

09-3189  
AUDIT  
SIGNED 12-30-2010

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BEFORE THE UTAH STATE TAX COMMISSION

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PETITIONER 1 & PETITIONER 2,

Petitioners,

v.

AUDITING DIVISION OF THE  
UTAH STATE TAX COMMISSION,

Respondent.

**INITIAL HEARING ORDER**

Appeal No. 09-3189

Account No. #####

Tax Type: Individual Income

Tax Years: 2005 & 2006

Judge: Chapman

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**Presiding:**

Kerry R. Chapman, Administrative Law Judge

**Appearances:**

For Petitioner: PETITIONER 1, 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 November 8, 2010.

PETITIONER 1 & PETITIONER 2 (the "Petitioners" or "taxpayers") are appealing Auditing Division's (the "Division") assessment of additional Utah individual income tax. On September 23, 2009, the Division issued Notices of Deficiency and Audit Change ("Statutory Notices") to the taxpayers for the 2005 and 2006 tax years, in which it imposed additional tax and interest (calculated through October 23, 2009), as follows:

<u>Year</u>	<u>Tax</u>	<u>Penalties</u>	<u>Interest</u>	<u>Total</u>
2005	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$
2006	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$

The taxpayers agree that they owe the amounts that the Division imposed in its 2005

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assessment. Accordingly, the Division's 2005 assessment will be sustained.

For the 2006 tax year, the taxpayers filed a part-year resident Utah return on which they reported that PETITIONER 1 moved from Utah to STATE 1 on DATE. PETITIONER 2 has remained domiciled in Utah since her husband moved to STATE 1. The Division, however, determined that both taxpayers were Utah domiciliaries for the entirety of 2006. As a result, the Division changed the taxpayer's 2006 part-year return to a full-year return. The taxpayers ask the Commission to find that PETITIONER 1 was not domiciled in Utah after DATE and to reverse that portion of the Division's 2006 assessment concerning his domicile. The Division asks the Commission to find that both taxpayers were domiciled in Utah for the entirety of 2006 and to sustain its 2006 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:

A. Domicile.

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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.

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:

....

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 §59-1-1417 (2010) 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 deter( X ) 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 1 changed his domicile from Utah to STATE 1 on DATE, as the taxpayers claim, or whether PETITIONER 1 remained domiciled in Utah for the entirety of 2006, as the Division claims. Section 59-10-103(1)(t)(i)(A) 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 1 was domiciled in Utah instead of STATE 1 during all of 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 1 was domiciled in STATE 1 instead of Utah after DATE, then that portion of the Division’s 2006 assessment concerning PETITIONER 1’s domicile will be reversed.

Prior to 2006, PETITIONER 1 had worked in Utah for a number of years for COMPANY 1. (“COMPANY 1”), a ( X ) company with offices in Utah. PETITIONER 1 explains that in 2005, COMPANY 1 offered him a job in CITY 1, STATE 1 to be its ( X ) manager, which involves taking care of the legal obligations of the company’s ( X ) transactions. Initially, PETITIONER 1 was to move to CITY 1 and begin the job in October 2005. However, around this time, COMPANY 2 (“COMPANY 2”) began the process of purchasing COMPANY 1. PETITIONER 1 was asked to remain in Utah and work at the Utah offices until DATE, when he moved to CITY 1 for the position. As of the hearing date, PETITIONER 1 continues to live in CITY 1, STATE 1 and work out of the CITY 1 office.

Upon moving to CITY 1 on DATE, PETITIONER 1 rented a one-bedroom apartment in CITY 1 on a one-year lease, an apartment that he continues to rent to this day. His utilities for the CITY 1 apartment are sent to his CITY 1 address. PETITIONER 1 and his wife continue to own the home that they have in Utah, a 2,000 square- foot triplex that was built in the 1980s, where PETITIONER 2 continues to

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reside. The taxpayers also own property in STATE 2, where they plan to retire in the future. Several times a month, either PETITIONER 1 will visit his wife at the Utah home for a day or two or PETITIONER 2 will visit her husband at the CITY 1 apartment for a weekend. The taxpayers usually spend their vacations in Germany, where their only child lives.

PETITIONER 1 currently has a doctor and a dentist in STATE 1. Prior to moving to STATE 1, PETITIONER 1 had a BANK account, which he kept. Statements for the bank account are sent to the Utah home. In 2007, the taxpayers filed 2006 tax returns, on which they used the Utah address. PETITIONER 1's work documents, including W-2 Forms, are sent to the Utah address.

When PETITIONER 1 moved to STATE 1, he took a personal vehicle with him that he used for work and personal purposes. The vehicle was registered in Utah, and he did not register it in STATE 1. Since January 2007, COMPANY 2 has provided PETITIONER 1 a work vehicle that he uses in STATE 1, and he has not kept a personal vehicle in STATE 1. The taxpayers maintain two Utah-registered vehicles at their home in Utah.

PETITIONER 1 maintained his Utah driver's license until he obtained a STATE 1 driver's license somewhere between December 1 and December 12, 2006, at which time he also registered to vote in STATE 1. Until this time, however, he was registered to vote in Utah, and in the November 2006 elections, he voted in Utah by absentee ballot. PETITIONER 1 explains that he did not obtain a STATE 1 driver's license and register to vote in STATE 1 until December 2006 because he "didn't know where he would end up" when he first moved to STATE 1. He explained that after the merger between COMPANY 1 and COMPANY 2, there was a major amount of confusion and uncertainty.

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 1 started working and living in STATE 1 on DATE and continues to work and live there. Based on these facts, PETITIONER 1 meets the second of the three criteria necessary to change his domicile from Utah to STATE 2. Specifically, PETITIONER 1 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).

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> Although PETITIONER 1 rented an apartment and moved to STATE 1 on DATE, he did not change his driver’s license and voter registration to STATE 1 until sometime in December 2006. Furthermore, the personal vehicle that he took to STATE 1 and used throughout 2006 was registered in Utah, and he voted in Utah in November 2006.

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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).

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From these facts, it appears that PETITIONER 1's intent changed sometime between his move to STATE 1 on DATE and December 2006. It does not appear that PETITIONER 1 intended to abandon Utah when he moved to STATE 1 on DATE. After moving to STATE 1, PETITIONER 1 continued to avail himself of privileges reserved for Utah residents, apparently while the confusion concerning the merger resolved itself and during the period where it was not established "where he would end up." The facts also suggest that by December 2006, he had formed an intent to abandon Utah and establish his domicile in Utah, as evidenced by his steps to obtain a STATE 1 driver's license and to register to vote in STATE 1.

For these reasons, it appears that PETITIONER 1 did not change his domicile from Utah to STATE 1 until December 1, 2006. Accordingly, that portion of the Division's 2006 assessment that imposes tax on PETITIONER 1 as a Utah resident individual from January 1, 2006 to December 1, 2006 should be sustained. That portion of the 2006 assessment that imposes tax on PETITIONER 1 as a Utah resident individual beginning on December 1, 2006 should be reversed.

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Kerry R. Chapman  
Administrative Law Judge



DECISION AND ORDER

Based upon the foregoing, the Commission sustains the Division's assessment for the 2005 tax year. For the 2006 tax year, the Commission finds that PETITIONER 1 was domiciled in Utah, and thus a Utah resident individual, from January 1, 2006 to December 1, 2006. The Commission finds that PETITIONER 1 was not domiciled in Utah, and thus not a Utah resident individual, beginning December 1, 2006. The Division is ordered to adjust its 2006 assessment accordingly. 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

Michael J. Cragun

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Commissioner

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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