

11-297
INCOME TAX
TAX YEAR: 2007
SIGNED: 08-25-2011
COMMISSIONERS: R. JOHNSON, M. JOHNSON, D. DIXON, M. CRAGUN

BEFORE THE UTAH STATE TAX COMMISSION

<p>PETITIONER, Petitioner, v. AUDITING DIVISION OF THE UTAH STATE TAX COMMISSION, Respondent.</p>	<p>REVISED INITIAL HEARING ORDER</p> <p>Appeal No. 11-297</p> <p>Account No. 7658 Tax Type: Income Tax Tax Year: 2007</p> <p>Judge: Phan</p>
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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

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 June 2, 2011. Petitioner (the Taxpayer) is appealing an audit deficiency of Utah individual income tax for the 2007 tax year. The Statutory Notice of Deficiency and Audit Change had been issued on December 14, 2010. The Taxpayer timely appealed the audit. The amount of the audit deficiency was \$\$\$\$\$. Respondent (the Division) did not assess penalties or interest with the audit. The tax deficiency resulted from the Division's denial of a portion of the credit for taxes paid to another state, which the Taxpayer had claimed on her return. The Division did not assess interest because it acknowledged that there had been a Tax Commission employee error.

APPLICABLE LAW

Utah imposes income tax on individuals who are residents of the state, in Utah Code Sec. 59-10-104(1) (2007)¹ 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.

“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

1 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.

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.

Resident individuals of Utah are allowed to claim a tax credit against taxes paid to another state. For the 2007 tax year, Utah Code §59-10-1003 provided as follows:

(1) Except as provided in Subsection (2), a claimant, estate, or trust may claim a nonrefundable tax credit against the tax otherwise due under this chapter equal to the amount of the tax imposed: (a) on that claimant, estate, or trust for the taxable year; (b) by another state of the United States, the District of Columbia, or a possession of the United States; and (c) on income: (i) derived from sources within that other state of the United States, District of Columbia or possession of the United States; and (ii) if that income is also subject to tax under this chapter. . . .

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

For the 2007 tax year, the Taxpayer filed as a resident of Utah an Individual Income Tax Return. On that return she claimed a credit for taxes paid to another state (STATE 1) in the amount of \$\$\$\$\$. After auditing the return, the Division reduced the credit to \$\$\$\$\$, which it has allowed as this was the tax amount paid to STATE 1. The Division disallowed \$\$\$\$\$ of the credit on the basis that this portion had not been paid out to another state, but was instead taxes paid to local city or township.

The facts were not in dispute between the parties. The Taxpayer was originally from STATE 1. In the 1970's she moved to Utah and established a domicile in this state. She worked as a nurse in Utah, had purchased a residence and filed Utah resident individual Income Tax Returns. In 2005 her father, who was elderly, had (WORDS REMOVED) in STATE 1. She soon determined that she would need to help care for him. She took a leave of absence from her employment in Utah and went to STATE 1 in 2005. She started working there in October 2005 and has been employed in STATE 1 since that time and spends most of her time in that state.

The year at issue in this matter is 2007. During 2007 the Taxpayer continued to work in STATE 1 as a nurse and reside at the family farm where she helped care for her father. The Taxpayer states that she continued to keep her residence in Utah and would travel back to Utah occasionally. She states that her Utah residence was an old home built in the 1870's and was in a bad neighborhood. It also could be divided into apartments and she was able to rent a portion of the residence out and maintain a separate portion for herself to use when she was in Utah. She had most of her mail directed to a postal service business in Utah that would forward her mail to her in STATE 1 or Utah depending on where she was at the time. For most of 2007, she was, however, in STATE 1. She concluded that she was in STATE 1 330 days or more that year. She did visit Utah on four separate occasions during the year for about one week per visit. She maintained a Utah Divers License.

The Taxpayer stated that in 2006 she started calling the Utah Tax Commission for advice on how she would need to file returns and she seemed to get a different answer from each person that she asked. In STATE 1 there was both a state tax that she was required to pay on the income she earned in STATE 1, as well as a township tax. Finally she reached EMPLOYEE 1 at the Tax Commission. EMPLOYEE 1 is a Compliance Specialist, for the Taxpayer Services Division. After discussions and email, EMPLOYEE 1 gave the Taxpayer the written instructions via email dated February 5, 2007, that if the Taxpayer filed a Utah resident return she could claim the taxes paid to the township as a credit for taxes paid to another state. In the email EMPLOYEE 1 stated as follows:

If you do claim file as a resident and claim the taxes paid to another state, it will be limited by what is listed on the W-2 so for the local tax you paid to the township, it needs to be listed on box 18 & 19 on the W-2. If it is then it is not a problem to include both amounts for the taxes paid, if not then you may be limited to only the state tax.

The local township taxes were listed on Box 18 & 19 on her W-2. The Taxpayer received this information early in 2007 and relied on this information to determine that she would not need to sell her Utah residence or move her domicile to STATE 1. She determined that as long as she could claim a credit for taxes paid to both STATE 1 and the township she would keep her Utah residence and file a resident individual return in Utah. She states that if this were not the case, she would have sold her Utah residence and just moved to STATE 1 because she could not afford to pay tax twice on the same income.

The Division acknowledged that the Taxpayer had followed the written advice given by another Utah Tax Commission employee. However, it was the Division's position that the advice was wrong under the

Utah Code and the Taxpayer was not entitled to claim a credit for the taxes paid to the township. The Division stated that in Utah Code §59-10-1003, the credit was limited in her case to the taxes paid to the state of STATE 1. So despite the acknowledgment that the Taxpayer followed written advice from a Tax Commission employee, the Division maintained that the Taxpayer should be required to pay the audit deficiency. However, as noted previously, the Division did not assess interest with the audit.

After reviewing the information presented in this matter, it is clear that for the 2007 tax year the Taxpayer remained domiciled in Utah. She had clearly not abandoned the Utah domicile or shown that she intended to establish a domicile in STATE 1 indefinitely. It appears clear that her intent was to remain in STATE 1 only for the special or temporary purpose of caring for an elderly parent. In fact that is how the Taxpayer had filed her tax return, as a Utah resident for 2007. It is also clear that under the Utah law, the Taxpayer is not entitled to claim a credit for taxes paid to a township. However, the Taxpayer was given the advice that she could do so from a Tax Commission employee in February 2007. She arranged her living arrangements for 2007 in reliance on the advice.

Although the Taxpayer did not argue that the Division should be equitably estopped from now disallowing the Taxpayer the credit, the Commission should consider this under the particular facts of this appeal. Equitable estoppel against a state agency is the exception rather than the rule, but in *Eldredge v. Utah State Retirement Bd.*, 795 P.2d 671, 675 (Utah Ct. App. 1990) the court concludes it could be applied “where it is plain that the interest of justice so require.”² The elements of equitable estoppel are set out in *Eldredge*, at 675, as follows: 1) a statement, admission, act, or failure to act by one party inconsistent with a claim later asserted; 2) reasonable action or inaction by the other party taken on the basis of the first party’s statement, admission, act, or failure to act; and 3) injury to the second party that would result from allowing the first party to contradict or repudiate such statement admission, act, or failure to act.

In this case all three elements are met. There is evidence of a statement directly from a Tax Commission employee who is in the position to be giving such advice to taxpayers in general and the Taxpayer in this matter. Because this was a written statement, of which the Taxpayer provided a copy, it is clear what advice was given and that the advice was specific to the facts of the Taxpayer’s situation. The Taxpayer received this advice early in 2007 and took reasonable action on this advice for the tax year at issue. She stated that she relied on this advice to decide that she would continue to maintain her Utah domicile, rather than sell her house and move. Had she changed domicile, she would not have this tax liability. There is

² The Tax Commission has considered equitable estoppels in other cases, but has not found the facts in those cases

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injury to the Taxpayer that would result if the Commission now repudiates the statement based on her reliance. Equitable estoppel should apply in very limited circumstances as courts have disallowed claims for equitable estoppel against the Tax Commission based on public policy concerns.³ However, this case is different in that it was not based on audit decisions made with incomplete or insufficient information. The advice given to the Taxpayer was very specific, on point to the question asked and the Taxpayer had provided complete and accurate information in seeking the advice.

The audit for the 2007 tax year should be abated based on the principle of equitable estoppel. However, the Taxpayer should note that for **tax years beginning after the date of this decision** she is not entitled to a credit for taxes paid to a township on a resident Utah individual income tax return.

Jane Phan
Administrative Law Judge

DECISION AND ORDER

Based upon the forgoing, the audit against the Taxpayer for tax year 2007 is abated. 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.

to support estoppel. See *Findings of Fact, Conclusions of Law and Final Decision in Appeal No. 08-0590*.
3 See *O'Rourke v. Utah State Tax Commission*, 830 P.2d 230 (Utah 1992) in which the Court stated "sound public policy precludes the assertion of estoppels against the Commission for an incorrect assessment made by its auditor based upon inadequate facts." Also *Orton v. Utah State Tax Comm'n*, 864 P.2d 904 (Ut. Ct. Appl. 1993) in which the Court stated, ". . .the Ortons have not established that they will suffer a grave injustice if estoppels is not granted, (citation omitted) since the Ortons' injury, if any, does not arise from the Tax Commission's correction of its earlier erroneous assessment, but from the fact that they did not pay state income taxes that they are lawfully required to pay."

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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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