

09-3652
INCOME - DOMICILE
TAX YEAR: 2007
SIGNED: 01-06-2011

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. 09-3652 Account No. ##### Tax Type: Income Tax Tax Year: 2007 Judge: Phan
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Presiding:
Jane Phan, Administrative Law Judge

Appearances:
For Petitioner: PETITIONER 1
 PETITIONER REP. 1, CPA
For Respondent: RESPONDENT REP. 1, Assistant Attorney General
 RESPONDENT REP. 2, Senior Auditor

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 October 12, 2010. Petitioners (the Taxpayers) are appealing an audit deficiency of Utah individual income tax for the tax year 2007. The Statutory Notice of Deficiency and Estimated Income Tax was issued on November 19, 2009. Petitioners timely appealed the audit. The amount of the audit deficiency listed on the Statutory Notice is as follows:

	Tax	Penalty	Interest	Total as of Notice Date ¹
2007	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$

1 Interest continues to accrue on the unpaid balance.

APPLICABLE LAW

Utah imposes income tax on individuals who are residents of the state, in Utah Code Sec. 59-10-104 (2007)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) 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 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.

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).)

DISCUSSION

Respondent (the Division) based its audit on the assertion that the Taxpayers were residents of Utah for tax purposes during all of 2007. The Taxpayers had had not filed a resident Utah Individual Income Tax Return and PETITIONER 1 maintains that he was not a resident of Utah, instead he states that he was a resident of STATE 1 in 2007. The Taxpayers did not dispute that PETITIONER 2 was a resident of Utah during 2007, however she did not receive taxable income during the year. The issue in this appeal is whether PETITIONER 1 was a "resident individual" in the State of Utah for the purposes of Utah Code Sec. 59-10-103(1)(k) during the audit year. It does not appear that PETITIONER 1 spent 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

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., 583 P.2d 613, 614 (Utah 1978);

new domicile: 1) a specific intent to abandon the former domicile; 2) the actual physical presence in a new domicile; and 3) the intent to remain in the new domicile permanently. See Utah Admin. Rule R865-9I-2(A). Although the facts presented show that the Taxpayer did have an actual physical presence in STATE 1, the weight of the evidence fails to support the Taxpayer's contention of intent to abandon the Utah domicile or the intent to remain permanently in STATE 1.

PETITIONER 1 is an airline pilot and during the audit year and for a number of years prior he was working for COMPANY 1. In 1981 the Taxpayers purchased a residence at ADDRESS, CITY 1 Utah. PETITIONER 1 acknowledges that this was his residence from the date of purchase until June 2005. The Taxpayers continue to own this residence and it is where PETITIONER 2 resided during 2007.

The facts proffered by PETITIONER 1 at the hearing show the ties that he had established with STATE 1. Sometime prior to June 2005, PETITIONER 1 began flying primarily routes that started out of or ended in STATE 1. He determined at that time that he should establish a residence in CITY 2, STATE 1. He entered into a lease in June 2005 for furnished rooms in a house that he shared with the owner at ADDRESS 2, CITY 2, STATE 1. This house was adjacent to a used car sales lot, which the owner of the residence operates. The rent that PETITIONER 1 paid for the apartment was \$\$\$\$ per month. PETITIONER 1 continues to lease this property and maintains to the present time that this is his residence.

PETITIONER 1 surrendered his Utah drivers license and obtained an STATE 1 Drivers license on December 30, 2005. He also registered to vote in STATE 1 at this time. He registered a 1990 Chevy pick-up truck in STATE 1 and maintained that registration from December 2005 through April 2007. In April 2007 he replaced the Chevy with a 1999 Dodge pick-up which he has continued to register through to the present time. He also registered a 1998 Toyota Rav 4 in STATE 1 in October 2007. He did sometime let his landlord use or lease these vehicles in the landlord's auto business. Prior to 2007, Delta changed PETITIONER 1's W-2 information and reported his wage income as STATE 1 sourced.

The Taxpayer also purchased with a partner a condominium/airplane hangar in CITY 3, STATE 1. He was a part-year owner in this property during 2007. He spent some funds and time fixing up the living quarters in this property during 2007, but although he stayed over sometimes at this property did not claim to reside there. The partnership was dissolved in 2008, after which PETITIONER 1 had no ownership interest in this property.

PETITIONER 1 has not applied for the STATE 1 resident fund. He states that it was his understanding to qualify for the payments from the fund he would have to own property in STATE 1 and

nowhere else.

Although PETITIONER 1 had established these ties with STATE 1, by the 2007 tax year he maintained many of his previous ties to Utah. He continued to own and maintain the residence in CITY 1, Utah and that residence is where PETITIONER 2 resided. He did not sell the residence, but stated that it was basically paid for. He had continued to file Utah resident income tax returns up through 2006. Almost all his year-end financial statements, bank and credit card statements were mailed to him at his residence in CITY 1, Utah. PETITIONER 1's credit card statements show that most transactions in 2007 were at Utah locations. PETITIONER 1 continued to visit doctors and a dentist in Utah and had other medical treatments in Utah. He continued to have a Utah CPA prepare his tax returns. The federal return for 2007 listed his Utah address. He also used a Utah insurance agent. In addition to the residence in Utah, the Taxpayer owned some vacant land parcels in RURAL COUNTY. He also owned a vacant land parcel in STATE 2. He and PETITIONER 2 had burial plots which they purchased in Utah, although these were purchased many years prior to the audit period. PETITIONER 1 had incorporated a business in Utah in 2003 and was listed as the registered agent in Utah on the Articles of Incorporation and with Department of Commerce at the address of his residence in CITY 1, Utah. This corporation continues to be active with PETITIONER 1 listed as the registered agent in Utah, although he states that the corporation operates as an aircraft business in STATE 1. The Division pointed out that the Taxpayer had obtained Utah resident hunting and fishing permits. However, PETITIONER 1 stated that he had purchased a lifetime permit in Utah at a great expense years earlier when he was a Utah resident and his hunting and fishing tags were based on this permit.

Although the PETITIONER 1 did take several steps toward establishing residency in STATE 1, his actions do not indicate that he intended to remain in STATE 1 permanently because he never actually purchased a residence there or even rented a place of his own. It appears that financially he had the ability to do so and purchasing a residence would be an action of someone who intended to remain in the new location permanently. Instead, PETITIONER 1 paid \$\$\$\$ per month for rooms in a house he shared with the owner. Further, the Taxpayer had retained many ties with Utah and did not appear to have abandoned his Utah domicile.

Regarding the penalties, however, the failure to file and failure to pay penalties should be waived in this matter. PETITIONER 1 did take many steps toward establishing domicile in STATE 1 including obtaining a drivers license and voter registration. It is difficult for a layperson to make that determination of when there have been sufficient steps to abandon a domicile in one state and establish one in new state. The

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Commission should sustain the audit deficiency as it pertains to the tax and interest, but waive the penalties.

Jane Phan
Administrative Law Judge

DECISION AND ORDER

Based upon the information presented at the hearing, the Commission sustains the audit deficiency against the Taxpayers as it pertains to Utah individual income tax and the interest accrued thereon for the Tax year 2007. The Commission waives the penalties. 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 _____, 2011.

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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