

09-2936
INCOME TAX - DOMICILE
TAX YEARS: 2003-2005
SIGNED: 01-06-2011

BEFORE THE UTAH STATE TAX COMMISSION

PETITIONER, Petitioner, v. AUDITING DIVISION OF THE UTAH STATE TAX COMMISSION, Respondent.	INITIAL HEARING ORDER Appeal No. 09-2936 Account No. ##### Tax Type: Income Tax Tax Years: 2003-2005 Judge: Phan
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Presiding:
Jane Phan, Administrative Law Judge

Appearances:
For Petitioner: PETITIONER
For Respondent: RESONDENT REP. 1, Assistant Attorney General
 RESONDENT 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 September 28, 2010. Petitioner (the Taxpayer) is appealing an audit deficiency of Utah individual income tax for the years 2003 through 2005. The Statutory Notices of Deficiency and Audit Change had been issued on September 15, 2009. The Taxpayer timely appealed the audit. The amounts of the audit deficiencies listed on the statutory notices at issue are as follows:

	Tax	Penalty	Interest	Total as of Notice Date ¹
2003	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$
2004	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$
2005	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$

APPLICABLE LAW

1. Interest continues to accrue on the unpaid balance.

Utah imposes income tax on individuals who are residents of the state, in Utah Code Sec. 59-10-104 (2002)² as follows:

...a tax is imposed on the state taxable income, as defined in Section 59-10-112, of every resident individual...

Resident individual is defined in Utah Code Sec. 59-10-103(1)(k) as follows:

(k) "Resident individual" means:

- (i) an individual who is domiciled in this state for any period of time during the taxable year, but only for the duration of such period; or
- (ii) an individual who is not domiciled in this state but maintains a permanent place of abode in this state and spends in the aggregate 183 or more days of the taxable year in this state. For purposes of this Subsection (1)(k)(ii), a fraction of a calendar day shall be counted as a whole day.

"Domicile" is defined at Utah Administrative Rule R865-9I-2(A), which provides:

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.

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 issues.

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

Respondent (the Division) based its audit on the assertion that the Taxpayer was a resident of Utah for tax purposes during all three years at issue. The Taxpayer had not filed resident Utah Individual Income Tax Returns and maintains that she was a resident of STATE 1 during 2003 through 2005. The issue in this appeal is whether the Taxpayer was a "resident individual" in the State of Utah for the purposes of Utah Code Sec. 59-10-103(1)(k) during the audit years. From the information presented the Taxpayer did not spend in the aggregate more than 183 days per year in Utah during the period in question. A resident individual, in the alternative, is one who is "domiciled" in the State of Utah.

The question of whether one establishes or maintains a domicile in Utah is a question of fact. The Commission has considered this issue in numerous appeals and whether someone is a "resident individual" for state tax purposes has been addressed by the appellate courts in Utah.³ As discussed by the courts in considering this issue, the fact finder may accord the party's activities greater weight than his or her declaration of intent.⁴ Once domicile has been established in Utah three things must be shown to establish a new domicile: 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. See Utah Admin. Rule R865-9I-2(A).

From the information provided by the parties at the hearing the Taxpayer did not abandon her Utah domicile and did not demonstrate the actual physical presence in a new domicile or the intent to remain permanently in the new domicile. The Taxpayer had been a resident of Utah. She resided in Utah at a condominium in CITY 3 she had purchased with her late husband from 1997 through 2000. In 2000 she

³ The issue of domicile for Utah individual income tax purposes has been considered by the Utah Supreme Court and the Court of Appeals in the following cases: *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).

⁴ See *Clements v. Utah State Tax Comm'n* 893 P.2d 1078 (Ct. App. 1995); and *Allen v. Greyhound Lines, Inc.*,

remarried and moved to CITY 1 with her new husband SPOUSE. She states that she let her daughter and grandchildren reside at the CITY 3 condo, as her daughter was a single mom with small children at that time. The Taxpayer has two other children who were also adults during the audit period and maintained their own residences.

She stated that she separated from SPOUSE in late 2002 and then moved in with her mother in CITY 2 or a friend in CITY 3 through March 2003. During this time she worked part-time for COMPANY 1. After March she lived with a friend in a motor home for the rest of that year. They stayed for three months in an RV Park in CITY 4, STATE 1, then July in CITY 5, STATE 1. They traveled across the country and in August and September they stayed in an RV Park in STATE 2 near where on the Taxpayers' adult children resided. They returned to STATE 1 where they spent the rest of the year at a National Park near LAKE.

In 2004 again the Taxpayer spent January through March in an RV Park in CITY 4, STATE 1. April and May she spent in the RV on a friend's property in STATE 3. She was in STATE 3 and registered a vehicle there during this time. She stayed with her mother in Utah during June and July and during this time worked some for the COMPANY 2. After that she traveled in the RV to STATE 2 where she stayed at an RV park through part of September. In September she returned to an RV park in STATE 1 for the rest of the year. She says that she did go in once to the Driver License Office in STATE 1 to obtain a license there but did not have the paperwork that was needed at that time and did not go back. She remained at the same RV Park from January through March 2005, moved to one in STATE 4 in April, back to STATE 1 in May and then back to Utah where she stayed with her mother June through part of August. She stated that her mother was needing some help at this time as she was quite elderly. While staying at her mother's she again worked part time for the COMPANY 2. She also states that her daughter had moved out of her CITY 3 condominium prior to this and then there had been two different tenants. So in 2005 the CITY 3 condominium was empty and she spent time fixing it up. In August and September she stayed at an RV Park in CITY 5 STATE 1, September through December she spent in CITY 6.

In 2003 the Taxpayer had received \$\$\$\$\$ in some wage income while she was working part-time at COMPANY 1 in Utah during the first three months of that year. There had been \$\$\$\$\$ in withholding for that year, which the Division gave credit for in the audit. In 2004 and 2005 she had received a small amount of nonemployee compensation for her part time work with the COMPANY 2, \$\$\$\$\$ and \$\$\$\$\$ respectively

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per year. During all of these years the Taxpayer's primary source of income was retirement and surviving spouse benefits from her late husband.

Eventually, after the audit period, in 2009, the Taxpayer obtained a STATE 1 driver license and registered to vote in that state. In 2010 she purchased a residence in STATE 1 where she continues to reside. She sold the CITY 3 condominium in 2010. She states that although she is still married to SPOUSE they have continued to be separated all this time.

Weighing the evidence, the factors indicate that the Taxpayer never actually abandoned her Utah domicile, or established one in STATE 1 during 2003 through 2005. She kept her Utah Drivers License during that period of time; all her mail was sent to the CITY 1 residence where SPOUSE continued to reside, including her financial and yearend tax documents. She explained that although they were separated they were friends and he would collect and forward the mail to her. She used the CITY 1 Address on her federal tax returns, even though she filed separately for 2004 and 2005. Her health insurance was based in Utah, through SPOUSE's employer. Any work done during the audit years was in Utah. The only residence that she owned was the condominium in CITY 3. She maintains that during 2003 through 2005 the utilities for the condominium were under her daughter's name and then the subsequent renters, but she did not have utilities in her name for a residence in STATE 1. Although it was not disputed that the Taxpayer spent much of each year in STATE 1 during the audit period, the facts do not support that the Taxpayer established a new domicile in STATE 1 with the intent to remain there permanently. She did not establish any type of permanent place of abode. Her contacts were all transitory. She did not have a mailing address in that state, obtain a driver license, nor register to vote.

Failure to file and failure to pay penalties were assessed with the audit for each of the years at issue pursuant to Utah Code Sec. 59-1-401. The Commission may waive penalties if reasonable cause has been shown. In this case the Taxpayer stated she did not file because she thought she was no longer a resident of Utah. However, for each of the years she received Utah source income. Because there was a perceived change of filing status on the part of the Taxpayer in 2003 from resident to nonresident the Commission waives the penalty assessed for that year on that basis. However, sufficient cause has not been shown for waiver of the penalties for 2004 and 2005.

Jane Phan
Administrative Law Judge

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DECISION AND ORDER

Based upon the information presented at the hearing, the Commission waives the penalties assessed for tax year 2003. The Commission sustains the audit deficiency of tax and interest for 2003. The Commission sustains the audit deficiency as to tax, penalties and interest for both tax years 2004 and 2005. 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, failure to pay the balance due as determined by this order within thirty days of the date hereon may result in a late payment penalty. Petitioner may contact Taxpayer Services at (801) 297-7703 to make payment arrangements.
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