

10-1280
 INCOME
 TAX YEAR: 2005, 2006, 2007
 SIGNED: 06-07-2012
 COMMISSIONERS: R. JOHNSON, M. JOHNSON, M. CRAGUN
 EXCUSED: D. DIXON

BEFORE THE UTAH STATE TAX COMMISSION

PETITIONER, Petitioner, v. AUDITING DIVISION OF THE UTAH STATE TAX COMMISSION, Respondent.	INITIAL HEARING ORDER Appeal No. 10-1280 Account No. #####-1 Tax Type: Income Tax Tax Year: 2005 - 2007 Judge: Phan
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Presiding:

Jane Phan, Administrative Law Judge

Appearances:

For Petitioner: PETITIONER
 For Respondent: RESPONDENT REP. 1, Assistant Attorney General
 RESPONDENT REP. 2, Manager, Income Tax Auditing
 RESPONDENT REP. 3, 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 March 20, 2012. Petitioner (Taxpayer) is appealing an audit deficiency of Utah individual income tax for the years 2005, 2006 and 2007. The Statutory Notices of Deficiency and Estimated Income Tax had been issued on April 1, 2010 for each year at issue. The Taxpayer timely appealed the audit. The amount of the original audit deficiency and the amended audit deficiency at issue are as follows:

	Tax	Penalty	Interest	Total as of Notice Date ¹
2005	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$
2006	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$
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(1) (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)(v) (2007) as follows:

(k)(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 defined "domicile" in Utah Administrative Rule R865-9I-2(1) as follows:

(1) Domicile

(a) 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.

(b) 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.

(i) Tax Commission rule R884-24P-52, Criteria for Determining Primary Residence, provides a non-exhaustive list of factors or objective evidence determinative of domicile.

(ii) Domicile applies equally to a permanent home within and without the Untied States.

(c) A domicile, once established, is not lost until there is a concurrence of the following three elements:

(i) a specific intent to abandon the former domicile;

(ii) the actual physical presence in a new domicile; and

(iii) the intent to remain in the new domicile permanently.

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.

(d) 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.

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 ("Division") based its audit on the assertion that the Taxpayer was a resident of Utah for tax purposes for all of 2005, 2006 and 2007. The Taxpayer had not filed Utah returns for any of these years. The Taxpayer maintained that she was not a resident of Utah, but was instead a resident of STATE 1 for all of 2006 and 2007. She did acknowledge at the hearing that she would have been a part-year resident of Utah during 2005 and that she was a resident of Utah up to the first half of that year. However, she originally had not filed as a part-year resident for 2005.

The Taxpayer had not filed a federal return for the 2006 tax year at the time the audit was issued and so the Utah Audit was based on federal information, but no return. After the audit deficiency had been issued the Taxpayer filed a federal individual income tax return on August 18, 2010. The return was accepted and posted to the account by the IRS in October 2010 and a refund issued to the Taxpayer. The Division has not yet revised its audit for the 2006 tax year to reflect the amounts that are now posted to the federal account. They also indicate that returns were recently posted by the IRS for the other years and if the Taxpayer was found to be domiciled in Utah the audit would need to be revised for each of these years.

The Taxpayer had filed married filing separate status for many years and indicated that she would have had the same status during the audit period. The Taxpayer's spouse is now deceased, having died in January 2010.

The Taxpayer had purchased a residence at ADDRESS, CITY 1, Utah, in YEAR. She resided there for many years and taught school in Utah. She retired as a school teacher in June 2000. She states that it was

her intent after retiring to move to STATE 1. She did travel to STATE 1 with her spouse where one of her adult children resided in CITY 2 and her sister also resided at CITY 3, STATE 1. She said that she and her husband moved two U-Haul trailers to STATE 1 in 1999. She states that she obtained a drivers license in STATE 1 ten years ago. However, there was no record to show when the license was first obtained. She did register to vote in STATE 1 in January 2003, listing her sister's address at CITY 3, STATE 1. However, during the same period of time the Taxpayer did continue to work part-time in Utah for COMPANY 1. She explained that she had been working for COMPANY 1 part-time while teaching for a number of years to make ends meet. She continued to work for COMPANY 1 part-time after her retirement from teaching, up through March 2005. At that time she also retired from COMPANY 1. It was her contention that at least by June 2005 she and her husband had moved to STATE 1.

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 2005 through 2007, or whether she changed her domicile to STATE 1 during 2005. Under the statutory provisions a person would be a "resident individual" if they maintained a place of abode in this state and spent in the aggregate more than 183 days per year in this state. Or, in the alternative, a person would be a "resident individual" in this state if they were "domiciled" in Utah.

The Taxpayer testifies that she was not in the state of Utah more than 183 days in 2006 or 2007 and there is some information, including a letter from her sister for support of this position. The Division did not provide evidence that refuted this contention. In the alternative the Taxpayer would be a "resident individual" in this state if she remained "domiciled" in this state. 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 In this case the Taxpayer had been domiciled in Utah at some point prior to 2005. Once domicile has been established in Utah three things must be shown to establish a new domicile: 1) a specific intent to abandon the former domicile; 2) the actual physical presence in a new

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.*,

domicile; and 3) the intent to remain in the new domicile permanently. See Utah Admin. Rule R865-91-2(1). Therefore, the evidence presented by the parties is viewed under the framework of these provisions.

The first consideration is whether the Taxpayer abandoned her Utah domicile. The Taxpayer never sold her Utah residence and although she had some of her belongings moved to STATE 1 she left a number of possessions at the residence. She explained that she should have cleared out her possessions from the residence when the real estate market was good, so that it could have been sold. She said she missed that opportunity and has left many of the possessions at the property accumulated since 1964. One of her adult daughters resides at the Utah property and has since 2000. She also indicated that this daughter might purchase the property from her, but even as of the date of the hearing the Taxpayer was the owner of this residence. The Taxpayer has had a CAR registered in her name in Utah from 1997 through 2009. Utah records show that she had a valid Utah Drivers License from April 2005 through October 2010. The Taxpayer states that she had a STATE 1 license and provided a copy of her current license, but it does not show the date it was issued.

The Taxpayer did receive mail at her Utah address including yearend tax information, although mail was also sent to STATE 1. She had medical treatment from a doctor in STATE 1 for the periods spanning from April 2005 to February 2006, however, the medical bills for the treatment were mailed to her at the Utah address. The Taxpayer represented that other than the one daughter who resided in Utah at the Taxpayer's residence, she had no other relatives in Utah. During the audit period she had three additional adult children who all resided in other states; one in STATE 2, one in STATE 1 and one in STATE 3.

The second consideration is whether the Taxpayer had an actual physical presence in STATE 1. The Taxpayer never leased an apartment or purchased a residence in STATE 1 during the audit period, or even to the present time. She states that when in STATE 1 during the audit period she and her husband stayed with her sister at CITY 3 or with their daughter in CITY 2. The Taxpayer provided a letter from her sister which indicated that the Taxpayer resided with the sister 6 to 8 months per year beginning in April 2005 to the present time. The sister also stated that the Taxpayer helped pay utilities when she was there and generally left two of her vehicles at the sister's residence. The Taxpayer had vehicles registered in STATE 1 from 2003 going forward to the present time and these were the vehicles maintained at the sister's residence.

The Taxpayer and her spouse did plan to start a business in STATE 1 and had filed for Certificate of Ownership papers in COUNTY 1 STATE 1 in September 2007, listing the address for the business as the

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

daughter's address in CITY 2, STATE 1. According to the Taxpayer, they ended up not doing anything with the business. The Taxpayer did register to vote in STATE 1 in 2003 and voted consistently in STATE 1 from 2003 going forward to the present time. She provided copies of voter registration information from STATE 1.

The Taxpayer had opened a STATE 1 Bank Account. Her retirement income from her teaching position was direct deposited into the STATE 1 account. However, the account deposit slip provided by the Taxpayer listed both a STATE 1 and Utah address for the Taxpayer.

The Taxpayer established that she had received medical treatment in STATE 1 with a doctor's bill that listed several visits in STATE 1 from the period of April 2005 through February 2006. However, the bill was mailed to the Taxpayer's residence in Utah. During the tax years at issue the Taxpayer did receive mail in STATE 1 at either her daughter's address or his sister's address including some of her year-end tax reporting information, but mail also went to Utah. When the Taxpayer's spouse died in January 2010 she had him buried in STATE 1.

During the audit period the Taxpayer and her spouse traveled a lot, generally to visit with their children. At the hearing she explained that two of her daughters worked for the airline industry, so that she and her husband were able to fly for no cost. She explained that in 2006 or 2007 her daughter who resided in STATE 2 started having mental health problems and she and her spouse started spending a lot of time traveling to STATE 2, so that she could go with that daughter to counseling appointments. Then in 2008, the daughter living in STATE 3 was diagnosed with breast cancer. The Taxpayer stated that she would go there for extended visits to help her daughter and her daughter's young children. This daughter died in YEAR.

The third consideration is whether the Taxpayer intended to remain in the STATE 1 domicile permanently. It was the Taxpayer's statement that she felt that STATE 1 was her domicile. She had taken some steps consistent with this intent. She had obtained a STATE 1 Driver License and registered to vote in that state. She had buried her spouse in that state in 2010. She had some of her mail going to her sister's address in that state and some of her direct deposits to an account in STATE 1. However, she never did rent an apartment or acquire a residence of her own in that state, but stayed with her sister or daughter. And inversely she did continue to own the residence in Utah.

After reviewing the evidence submitted by this party, the weight supports that the Taxpayer continued to remain domiciled in the state of Utah. Although she did take a number of steps to establish a presence in STATE 1, she did not actually have an apartment or residence in STATE 1 and therefore did not establish domicile, instead staying with relatives when there and continuing to maintain her only residence at

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the property that she owned in Utah.

Penalties were assessed for each of the years at issue. They were the 10% failure to file timely and 10% failure to pay timely penalties under Utah Code Sec. 59-2-401. The Commission may waive penalties under Utah Code Sec. 59-1-401(13) upon a showing of reasonable cause. In this matter the Taxpayer acknowledged at the hearing that she had been a part year resident for 2005. Even if she had been only a part-year resident as she has indicated, a return should have been filed for the period in which she was a resident of Utah. However, given that she would have just retired from her second job, the traveling and mental health issues with her daughter, there is cause for waiver of the penalties for 2005. For 2006 and 2007 the Taxpayer had taken a number of steps towards changing her domicile from Utah to STATE 1 and may have thought that she was no longer a Utah resident. As it is not always clear when a change of domicile has occurred even to the Commission, it is understandable that this Taxpayer felt she did not need to file Utah resident individual returns for 2006 and 2007. The penalties for those years should be abated as well. The Division will need to recalculate the amount due for each period based on the most current federal transcript information as well as adjust the interest accordingly.

Jane Phan
Administrative Law Judge

DECISION AND ORDER

Based upon the information presented at the hearing, the Commission finds that the Taxpayer was domiciled in Utah and, therefore, a resident individual throughout 2005, 2006 and 2007. The penalties are to be waived for each year at issue. The Division is to revise its audit based on the most recent federal transcripts and adjust and update the interest 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

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Failure to request a Formal Hearing will preclude any further appeal rights in this matter.

DATED this _____ day of _____, 2012.

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.