

09-3414
TAX TYPE: INCOME
TAX YEARS: 2005 & 2006
DATE SIGNED: 11-30-2012
COMMISSIONERS: B. JOHNSON, D. DIXON, M. CRAGUN
EXCUSED: M. JOHNSON
GUIDING DECISION

BEFORE THE UTAH STATE TAX COMMISSION

<p>TAXPAYER Petitioner,</p> <p>vs.</p> <p>AUDITING DIVISION OF THE UTAH STATE TAX COMMISSION,</p> <p>Respondent.</p>	<p>FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL DECISION</p> <p>Appeal No. 09-3414</p> <p>Account No. ##### Tax Type: Income Tax Tax Years: 2005 & 2006</p> <p>Judge: Phan</p>
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Presiding:

D'Arcy Dixon Pignanelli, Commissioner
Jane Phan, Administrative Law Judge

Appearances:

For Petitioner: TAXPAYER
For Respondent: REPRESENTATIVE FOR RESPONDENT, Assistant Attorney General
RESPONDENT, Manager, Income Tax Auditing

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission pursuant to Utah Code Sec. 59-1-501 and 63G-4-201 et al., for a Formal Hearing, on September 10, 2012. Based upon the evidence and testimony presented at the hearing the Tax Commission hereby makes its:

FINDINGS OF FACT

1. This matter is before the Commission on Petitioner's ("Taxpayer's") appeal of income tax, penalty and interest deficiencies issued against him for tax years 2005 and 2006. Respondent ("Division") had issued the Statutory Notices of Estimated Income Tax on July 6, 2010.¹ The Taxpayer had timely appealed the audit deficiencies and the matter proceeded to the Formal Hearing.

2. The amount of the deficiency at issue is as follows:

¹ Respondent's Exhibits 2 & 7.

Year	Tax	Penalties	Interest	Total ²
2005	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$
2006	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$

3. The penalties assessed with the audit were a 10% failure to file penalty and a 10% failure to pay penalty assessed pursuant to Utah Code Sec. 59-1-401.

4. The Taxpayer did not file a Utah Individual Income Tax Return for the 2005 and 2006 tax years as it was his position that he was not a Utah resident individual for tax purposes. The Division issued the audit on the basis that the Taxpayer had maintained his domicile in Utah throughout the tax years, and, therefore, met the criteria of a Utah resident individual. After the audits had been issued, the Taxpayer filed a Utah non-resident return for the 2006 tax year claiming income which he had earned while working in Utah.

5. During the years 2005 and 2006, the Taxpayer did not maintain a residence in Utah. He had resided and been domiciled in Utah from 1993 through 2004. He testified that did not own a home or rent property in this state by the end of 2004. He did maintain a post office box in CITY-1, Utah to receive his mail. He states that he had uncles and aunts in this area and they would get his mail for him. He also testified that he had the P.O. Box there so his aunt and uncle could handle his affairs in case something happened to him. He said that his mother had resided in CITY-1 and had a house there, but testified that by the years at issue, his mother was living in STATE-1 with one of his siblings. The Taxpayer's employment was as a TRADESMAN for large (X) projects, like REMOVED EXAMPLES, and he would travel to the job sites, which during the two year audit period were in multiple states. He would stay at each location until his job was completed, then move on to another site.

6. The Taxpayer stated that he was working in STATE-2 at the end of 2004 until April 2005. It was his testimony that he had rented a single family residence in that state. He then returned to Utah for a period of 4 weeks. He states that during this time he stayed in an extended stay suite hotel. He maintains that he did not own any property in 2004. He had put his stuff into a storage unit in Utah before leaving for STATE-2. In April 2005 he had his Utah Driver License reinstated. His license had been suspended and he had to pay to get it reinstated. He had registered his vehicle in Utah for 2005. He then went to CITY-2, STATE-1 in May 20, 2005 through September 1, 2005. This time he took his VEHICLE. He maintains by this time he had sold or given away all of his furniture and belongings in the storage unit, except the items he kept in his VEHICLE. In STATE-1, he rented a trailer site for his VEHICLE and that is where he stayed during this time. He also testified that he had rented a post office box there.

2 Interest calculated to the date of the Statutory Notices. Interest continues to accrue on any unpaid balance.

7. The Taxpayer testified that he was then sent to CITY-3, STATE-3, for work and remained there from September 1, 2005 to February 2006. He stated that there was little housing in CITY-3 and a lot of (X) workers, making housing options limited. He states that he was not even able to find a spot to rent to stay in his VEHICLE. He had to put his name on a waiting list for two weeks before he was able to get a room in an Inn in CITY-3. He stayed in the Inn the entire time he was working in STATE-3. He testified that CITY-3 was isolated and the next nearest place where one could stay was CITY-4, 80 miles away.

8. It was the Taxpayer's position that upon moving to CITY-3, he changed his domicile to STATE-3. One reason provided was that CITY-3 was where his friends were.

9. For the 2005 tax year, the Taxpayer's employer, COMPANY-1, issued W-2s to the Taxpayer and they were mailed to the Taxpayer at the CITY-3 Inn, in CITY-3 STATE-3. These W-2's showed Utah, STATE-1 and STATE-2 wages.³ The Taxpayer filed a STATE-1 non-resident income tax return⁴ and a STATE-2 non-resident return⁵ claiming the income earned while in each state. Both returns listed as the Taxpayer's address the P.O. Box in CITY-1, Utah. The Taxpayer also filed a federal return for 2005, listing as his address the P.O. Box in CITY-1, Utah.⁶

10. After that job was finished, the Taxpayer moved to Utah to work at the COMPANY-2. He states that rather than staying near the job site, he rented a small home in CITY-1, Utah⁷ and worked at the COMPANY-2 from February 2006 through July 2006. He testified that he considered his residence to be in CITY-3, STATE-3 and would continue to return there to visit and stay with friends during weekends or time off. He did not maintain a residence in CITY-3.

11. The Taxpayer testified that in July 2006 he moved in his VEHICLE to STATE-4 for his next job. He states that he stayed in his VEHICLE at the CITY-7 trailer park until December 23, 2006, and received mail at the trailer park. He also represented that he obtained a STATE-4 Driver License in 2006.

12. For the 2006 year, the Taxpayer filed a non-resident STATE-4 return,⁸ claiming the income earned while in that state. On the return he listed as his "home address" the P. O. Box in CITY-1, Utah. His employer had mailed two W-2's to Petitioner for the 2006 tax year, and they were addressed to the P. O. Box in CITY-1, Utah.⁹ One showed Utah wages and the second STATE-4 wages.

13. When the Taxpayer had his Utah Driver License reinstated in 2005, the address used was a

3 Respondent's Exhibit 3.

4 Respondent's Exhibit 5.

5 Respondent's Exhibit 6.

6 Respondent's Exhibit 4.

7 According to Google Maps this is a distance of 70 miles.

8 Respondent's Exhibit 10.

different address than the CITY-1 address. The address indicated on his Utah Driver License was ADDRESS-1, CITY-5, Utah.

14. The Division provided the Utah Driver License Record.¹⁰ This showed that the Taxpayer had his Utah license reinstated on April 1, 2005. The Taxpayer testified at the hearing that his Utah license had, in fact, been suspended from April 1, 2004 through April 1, 2005, when it was reinstated. The record shows the license was suspended a second time from August 23, 2005 through November 21, 2005.

15. The Taxpayer testified that after that second suspension he got his Utah Driver License back as well as obtained one in STATE-3. He states that his Utah license was suspended again for a third time beginning in July 20, 2006 to August 2007, which was confirmed by the Driver License Record.

16. The Taxpayer had been domiciled in Utah from 1993 through 2004. Although the Taxpayer did travel to other states for his employment the Taxpayer did not take actions consistent with establishing a new domicile in any of these other states. The only state in which he continued ties was Utah and he maintained a Utah Driver License between suspensions. He did not abandon his Utah domicile or establish a new domicile in another state.

APPLICABLE LAW

Utah imposes income tax on individuals who are residents of the state, in Utah Code Sec. 59-10-104(1) (2006)¹¹ 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)(t) (2006) as follows:

(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 such 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.

(ii) For purposes of this Subsection (1)(v)(i)(B), a fraction of a calendar day shall be counted as a whole day.

For purposes of determining whether an individual is domiciled in this state the Commission has

9 Respondent's Exhibit 8.

10 Respondent's Exhibit 11.

11 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.

defined "domicile" in Utah Administrative Rule R865-9I-2(A) as follows:

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 factor 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.

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).)

ANALYSIS

Utah Code Sec. 59-10-104 imposes a tax on every "resident individual." "Resident individual" is defined at Utah Code Sec. 59-10-103(1) which states, ""Resident individual" means: (i) an individual who is domiciled in this state for any period of time during the taxable year, . . . **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 (emphasis added)." It was unrefuted that Taxpayer did not spend 183 days or more in this state. The issue before the Commission is the alternative basis for residency, whether the Taxpayer remained "domiciled" in Utah during 2005 and 2006.

The Taxpayer had been domiciled in Utah from 1993 through 2004. Therefore, in considering the law and the applicable rule, the Tax Commission begins its analysis with the position that the Taxpayer had established domicile in Utah. "Domicile" is defined by Utah Admin. Rule R865-9I-2 and the rule provides that once a domicile has been established, three elements must be shown before a new domicile is indicated: 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.

The question of whether one maintains a domicile or has abandoned and established a new domicile out of the state 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 courts in Utah.¹² 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.¹³ Additionally Petitioner has the burden of proof to establish that the audit is incorrect.

The Taxpayer's actions do not show that he abandoned Utah as a domicile or that he intended to remain in any of the new locations permanently. The Taxpayer's work was such that he would travel from job site to job site. The (X) sites that he worked on were large projects lasting several months and were not limited to any one state. The evidence submitted in this matter indicated that the Taxpayer would travel to the new location for the special and temporary purpose of employment in that location and as soon as the employment was over, he would move to the new location. He did not set up and maintain a residence in the new location which he kept or maintained during the next job and to which he would return when the job was over or during weekends and time off from work. The Taxpayer had claimed that when he went to CITY-3, STATE-3, he intended that to be his domicile. He stayed there at an Inn. He did testify that it was difficult to find any housing at that time, but he never did establish one there. He did not buy a piece of land to park his VEHICLE on, or rent a more permanent apartment or even set up a more permanent rented trailer site in a mobile home park. His actions do not show any intent to remain there permanently. When that job was over he moved on to the next site. He states that he would travel back to CITY-3. He stated that he considered it his residence because it was where his friends were and when he went back he would stay with friends.

His next job, however, was in CITY-6, Utah. He could have rented an apartment or found a trailer

12 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).

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

park to set up his VEHICLE near CITY-6. CITY-6 would have been nearer to CITY-3 as far as a commute. Instead he chose to rent a house in CITY-1 which was further away from CITY-3 and seventy miles from CITY-6. Of all the places, CITY-1 was the one place with which he had maintained a connection with his mail and the address which he provided for his tax returns. In addition to maintaining a Utah Address, the Taxpayer maintained a Utah Driver License for those periods between suspensions.

In addition to jobs in Utah, the Taxpayer worked in STATE-2, STATE-1, STATE-3, and STATE-4 during the tax years at issue, but he remained in each location only while working at a temporary job site and then he would move on to the next location. In each case, the returns he filed in these states were non-resident returns. Utah Admin. Rule R865-9I-2(A)(1) provides that domicile is the “place at which an individual has voluntarily fixed his habitation, not for a special or temporary purposes, but with the present intention of making a permanent home.” The facts do not support the Taxpayer’s position that his tax domicile was in some state other than Utah. A taxpayer does not lose his or her Utah domicile until they actually establish a new domicile in another location.

CONCLUSIONS OF LAW

1. Although the Taxpayer had a physical presence in other states during the two year period at issue in this appeal, the facts indicate that each move was for a temporary purpose, that being a temporary job. The Taxpayer retained ties to Utah and failed to establish that he intended to remain in any of the new states permanently as required to change domicile under Utah Admin. Rule R865-9I-2. Therefore, he remained domiciled in Utah during 2005 and 2006, and was a “resident individual” as defined at Utah Code Sec. 59-10-103.

2. As Petitioner was a “resident individual” during the 2005 & 2006 tax years, he is subject to Utah individual income tax pursuant to Utah Code Sec. 59-10-104.

3. As the Taxpayer was working primarily out of state in 2005 and for much of 2006, as well as not maintaining a residence in Utah during these years, his expectation that he need not file a Utah return on income he earned in other states, although erroneous is not incomprehensible. This section of the law is difficult. There is reasonable cause to waive the failure to file and failure to pay penalties assessed for each year under Utah Code Sec. 59-1-401(13).

Jane Phan
Administrative Law Judge

DECISION AND ORDER

Based on the foregoing, the Tax Commission sustains the Utah Individual Income Tax audit deficiencies for 2005 and 2006 as they pertain to the tax and interest. The Commission finds reasonable cause for waiver of the penalties for both years. It is so ordered.

DATED this ____ day of _____, 2012.

R. Bruce Johnson
Commission Chair

Marc B. Johnson
Commissioner

D'Arcy Dixon Pignanelli
Commissioner

Michael J. Cragun
Commissioner

Notice: Failure to pay within thirty days the balance that results from this order may result in additional penalties and interest. You have twenty (20) days after the date of this order to file a Request for Reconsideration with the Tax Commission Appeals Unit pursuant to Utah Code Sec. 63G-4-302. A Request for Reconsideration must allege newly discovered evidence or a mistake of law or fact. If you do not file a Request for Reconsideration with the Commission, this order constitutes final agency action. You have thirty (30) days after the date of this order to pursue judicial review of this order in accordance with Utah Code Sec. 59-1-601 et seq. & 63G-4-401 et seq.