

11-1231
INCOME
TAX YEAR: 2007
SIGNED: 02-16-2012
COMMISSIONERS: R. JOHNSON, D.DIXON, M. CRAGUN
EXCUSED: M. JOHNSON

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. 11-1231 Account No. ##### Tax Type: Individual Income Tax Years: 2007 Judge: Chapman
---	--

Presiding:

Kerry R. Chapman, Administrative Law Judge

Appearances:

For Petitioner: PETITIONER REP., Representative
 PETITIONER 1, Taxpayer
For Respondent: RESPONDENT REP. 1, from Auditing Division
 RESPONDENT REP. 2, from Auditing Division

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission for an Initial Hearing pursuant to the provisions of Utah Code Ann. §59-1-502.5, on February 7, 2012.

PETITIONER 1 and PETITIONER 2 (the “Petitioners” or “taxpayers”) are appealing Auditing Division’s (the “Division”) assessment of additional Utah individual income tax for the 2007 tax year. On February 14, 2011, the Division issued a Notice of Deficiency and Audit Change (“Statutory Notice”), in which it imposed additional tax and interest (calculated through March 16, 2011), as follows:

<u>Year</u>	<u>Tax</u>	<u>Penalties</u>	<u>Interest</u>	<u>Total</u>
2007	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$

The taxpayers filed a Utah part-year resident return for the 2007 tax year. The Division determined that the taxpayers were domiciled in Utah for all of 2007 and assessed them as Utah full-year residents for the 2007 tax year.

The taxpayers contend that they were Utah part-year residents for 2007 because they changed their domicile when they moved from Utah to COUNTRY on July 7, 2007. The taxpayers contend that when they moved to COUNTRY, they intended to live there for several years. They stated that even though they intended to return to the United States someday, they did not know whether they would return to Utah or to some other state. The taxpayers acknowledge that they returned to Utah in April 2008, but state that their return was unanticipated and occurred only because of an injury that their #####-YEAR-OLD son suffered in COUNTRY in January 2008. For these reasons, the taxpayers ask the Commission to find that they abandoned their Utah domicile in July 2007 and that they properly filed a Utah part-year return for the 2007 tax year.

The Division does not dispute that the taxpayers moved to COUNTRY in July 2007 and that they lived there until April 2008, when they returned to Utah. The Division contends, however, that the taxpayers did not take sufficient steps to abandon their Utah domicile and establish a new domicile in COUNTRY. As a result, the Division contends that the taxpayers remained domiciled in Utah for all of 2007. For these reasons, the Division asks the Commission to sustain its assessment in its entirety.

However, should the Commission find that the taxpayers were Utah part-year residents for 2007, as the taxpayers contend, the Division states that a small change would still need to be made to the taxpayer's Utah part-year return. On the taxpayer's 2007 TC-40S, the form on which they allocated their income and other adjustments to Utah, they allocated \$\$\$\$ of moving expenses to Utah (i.e., 50% of their total \$\$\$\$ of moving expenses). The Division states that moving expenses are allocable to Utah only if a part-year taxpayer is moving into Utah or within Utah. As a result, the Division states that the moving expenses allocated to Utah

Appeal No. 11-1231

on the TC-40S should be reduced from \$\$\$\$\$ to \$\$\$\$\$. The taxpayers concede that the moving expenses allocated to Utah should be reduced to \$\$\$\$\$ under these circumstances and agree that they would be liable for the additional taxes and interest resulting from this change.

APPLICABLE LAW

Under Utah Code Ann. §59-10-104(1)¹, “a tax is imposed on the state taxable income . . . of every resident individual[.]”

For purposes of Utah income taxation, a “resident individual” is defined in UCA §59-10-103(1)(v), 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.

Utah Admin. Rule R865-9I-2 (“Rule 2”) provides guidance concerning the determination of “domicile,” as follows in pertinent part:²

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.

1 All citations are to the 2007 version of the Utah Code and the Utah Administrative Code, unless otherwise indicated.

2 Effective January 1, 2012, Utah law concerning “domicile” was substantively amended. The definition of “domicile” in Rule 2 was deleted from the rule, and new criteria concerning “domicile” was enacted in UCA §59-10-136. However, the 2007 version of Utah law concerning “domicile” is applicable to this appeal.

- 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.

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;

Appeal No. 11-1231

- 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.

.....

UCA §59-1-1417 (2012) 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 determining 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 the taxpayers were Utah full-year resident individuals or Utah part-year resident individuals for the 2007 tax year. Section 59-10-103(1)(v) 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 the taxpayers were domiciled in Utah for all of 2007, they are Utah full-year resident individuals, and all of their income is subject to Utah taxation, regardless of whether it was earned while they was living and working in another state or country. However, if the Commission finds that the taxpayers were domiciled in Utah only until July 2007,

Appeal No. 11-1231

as the taxpayers contend, the Utah part-year return they filed for the 2007 year will be accepted except for the one change involving moving expenses to which the taxpayers have agreed.

There is no dispute that the taxpayers were domiciled in Utah prior to July 2007, when they moved to COUNTRY. There is also no dispute that they were domiciled in Utah after mid-April 2008, when they moved back to Utah. At issue is whether they changed their domicile to COUNTRY during the interim and, specifically for this appeal, whether they were domiciled in Utah or in COUNTRY between July 2007 and the end of 2007.

PETITIONER 1 was born and raised in COUNTRY. He moved from COUNTRY to STATE by himself when he was ##### years old to attend high school. PETITIONER 2 was born and raised in STATE. Both taxpayers came to Utah in the late 1980's to attend UNIVERSITY. After both taxpayers went on missions, they married and lived in Utah for an uninterrupted period between 1990 and July 2007. In July 2007, the taxpayer moved to COUNTRY with their ##### children, who were then between the ages of 7 and 15.

For several years prior to 2007, PETITIONER 1 was a minority partner in COMPANY ("COMPANY"), a Utah-based company. PETITIONER 1 stated that he was the "chief technology officer" for COMPANY and that he was responsible for software development. He explained that COMPANY's business consisted of (WORDS REMOVED). PETITIONER 1 explained that because of his contacts in COUNTRY, COMPANY "outsourced" its software development needs to employees in COUNTRY, who wrote software to develop and maintain the company's website. In 2007, it was decided that PETITIONER 1 would move to COUNTRY to manage the activities of the COUNTRY operations.

Although the taxpayers had anticipated living in COUNTRY for several years, PETITIONER 1 explained that their plans were interrupted when their #####-YEAR-OLD son suffered an injury from (WORDS REMOVED) in January 2008. PETITIONER 1 explained that his son was operated on in

Appeal No. 11-1231

COUNTRY and later “life-flighted” to a hospital in CITY, STATE 2 for further treatment. Because of a medical issue that developed while the taxpayers’ son was in the STATE 2 hospital, it was decided that the best treatment for their son would be at a hospital in CITY 2, STATE 3. The taxpayers transferred their son to the STATE 3 hospital in late February 2008.

The taxpayers explained that at as late as March 2008, they still hoped to return to COUNTRY, as their three older children had remained in school in COUNTRY and were under the care of relatives there. However, sometime in March 2008, the taxpayers found out that their son would need approximately one year of therapy to recover from his medical problems. It was at this time that the taxpayers decided to return to Utah where their son could obtain the therapy he needed instead of returning to COUNTRY where medical care was not as advanced. PETITIONER 1 returned to COUNTRY to attend to the family’s move back to Utah, and most of the family returned to Utah in mid-April 2008. One daughter remained in COUNTRY until the end of the school year and joined her family back in Utah later in 2008.

Prior to moving to COUNTRY, the taxpayers had owned a home in Utah for many years. They sold their Utah home in July 2007, when they moved to COUNTRY. The taxpayers did not own any other real property in Utah during the period they lived in COUNTRY. Upon moving to COUNTRY, the taxpayers rented an apartment on a one-year lease with an option for another two years. PETITIONER 1 explained that because the taxpayers had no credit history in COUNTRY upon moving there, they could not purchase a house because of “strict borrowing laws” in COUNTRY. PETITIONER 1 also stated that when they decided to move back to Utah in April 2008, they had to pay a penalty to cancel the lease on the apartment they had rented. He explained that the penalty was based on total rental payments for one year minus the payments they had already made. Upon moving back to Utah in April 2008, the taxpayers purchased another home in Utah.

The taxpayers owned two cars in Utah prior to moving to COUNTRY. They sold both vehicles prior to moving to COUNTRY and purchased a vehicle in COUNTRY upon their arrival. When the taxpayers

Appeal No. 11-1231

moved to COUNTRY, PETITIONER 1 estimated that they sold approximately 1/3 of their household furnishings, shipped approximately 1/3 to COUNTRY, and stored approximately 1/3 in a storage unit in Utah.

PETITIONER 1 explained that they “shipped a container” of furnishings to COUNTRY. He also explained that his wife collected antiques and was concerned that they might be damaged if shipped to COUNTRY. He stated that they decided to store the antiques in Utah until his wife decided what to do with them.

Upon moving back to Utah, the taxpayers sold most of the furnishings that they had previously shipped to COUNTRY. PETITIONER 1 stated that they shipped a few items back, but did not ship everything because of the cost and because they were now “financially drained” because of their son’s medical care.

PETITIONER 1 became a United States citizen in 2001. Because he had dual citizenship in the United States and COUNTRY, PETITIONER 1 was able to move to COUNTRY and work without obtaining a visa or work permit. The taxpayers declared their children to be dual citizens of the United States and COUNTRY in order for the children to go to school in COUNTRY. Because PETITIONER 2 was not a COUNTRY citizen, she was the only family member who obtained a COUNTRY resident visa.

During the time the taxpayers lived in COUNTRY, they drove using their Utah driver’s licenses. PETITIONER 1 stated that they could drive in COUNTRY for six to eight months with a United States driver’s license before they were required to obtain COUNTRY driver’s licenses. He stated that they were about to obtain COUNTRY driver’s licenses when their son was injured and that given the subsequent events, they never obtained licenses in COUNTRY.

Once the taxpayers returned to Utah, PETITIONER 1 started working again in the Utah office of COMPANY. PETITIONER 1 stated that COMPANY hired an engineer that he had trained in COUNTRY to manage COMPANY’s COUNTRY operations.

Upon moving to COUNTRY, the taxpayers cancelled their Utah health insurance and purchased health insurance in COUNTRY. PETITIONER 1 stated that he paid 100% of the cost of the COUNTRY health

Appeal No. 11-1231

insurance and that his employee, COMPANY, did not cover any portion of the cost of the insurance. The taxpayers were active members of the RELIGION when they lived in Utah. Upon moving to COUNTRY, they transferred their memberships and were active members in COUNTRY.

While living in COUNTRY, the taxpayers had little of their mail forwarded to COUNTRY. They forwarded their bank statements, tax information, and other “financial” mail to a former Utah neighbor to collect and hold. PETITIONER 1 explained that not only was mail service in COUNTRY unreliable, but that he and his wife were also concerned about kidnappings. As a result, the taxpayers did not want any mail being delivered through the COUNTRY postal service that concerned money or that would alert people that the taxpayers were Americans. PETITIONER 1 also explained that he had planned to return to the Utah once or twice a year for meetings at COMPANY and that he was going to pick up his mail on these trips.

Prior to moving to COUNTRY, the taxpayers had a bank account at BANK. PETITIONER 1 explained that they kept this account when they moved to COUNTRY in order for his paychecks from COMPANY to be directly deposited. PETITIONER 1 also explained that they kept the BANK account because COUNTRY law prohibited them, initially, from opening a bank account in COUNTRY. He stated that they could not open an account in COUNTRY until they had first established a credit history there. He stated, however, that they were eventually able to open an account at BANK 2 in COUNTRY. The taxpayers also had retirement accounts in the United States that they kept after moving to COUNTRY. The retirement accounts were in states other than Utah.

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

Appeal No. 11-1231

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.”

The taxpayers moved to COUNTRY in July 2007. Accordingly, it is clear that the taxpayers meet the second of the three criteria necessary to change their domicile from Utah to COUNTRY. Specifically, the taxpayers 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) and (c) require “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).

The taxpayers claim that when they moved to COUNTRY, they intended to remain there for several years. Although they intended to return to the United States someday, they stated that they had established no timeframe to return and that they had no specific intent to return to Utah once they did return to the United States. Utah appellate courts have addressed whether a person is domiciled in Utah for state income tax purposes³ and have determined that a person’s actions may be accorded greater weight in determining his or her domicile than a declaration of intent.⁴

3 The issue of domicile for Utah individual income tax purposes has been considered by the Utah Supreme Court and the Utah Court of Appeals. See *Benjamin v. Utah State Tax Comm’n*, 250 P.3d 39 (Utah 2011); *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 *Benjamin v. Utah State Tax Comm’n*, 250 P.3d 39 (Utah 2011); *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).

The Division contends that the taxpayer's actions are insufficient to show an intent to abandon Utah and establish a new domicile in COUNTRY. The Division's position that the taxpayers did not take sufficient steps to change their domicile is not without some merit. The taxpayers were absent from Utah for less than a year, and they retained their Utah driver's licenses upon moving to COUNTRY. They also kept their Utah bank account, had their mail forwarded to a friend in Utah, and stored approximately 1/3 of their household furnishings in Utah. In addition, PETITIONER 1 was a minority member of COMPANY, a company based in Utah. Furthermore, the taxpayers did not purchase a home in COUNTRY, even though they had owned a home in Utah for many years. The taxpayers did not abandon their Utah ties completely or establish many of the ties that are indicative of domicile in COUNTRY.

Nevertheless, these facts appear to be outweighed by other facts and circumstances. It appears that the taxpayers were gradually changing some of their ties from Utah to COUNTRY and that the unanticipated injury of their son put a stop to some changes before they occurred. For example, the taxpayers explained that they were about to obtain COUNTRY driver's licenses when their son was injured. In addition, the taxpayers explained that they rented an apartment in COUNTRY and kept their Utah bank account because COUNTRY credit laws prevented them, initially, from purchasing a home and establishing bank accounts there. Nevertheless, the taxpayers were able to establish one bank account before their unanticipated move back to Utah. Furthermore, the taxpayers explained that they did not have most of their mail forwarded to COUNTRY because of an unreliable postal service and fear of kidnappings.

A preponderance of the facts also indicate that at the time the taxpayers moved to COUNTRY, they intended to remain there indefinitely⁵ and that they returned to Utah after less than a year only because of their

⁵ A taxpayer does not need to have an intent to remain in a place "for all time" in order to be domiciled in that place. In *Clements v. State Tax Comm'n*, 839 P.2d 1078 (Utah Ct. App. 1995), the Utah Court of Appeals found that "domicile will be found where there is a residence coupled with an intent to remain for an indefinite period."

Appeal No. 11-1231

son's injury. The taxpayers sold their Utah home and leased an apartment in COUNTRY for a year, with an option for another two years. The taxpayers sold their Utah vehicles and purchased a vehicle in COUNTRY. The taxpayers either sold or shipped to COUNTRY a majority of their Utah household furnishings. The taxpayers' four children moved with them to COUNTRY and attended school there. The family had many ties to COUNTRY, due to PETITIONER 1 being born and raised there and due to his family members still living there. The taxpayers obtained health insurance in COUNTRY and were active in their church in COUNTRY.

For these reasons, the taxpayers have demonstrated not only an intent to abandon Utah, but also an intent to remain in COUNTRY permanently, thus satisfying Rule 2(3)(a) and (c). Because all three sections of Rule 2(3) have been satisfied, the taxpayers are considered to have changed their domicile to COUNTRY in July 2007 and to have remained domiciled in COUNTRY for the remainder of that year. Accordingly, the taxpayers properly filed a Utah part-year resident return for the 2007 tax year. Their part-year return is correct, except for one change to which the taxpayers have agreed. The moving expenses that the taxpayers allocated to Utah on the TC-40S portion of their return should be reduced from \$\$\$\$\$ to \$\$\$\$\$.

Kerry R. Chapman
Administrative Law Judge

Appeal No. 11-1231

DECISION AND ORDER

Based upon the foregoing, the Commission finds that the taxpayers changed their domicile to COUNTRY in July 2007 and that they remained domiciled in COUNTRY for the remainder of that year. Accordingly, the Commission accepts the Utah part-year resident return that the taxpayers filed for the 2007 tax year, with one exception. The moving expenses allocated to Utah on the TC-40S should be reduced from \$\$\$\$\$ to \$\$\$\$\$. 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 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.