

11-103
TAX TYPE: INCOME TAX
TAX YEAR: 2007
DATE SIGNED: 7-12-2012
COMMISSIONERS: B. JOHNSON, M. JOHNSON, D. DIXON
EXCUSED: M. CRAGUN
GUIDING DECISION

BEFORE THE UTAH STATE TAX COMMISSION

<p>TAXPAYER,</p> <p style="text-align: center;">Petitioner,</p> <p>v.</p> <p>AUDITING DIVISION OF THE UTAH STATE TAX COMMISSION,</p> <p style="text-align: center;">Respondent.</p>	<p style="text-align: center;">INITIAL HEARING ORDER</p> <p>Appeal No. 11-103</p> <p>Account No. #####</p> <p>Tax Type: Income Tax</p> <p>Tax Year: 2007</p> <p>Judge: Phan</p>
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Presiding:
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 for an Initial Hearing pursuant to the provisions of Utah Code Sec. 59-1-502.5, on May 15, 2012. Petitioner (“Taxpayer”) is appealing an audit deficiency of Utah individual income tax for 2007. The Statutory Notice of Deficiency and Audit Change had been issued on November 15, 2010. Petitioner timely appealed the audit. The amount of the audit deficiency listed on the statutory notice at issue is as follows:

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

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(1) (2007)² as follows:

...a tax is imposed on the state taxable income of every resident individual...

Resident individual is defined in Utah Code Sec. 59-10-103(1)(v) (2007) as follows:

(v)(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.

State taxable income is defined in Utah Code Sec. 59-10-103(1)(y)(i) to be:

Subject to Subsection 59-10-302(2), for a resident individual other than a resident individual described in Subsection (1)(y)(iii), means the resident individual's federal taxable income after making the: (A) additions and subtractions required by Section 59-10-114; and (B) adjustments required by Section 59-10-115 . . .

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

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.

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. . .

DISCUSSION

The Taxpayer had originally filed a Utah Resident Individual Income Tax Return for tax year 2007. He had also filed a federal return for that year and a nonresident STATE return. On his Utah return he listed on line 4a \$\$\$\$\$ as his federal adjusted gross income for 2007. He then subtracted on line 9e Other Deductions, an amount of \$\$\$\$\$. On the STATE return he had listed that he was a nonresident of STATE and a resident of Utah. He had listed the \$\$\$\$\$ as STATE source income. He had paid tax to STATE on this income in the amount of \$\$\$\$\$.

In its audit, Respondent ("Division") disallowed the Taxpayer's deduction in the amount of \$\$\$\$\$, thereby increasing his Utah Taxable income, by that amount and then allowing the Taxpayer a credit of \$\$\$\$\$ for taxes paid to STATE. It was the Division's contention that because the Taxpayer was a Utah resident under Utah Code 59-10-103(1)(v) (2007), this income was includable in his Utah taxable income pursuant to Utah Code 59-10-104(1) and there was no statutory provision that would allow for the deduction of this amount.

After the audit had been issued the Taxpayer changed his position on his filing status and asserted that he was not a resident of Utah during all 2007. The Taxpayer claimed that he was a resident of ANOTHER COUNTRY for most of the year. Whether the Taxpayer was a "resident individual" in the State of Utah is determined by Utah Code Sec. 59-10-103(1)(y) during the audit years. Under that section a

“resident individual” is one who either spent in the aggregate more than 183 days per year in Utah, or, in the alternative, one who is "domiciled" in the State of Utah. Under the facts of this case, it became clear that the Taxpayer had not spent 183 days or more in Utah. The issue was whether or not he was “domiciled” in 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, Utah Admin. Rule R865-9I-2(A)(3) provides that it is not lost until three things are shown: 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.

The evidence provided by the Taxpayer indicated that he had the actual physical presence in ANOTHER COUNTRY for most of 2007. He and his wife were serving A SPECIAL, TEMPORARY PURPOSE in ANOTHER COUNTRY from March 2007 through August 2008. The facts do not show the specific intent required to abandon the Utah domicile, or the intent to remain in ANOTHER COUNTRY permanently. The Taxpayer had retired from employment in STATE in 2004. He purchased a residence in Utah with his wife in 2005 and the both obtained Utah Driver Licenses. They registered to vote in Utah and filed income taxes as resident individuals even in 2007 the year at issue. Their move to ANOTHER COUNTRY was for a temporary purpose and not with the intent to remain their permanently. It was to serve A SPECIAL, TEMPORARY PURPOSE for a set 18 month period. They had been granted a temporary visa for this period of time. The Taxpayer acknowledged that they could not have stayed in ANOTHER COUNTRY permanently after their SPECIAL, TEMPORARY PURPOSE was completed because the NON-PROFIT ORGANIZATION sponsored them on the visa and it was only temporary. They did not acquire a residence in ANOTHER COUNTRY. They did not pay taxes to ANOTHER COUNTRY as residents of that country. They did deduct on their federal return for the time they were on their SPECIAL, TEMPORARY PURPOSE their cost of housing in ANOTHER COUNTRY.

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);

Further, the Taxpayer and his wife did not sell their Utah residence before leaving for ANOTHER COUNTRY. They also left a car registered in their names in Utah. They left utilities in their name including their phone. One of their adult children resided at their residence while they were away, maintained the place for them and paid the bills. They kept their Utah Driver Licenses. All of these factors indicated that Utah was their domicile and despite being in ANOTHER COUNTRY for 18 months, they were there for a special, temporary purpose and not with intent to make ANOTHER COUNTRY their permanent home. The Taxpayer did argue that they might have moved back to STATE after their SPECIAL, TEMPORARY PURPOSE. This statement of intent does not change the fact that they did not abandon their Utah domicile before they left for ANOTHER COUNTRY and they certainly had not reestablished a domicile in STATE before leaving for ANOTHER COUNTRY.

As the Taxpayer was a resident of Utah pursuant to Code Sec. 59-10-103(1)(v) during all of 2007, he was required to pay Utah individual income tax on his state taxable income under Utah Code Sec. 59-10-104(1) (2007). "State taxable income" is defined at Utah Code Sec. 59-10-103(1)(y) as the resident individual's federal taxable income. "Federal taxable income" is defined at Utah Code Sec. 59-10-103(1)(i) as the taxable income defined by Section 63 of the Internal Revenue Code.

In alternative to the domicile issue, the Taxpayer also argued that the \$\$\$\$ he had deducted from his Utah return had been earned while working in STATE before he retired and should only be taxable to STATE. He stated that he had earned stock options from COMPANY OF EMPLOYMENT in STATE for work during the years 2000, 2001 and 2002. In 2004 he retired from COMPANY OF EMPLOYMENT. He moved with his spouse to Utah in 2005. The vested options were paid out to him in 2007. COMPANY OF EMPLOYMENT issued a W-2 form to the Taxpayer indicating this payment for the 2007 tax year. The Taxpayer did not argue that this \$\$\$\$ could be excluded from his federal taxable income for 2007. His argument was that he paid the lawful amount of tax on this income to STATE, which he asserted was \$\$\$\$\$, and therefore he should not have to pay taxes on this amount to Utah.

The Taxpayer's position has no basis in law. As this amount was lawfully included in his federal taxable income for the 2007 tax year, it is taxable to the State of Utah under Utah Code Sec. 59-10-104(1) for the 2007 tax year. The Taxpayer is entitled, however, to a credit for the taxes that he paid to STATE and the Division has allowed the credit for the full amount paid.⁵ The audit should be sustained.

⁵ The Taxpayer provided tax rate schedules showing the rate in STATE was higher, while the tax amount the

Jane Phan
Administrative Law Judge

DECISION AND ORDER

Based upon the information presented at the hearing, the Commission sustains the audit. 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 _____, 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.

Division claimed owed to Utah was higher than the tax that he paid to STATE. However, there may be reasons for this difference unrelated to the issues in this case as STATE may allow a larger amount of deductions, exemption or credits than Utah.