

12-747
TAX TYPE: INCOME TAX
TAX YEAR: 2008
DATE SIGNED: 8-7-2012
COMMISSIONERS: B. JOHNSON, M. CRAGUN, R. PERO
DISSENTS: D. DIXON
GUIDING DECISION

BEFORE THE UTAH STATE TAX COMMISSION

<p>TAXPAYER-1 AND TAXPAYER-2,</p> <p style="text-align: center;">Petitioners,</p> <p>v.</p> <p>AUDITING DIVISION OF THE UTAH STATE TAX COMMISSION,</p> <p style="text-align: center;">Respondent.</p>	<p>INITIAL HEARING ORDER</p> <p>Appeal No. 12-747</p> <p>Account No. #####</p> <p>Tax Type: Income Tax</p> <p>Tax Years: 2008</p> <p>Judge: Phan</p>
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Presiding:

Jane Phan, Administrative Law Judge

Appearances:

For Petitioner: REPRESENTATIVE FOR TAXPAYER, Attorney at Law
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 April 8, 2013. Petitioners (Taxpayers) are appealing an audit deficiency of Utah individual income tax, penalties and interest for 2008. The Notice of Deficiency and Estimated Income Tax had been issued on February 2, 2012. Taxpayers timely appealed the audit. The amount of the audit deficiency as shown on the Notice is as follows:

	Tax	Penalties ¹	Interest	Total as of Notice ²
2008	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$

¹ At the hearing the Division agreed that the penalties should be waived.

² At the hearing the Division noted that this total audit deficiency as shown on the Notice did not include \$\$\$\$\$ in taxes that the Taxpayers had jointly paid to the State of Utah with the returns they had filed. Interest would be adjusted to accrue only 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) (2008)³ 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)(q) (2008) as follows:

(q)(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 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 Untied 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;

³ 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) 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.

. . . .

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 audits on the assertion that Taxpayers were both residents of Utah for individual income tax purposes for 2008. The Taxpayers had filed separate Utah returns for 2008 under the provision for Special Instructions for when one spouse is a resident of Utah and one spouse is a nonresident. They had filed a joint federal return. It was the Taxpayer's contention that TAXPAYER-2 was a Utah resident and TAXPAYER-1 was not a resident of Utah. TAXPAYER-2 had filed a Utah Individual Income Tax Return claiming her employment income. TAXPAYER-1, claiming to be a nonresident also filed a Utah Return, claiming rental income that would be Utah source income, but not his wages which he had earned from employment in STATE. The wage income as indicated on the return was \$\$\$\$\$.

Upon auditing the Utah returns filed by TAXPAYER-2 and TAXPAYER-1, the Division disallowed the returns from both Taxpayers and replaced them with a joint audit which was reflected in the Notice. As the Division rejected, rather than audited the returns filed by the Taxpayers, it resulted in the assessment of both the 10% failure to file and 10% failure to pay penalties, which totaled \$\$\$\$\$. The Division agreed at the hearing that both penalties should be waived.

Also at the hearing the Division noted that tax audit deficiency as shown in the Notice did not reflect payments of tax made by the Taxpayers with their filed Utah returns. The Division noted that TAXPAYER-1

had paid \$\$\$\$ and TAXPAYER-2 \$\$\$\$ which had not been credited toward the audit balance. The Division's representatives stated that after giving credit for taxes already paid, the tax amount due was \$\$\$\$ and interest would be adjusted to be based on that amount of the tax. The Division had given credit for TAXPAYER-2 withholding in the audit originally and that was already reflected in the audit Notice.

The issue in this appeal is whether TAXPAYER-1 was a "resident individual" in the State of Utah for the purposes of Utah Code Sec. 59-10-104 in 2008, or whether he was domiciled in STATE. From the information presented TAXPAYER-1 did not spend in the aggregate more than 183 days per year in Utah during 2008. A resident individual, in the alternative, is one who is "domiciled" in the State of Utah. See Utah Code Sec. 59-10-103.

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.⁴ As discussed by the courts in considering this issue, the fact finder may determine intent "based on the 'totality of the facts and circumstances surrounding the situation,' and the taxpayer's statement of intent is only one factor of many to be considered. 'In determining whether a party has established a Utah domicile, the fact finder may accord the party's activities greater weight than his or her declaration of intent.'" *Benjamin v Utah State Tax Comm'n*, 250 P.3d 39, 2011 UT 14, prg. 22 (Utah 2011) citing *Clements*, 893 P.2d at 1081 (citing *Allen v Greyhound Lines, Inc.*, 583 P.2d 613 (Utah 1978)).

In this case the Taxpayer had been domiciled in Utah. 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 domicile; and 3) the intent to remain in the new domicile permanently. See Utah Admin. Rule R865-9I-2.

The Taxpayers had been Utah Residents for many years. In 2005 they purchased a home in CITY-1, Utah. TAXPAYER-1 was employed by COMPANY-1 and he was a part owner of that business. Around September of 2006 it was determined that TAXPAYER-1 would open up and develop a STATE division for the business. Prior to that time they had no business in STATE. TAXPAYER-1 agreed to be the MANAGER

⁴ 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: *Benjamin v Utah State Tax Comm'n*, 250 P.3d 39, 2011 UT 14 (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).

in STATE and this required his physical presence in that state. TAXPAYER-2 had a job in Utah which she did not want to leave and their son was in elementary school in Utah. TAXPAYER-1 stated that the family had decided that TAXPAYER-2 would continue to reside at their residence in Utah with their son and move to STATE when their son was out of high school, which was more than 10 years in the future. In 2011 the value of the Utah Residence was listed by (X) County at \$\$\$\$\$. TAXPAYER-1 purchased a fifth wheel trailer and towed it to STATE in September 2006. TAXPAYER-1 rented on a month to month basis, a site in a trailer park in CITY-2, STATE. He explained that this location was 20 miles from CITY-3 STATE where the STATE business was located, but he chose to stay in CITY-2 because it was a beautiful area. TAXPAYER-1 did not purchase a residence or even any property in STATE to set up a more permanent residence while he was there from September 2006 through 2008. He did not register a vehicle in STATE. There were several vehicles registered to him in Utah during 2006 to 2008 and he maintained these were vehicles used by his wife. He drove a company vehicle in STATE.

TAXPAYER-1 previously had a SPECIALTY license in STATE.⁵ He worked very long hours while in STATE and did not travel back to Utah for weekends. He did purchase a golf membership while he was there in April 2008, but did not have any other memberships or other associations in STATE. He maintained a post office box for mail in STATE and opened a bank account in STATE. He did obtain a STATE driver license in February 2008 and registered to vote in October 2008 in STATE. He stated that he had been motivated to obtain a STATE driver license because he wanted to vote in the upcoming election and he had to have a driver license to register to vote in STATE. Also late in 2008 he purchased a Utah nonresident combination hunting license.

He stated that he did not even return to Utah from January 1, 2008 to sometime in August 2008. The business did start to grow successfully in STATE in 2007, but in 2008 with the economic downturn it just collapsed. Starting from August to October of 2008 there were discussions about whether the STATE office should be closed, and the decision was made to close the business by October 2008. He moved the travel trailer back to Utah in October 2008, stating that he did not want to move it during the winter. He says that he continued to work in STATE to the end of the year but stayed at the STATE offices or employee rentals after October 2008.

While in STATE, TAXPAYER-1 received a per diem reimbursement from the business for the time that he spent in STATE. Generally, a business would pay this only when an employee is required to be away

⁵ See Letter from NAME, February 23, 2012.

from home. He explained that the reason he took a travel trailer to STATE and did not purchase a permanent place was that he did not know if the STATE Division would work out and he was kind of waiting until his wife would move up there. However, the events given that would need to occur before TAXPAYER-2 would move to STATE, qualifying for retirement and their child graduating from high school were ten years away. He sought medical treatment in Utah during 2008 and had a Utah tax preparer prepare his returns. He did use his address in STATE on his Utah return for 2008, despite that he had already moved from STATE at that time.

Upon review of the facts presented by the parties it is undisputed that TAXPAYER-1 did have a physical presence in STATE in 2008. He was living and working in STATE from 2006 through October 2008 and then was more back and forth from STATE to Utah until the end of 2008. However, once a domicile has been established in Utah, in addition to the physical presence in a new state, to establish a change of domicile the taxpayer must show also a specific intent to abandon the Utah domicile and an intent to remain in the new domicile permanently. TAXPAYER-1 did take a few steps that point toward establishing a domicile in STATE after he had been there for a while. In February 2008 he obtained a STATE driver license. In October 2008 he registered to vote in STATE. But by this time there were discussions about closing the STATE office and returning to Utah. TAXPAYER-1 hauled his trailer back to Utah in October 2008.

However, there was evidence that he did not intend to remain permanently in STATE. After being there since 2006, he never established a permanent residence in STATE. He was staying in a travel trailer at a site rented from month to month in a trailer park rather than making long term living arrangements. TAXPAYER-1 stated that he took a travel trailer to STATE and stayed in it because he wanted to see if the STATE business operation would work out and he was apparently waiting to actually set up a permanent place of abode until events that were 10 years out, when his son graduated from high school and his wife would leave her employment. Additionally, he received a per diem reimbursement from his employer to compensate him for his expenses in STATE. Had his employer considered him to be a resident of STATE, it is unlikely that they would have paid this reimbursement. Based on the information presented, TAXPAYER-1 did not show sufficient intent to remain permanently in the new domicile.

The Division had agreed to waive the penalties in this matter. It does not appear the failure to file penalty was appropriate as TAXPAYER-1 had timely filed a return and there is reasonable cause to waive the failure to pay penalty as the facts in this case make it difficult to determine whether or not he had changed his

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domicile to STATE.

Jane Phan
Administrative Law Judge

DECISION AND ORDER

Based upon the foregoing, the Commission sustains the audit as to tax amount, with the Division applying the credits for payments already made for the 2008 tax year and interest adjusted thereon. The Commission waives the failure to file and failure to pay penalties assessed with 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

Michael J. Cragun
Commissioner

Robert P. Pero
Commissioner

COMMISSIONER DIXON DISSENTS

I have previously found in several decisions that taxpayers can be separately domiciled and still be married. And I also have found that what one claims to be a home does not need to be something that is owned; it can be rented, or even company housing, and the living situation need not be permanent, because the case law supports that an indefinite period of time can support the creation of domicile. In looking at the facts

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of the appeal, the case law and previous Commission Orders⁶, I would rule that TAXPAYER-1 established a new domicile in STATE.

The Majority has raised the issue as to whether TAXPAYER-1 really did not do enough to establish domicile in STATE. In Tax Commission Order 08-1487 the Commission found that the Petitioner did not perform a number of actions often associated with changing ones domicile, such as obtaining a new driver's license, changing vehicle registration and opening a bank account, but the Commission found when the Petitioner's actions were looked at as a whole they demonstrated the Petitioner's intent to abandon his Utah domicile, and an intent to remain in his new domicile permanently. TAXPAYER-1 obtained a STATE driver's license, a PO Box, and a bank account. He registered to vote, obtained a golf membership in STATE and a non-resident Utah hunting license. This appears to be more than the Petitioner in 08-1487.

The Majority found that TAXPAYER-1 did not change his domicile because his wife and child were still in Utah. The Commission has previously ruled that a couple can be separately domiciled and still be married. See Tax Commission Order 00-1182. In terms of a couple with children, I disagree that two people cannot have two different domiciles even when one has a wife and child. In Tax Commission Order 08-0478, I ruled with the Majority and found the Petitioner abandoned his Utah domicile because he chose not to return to Utah when his wife and family did (and in that case the Petitioner had not obtained a driver's license or registered to vote in the state). Although it involves the Service Person Relief act, in 10-1257, I dissented finding that one spouse had established a separate domicile in another state, regardless of any future intent or remaining ties to Utah, and cited case 08-0499. I hold a person can have a different intent and take different actions than their spouse, and still have an interested in their spouse and child.

The Majority has raised the issue of the permanency of a fifth-wheel placed on a site rented month to month as demonstration of no intent to stay permanently in STATE or establishing domicile. In Tax Commission Order 06-0570 the Petitioner purchased a travel trailer that was parked at a leased space in an RV park in Utah, but then the Petitioner moved to another state to teach, and lived in teacher housing. She then moved to another state to attend school. In that case the commission found the travel trailer parked on a lease space in Utah was one factor that supported her creating domicile and maintaining domicile in Utah. I would hold TAXPAYER-1 is similar situated, and the travel trailer on a leased space should not be considered a reason he did not create domicile in STATE.

⁶ Redacted commission orders can be found at <http://www.tax.utah.gov/commission-office/decisions>.

In another tax commission order 01-0507, the Petitioner moved from Utah to another state, and lived in his fifth-wheel on BLM land. Four months later he moved his fifth-wheel to another city in that same state; then moved to another state and parked his fifth wheel behind an acquaintance's business and resided in his fifth wheel on the business property. The Commission ruled that camping on BLM land did not establish domicile, but found when the Petitioner moved off BLM land, even on to someone else's business property, when coupled with other factors, he had established a domicile.

In 09-0261 at issue was the permanency of the Petitioner's new domicile. I dissented and found the Petitioner had established a new domicile even if it was in company provided housing.

Finally, the Majority has raised the issue of per diem, and that receiving per diem means when in STATE, TAXPAYER-1 was away from home. The conditions of work are just one factor of many to be considered. There is not enough information in the record regarding the per diem. The record appears void of any information on the conditions of the partnership and method of compensation or draw-down of pay from the company as a partner.

In 07-1300, one of the issues was whether specified terms of an employment contract determined whether the situation was a temporary assignment. The majority found in that case, that there were other factors to be considered and despite the employment contract, the Petitioner did intend to abandon his Utah domicile, had a physical presence in another city, and intended to remain there indefinitely.

In 04-1297, the Commission wrestled with the issue of a move to another country and temporary employment. I quote in part the finding below:

“Considering the factors that show intent to create a domicile, Petitioner's move to Utah appears to be like his move to COUNTRY. Both were moves for an indefinite period to accomplish a work assignment for his employer. Both involved driving cars registered in the locality in which Petitioner resided....Although Petitioner had financial dealings and worked with medical and other professional advisers in several states and in COUNTRY, there is no pattern of favoring Utah or demonstrating intent to return to Utah...”

The governing standard for this appeal is *Allen v. Greyhound Lines, Inc.*, 583P.2d 613 (Utah 1978).

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The Utah Supreme Court in *Allen*, at 615, stated:

“A man’s home is where he makes it, not where he would like to have it. Even though a person may not intend to remain in the state for all time, domicile will be found where there is a residence coupled with intent to remain for an indefinite period.”

Based on case law one can have intent to remain for an indefinite period of time; permanent need not mean for all time. Case law in Utah supports that a home is where there is intent to remain for an indefinite period.

The Majority took issue with the Petitioner “... *staying in a travel trailer at a site rented from month to month in a trailer park rather than making long term living arrangements.*” I would hold for many people in Utah and in the United States, staying in a trailer, in a trailer park, rented month to month is their home; it is their long term living arrangement. Many people rent from month to month whether it is a trailer, an apartment or a house. One’s home does not need to be permanent or owned for the purposes of establishing domicile. Again, case law in Utah supports that a home is where there is intent to remain for an indefinite period of time, not all time.

D’Arcy Dixon Pignanelli
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 here on, may result in a late payment penalty. Petitioner may contact Taxpayer Services at (801) 297-7703 to make payment arrangements.