domiciled in STATE 1, and not Utah, during this period, the Division's assessment will be reversed and the matter is resolved. On the other hand, if it is determined that the taxpayers remained domiciled in Utah during this period, all income that the taxpayers earned during this period is subject to Utah taxation, regardless of whether it was earned in another state. In the latter circumstance only, it must also be determined whether the taxpayers' 2004 FAGI should be adjusted to account for the work-related and moving expenses claimed by the taxpayers. If these expenses are deducted from FAGI, the amount of the Division's assessment would be reduced.

Domicile. Section 59-10-103(1)(q)(A) provides that a person is a Utah resident individual if that person is domiciled in Utah. At issue is whether the taxpayers were domiciled in Utah for the entirety of 2004, as the Division claims; or whether the taxpayers were domiciled in STATE 1 from January 1, 2004 through October 30, 2004, as the taxpayers claim.

The taxpayers had lived and worked in the Salt Lake City area for a number of years until PETITIONER 1 retired in November 2000 from his job as a systems engineer with the COMPANY 1 ("COMPANY 1"). The taxpayers sold their Salt Lake City home at the time of PETITIONER 1's retirement from the COMPANY 1. From November 2000 through June 2001, the taxpayers lived in a "5th Wheel" motor home, mainly in STATE 2 and STATE 3.

In June 2001, the taxpayers purchased a home in CITY 1, Utah ("CITY 1 home"). After the events of September 11, 2001, PETITIONER 1 accepted a position as an instructor with the COMPANY 2 ("COMPANY 2"). PETITIONER 1 continued to live in the taxpayers' CITY 1 home while performing his duties for COMPANY 2. In 2003, however, PETITIONER 1 accepted another job with COMPANY 3 (" ") in CITY 2, STATE 1 to assist with the installation of new equipment in (X) centers throughout the United States. The taxpayers moved to CITY 2, STATE 1 on October 7, 2003 and remained there until October 30, 2004, when they moved back to their CITY 1 home.

The taxpayers did not sell their CITY 1 home when they moved to STATE 1. In STATE 1, the taxpayers rented an apartment, signing a one-year lease. Although the taxpayers took some furnishings from Utah to STATE 1, they rented much of the furniture for the STATE 1 apartment. While living in STATE 1, PETITIONER 1, who has asthma, experienced health problems that made them decide to move back to CITY 1 in October 2004. PETITIONER 1 stated that they initially thought that they might be in STATE 1 for five years before returning to their home in CITY 1, where they continued to have the intention to retire. However, his contract with COMPANY 3 was an "at will" contract that either party could end at any time, which enabled the taxpayers to return to CITY 1 after one year.

The taxpayers indicated that they chose CITY 1 to retire in because it is located "in the middle" of the locations in Utah and STATE 2 where members of their family live. Not only did the taxpayers maintain their CITY 1 home during the period they lived in STATE 1, but they also retained their Utah bank

account at a CITY 3, Utah credit union. PETITIONER 1's paycheck from his job in STATE 1 was directly deposited into this account while the taxpayers lived in STATE 1. The taxpayers did not open any accounts in STATE 1.

Both taxpayers were registered to vote in Utah during the audit period, but do not appear to have voted in Utah in 2004 until November 2004, after they moved back from STATE 1. Both taxpayers also retained their Utah driver's licenses while living and working in STATE 1. Furthermore, the taxpayers took their two motor vehicles from CITY 1 to STATE 1 when they moved there on October 7, 2003. The taxpayers never registered the vehicles in STATE 1. The taxpayers lived in STATE 1 for more than a year. Even though the registration for both vehicles would have expired during the 12½ months they lived in STATE 1, the taxpayers reregistered the vehicles in Utah, not in STATE 1.

While living in STATE 1, the taxpayers attended CHURCH in CITY 4, STATE 1. In addition, the taxpayers retained the services not only of a dentist, but also several medical doctors in STATE 1. PETITIONER 1 was also hospitalized in STATE 1 at least once during the time the taxpayers lived there. For the audit period at issue, however, the taxpayers reported that their "family doctor" was located in CITY 5, Utah.

The taxpayers contend that they had heard that a person was considered to have changed domicile if he or she had moved away for more than 12 months. If this is correct, the taxpayers contend that they changed their domicile from Utah to STATE 1 because they lived in STATE 1 for more than 12½ months. There is no Utah statute or rule that provides that a person's domicile is changed after being away from Utah for at least 12 months. On the contrary, a person who has lived in another state or country for years may, depending on the circumstances, have remained domiciled in Utah during the years he or she is away from Utah. The taxpayers' specific circumstances must be examined to determine whether they changed their domicile from Utah to STATE 1.

There is no question that the taxpayers were domiciled in Utah until they moved to STATE 1 on October 7, 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 the taxpayers rented an apartment in STATE 1 once they moved there in October 2003. Accordingly, the taxpayers established a physical presence in STATE 1 and satisfy the second condition of Rule 2(A)(3). However, further analysis is needed to determine if the taxpayers met the other two conditions that would be necessary for them to have changed their Utah domicile to STATE 1.

Although the taxpayers assert that they intended to reside in STATE 1 for up to five years when they moved there in October 2003, they never asserted that they intended STATE 1 to be their permanent home. Instead, they stated that they always intended on returning to their home in Utah at some point. The taxpayers' stated intent,, however, is only one factor to consider in deciding whether they changed their domicile from Utah to STATE 1. Utah appellate courts have addressed whether a person is domiciled in Utah for state income tax purposes [2] 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] Accordingly, the Commission must also look at the taxpayers' actions to determine whether the intent required by Rule 2(A)(3) exists.

The taxpayers lived and worked in STATE 1 during the audit period. They also saw doctors and attended church in STATE 1. However, most of the other factors indicate that the taxpayers were in STATE 1 for a temporary purpose, specifically for a job that PETITIONER 1 had taken, and that they had not

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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).

abandoned Utah as their permanent domicile. The taxpayers kept their CITY 1 home and stated that it was always their intent to return to it. They did not purchase real estate in STATE 1. Instead, they rented an apartment in STATE 1, as well as many of the furnishings of the apartment. The taxpayers never obtained STATE 1 driver's licenses or registered to vote in STATE 1. It also appears that the taxpayers reregistered their two vehicles in Utah during the period they lived and worked in STATE 1. The taxpayers did not open any accounts in STATE 1. PETITIONER 1's paycheck from his employment in STATE 1 was directly deposited into a bank account they had had for many years in CITY 3, Utah. The taxpayers also indicated that they kept their "family doctor" in CITY 5, Utah during the period they lived and worked in STATE 1.

The taxpayers have the burden of proof to show that they changed their domicile from Utah to STATE 1. When the facts proffered at the Initial Hearing are looked at as a whole, they do not show that the taxpayers abandoned their Utah domicile and established a new domicile in STATE 1. Accordingly, the taxpayers are found to be Utah domiciliaries for the entirety of 2004.

Work-Related and Moving Expenses. In case the taxpayers were determined to be Utah domiciliaries for the entirety of 2004, they submitted an amended 2004 federal return to the Division to show the work-related and moving expenses that they should have deducted from their 2004 FAGI. The taxpayers explained that they did not take these deductions originally because they thought they had changed their domicile to STATE 1 and would not qualify for the deductions. The taxpayers stated that they did not file the amended 2004 federal return with the Internal Revenue Service ("IRS") because the statute of limitations to file an amended 2004 federal return had expired by the time they received the Division's Statutory Notice in August 2009.

In a number of cases where the IRS will no longer accept and review the proposed changes on an amended federal return, the Commission has determined whether the taxpayer's proposed changes should be accepted for state tax purposes, even though it may result in different amounts of FAGI being used for

federal and state tax purposes.[4] In this case, it appears that the taxpayers may be entitled to additional deductions that are not reflected in the FAGI recognized by the IRS. To the extent the Division can verify that the taxpayers are entitled to the deductions claimed on the amended federal return, the Division should allow the deductions for state tax purposes.

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. The Commission does not waive interest unless it arose because of Tax Commission error, which is not present in this case.

_____
Kerry R. Chapman
Administrative Law Judge

DECISION AND ORDER

Based upon the foregoing, the Commission finds that the taxpayers were domiciled in Utah and, as a result, were Utah resident individuals for the entirety of the 2004 tax year. However, to the extent the Division can verify that the taxpayers are entitled to the additional deductions they claim on their amended federal return, the deductions should be recognized for state tax purposes. The Commission also finds that the reasonable cause exists to waive all penalties in this matter. The Division is ordered to adjust its assessment to reflect these rulings. 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

4 *See USTC Appeal No. 03-0586* (Initial Hearing Order May 24, 2004); *USTC Appeal No. 03-0510* (Initial Hearing Order Jan. 1, 2005); *USTC Appeal No. 06-1408* (Initial Hearing Order Nov. 5, 2007).

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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