

13-764

TAX TYPE: INCOME TAX

TAX YEARS: 2006 and 2007

DATE SIGNED: 1-29-2015

COMMISSIONERS: J. VALENTINE, M. CRAGUN, R. PERO

EXCUSED: D. DIXON

GUIDING DECISION

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BEFORE THE UTAH STATE TAX COMMISSION

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TAXPAYER,

Petitioner,

vs.

AUDITING DIVISION OF THE  
UTAH STATE TAX COMMISSION,

Respondent.

**FINDINGS OF FACT, CONCLUSIONS  
OF LAW, AND FINAL DECISION**

Appeal No. 13-764

Account No. #####

Tax Type: Income Tax

Tax Years: 2006 and 2007

Judge: Phan

**Presiding:**

D'Arcy Dixon Pignanelli, Commissioner  
Jane Phan, Administrative 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 a Formal Hearing on September 16, 2014, in accordance with Utah Code §59-1-501 and §63G-4-201 et seq. Based upon the evidence and testimony presented at the hearing, the Tax Commission hereby makes its:

FINDINGS OF FACT

1. Respondent ("Division") issued Notices of Deficiency and Estimated Income Tax against Petitioner ("Taxpayer") on February 7, 2013. Taxpayer timely appealed the audits<sup>1</sup> and the matter proceeded to the Formal Hearing.

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<sup>1</sup> Respondent's Exhibit 2.

2. The amount of the audit deficiency as shown on the Notices<sup>2</sup> are as follows:

	Tax	Penalties	Interest <sup>3</sup>	Total as of Date of Notice
2006	\$\$\$\$	\$\$\$\$	\$\$\$\$	\$\$\$\$
2007	\$\$\$\$	\$\$\$\$	\$\$\$\$	\$\$\$\$

3. The penalties assessed with the audit were 10% failure to file and 10% failure to pay penalties under Utah Code Sec. 59-1-401. During the hearing, the Division stated that it did not object to waiver of the penalties assessed in this matter.

4. The audits for each year are non filing assessments as the Taxpayer had not filed Utah returns for 2006 and 2007. It was the Taxpayer's assertion that he was not a resident of Utah for tax purposes during these two years, that he was instead a resident of the ISLAND. It was the Division's contention, that although living and working on the ISLAND, the Taxpayer remained domiciled in Utah during the audit period. The audits were issued against the Taxpayer as a Utah resident individual.

5. In order to determine where the Taxpayer was domiciled during the audit years, a factor to note is whether he established a domicile in Utah prior to the audit years. The Taxpayer testified that he had been married, living in STATE-1 with his wife, child and two step children for seven years until he and his wife divorced. In December 2001 he came to Utah with basically a suitcase full of clothes and ended up staying with parents while he searched for a new job and figured what he was going to do.

6. He states that it was two years before he was able to find any employment. The first job that he found was a temporary nine month position, but it was in Utah. After that was over it was another six months, but then obtained another temporary position with the government GOVERNMENT DIVISION-1. This was a six month position. During this period of time the Taxpayer lived with his parents,<sup>4</sup> filed Utah Individual Resident Returns<sup>5</sup> and obtained a Utah Driver License. As this job was temporary, he was looking for another position and obtained one in STATE-2 with the GOVERNMENT DIVISION-2 in June 2005. This was a temporary, summer, position that lasted from June to October 2005. While in STATE-2, he stayed in a cabin owned by the GOVERNMENT DIVISION-2, for which he paid rent.

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2 Respondent's Exhibit 1.

3 These amounts represent the interest and the total as of the date the Notice was issued. Interest continues to accrue on the unpaid balance.

4 At some point the Taxpayer's father passed away and it was his mother at this residence.

5 Respondent's Exhibit 5.

7. Knowing that this job was temporary, the Taxpayer continued to look for a more permanent job and on October 2005 had been able to obtain employment on the ISLAND. This job was with a large STATE-2 company that had a contract with the GOVERNMENT DIVISION-3 to provide services at ISLAND. It was the Taxpayer's testimony that the STATE-2 company had a five year contract with the GOVERNMENT DIVISION-3 and it was renewable. He stated that this job was the most permanent position that he had been able to obtain for years.

8. The Taxpayer returned to Utah to visit his family and obtain a passport. He needed a passport to travel to the ISLAND. He testified that as soon as he received his passport he was off to ISLAND

9. The Taxpayer left his vehicle in Utah at his mother's residence. He kept it registered in Utah, and states that he left it here for nieces and nephews to use.<sup>6</sup> He also retained his Utah Driver License throughout the audit period.<sup>7</sup> ISLAND did not issue Driver Licenses or passports, so he could not have obtained one from that jurisdiction. He had not rented or purchased a residence in Utah during the years here, and so he did not maintain a Utah residence while he was in ISLAND.

10. ISLAND is considered an Insular Possession of the United States. It is run under common law and does not have a government system that would issue Driver Licenses or a passport. A person is required to have a passport to travel to and return from ISLAND.

11. On the ISLAND, he estimated that there were about 50 full time employee residents. There were also numerous researchers and tourists on the islands. He states that the ISLAND is made of #####-islands and has about #####-acres in total. All the property and housing is owned by the U. S. Government. He testified that most of the workers stayed in an old military barracks converted to housing. He chose to stay in one of the 17 single family houses on the island. He states that he renovated this residence to make it livable and bought things necessary to make his home there, including furniture, a television and a vacuum cleaner. He also testified that other workers had resided on the island for many years and some of the people that he had worked with in 2006 and 2007 are still living and working there to this day. He also indicated that some employees had their wives and children living with them on the island.

12. The Taxpayer had mail sent to him on the island, but had his tax information sent to his mother's residence. He stated that this was in part out of habit as his late father was an accountant and had prepared his returns for him before he died. He also said he wanted his refunds to go to his mother to help her out and he did not think to change his address on his federal returns. His 2006 and 2007 federal

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6 Respondent's Exhibit 8.

7 Respondent's Exhibit 7.

returns did list his address as his mother's residence in Utah and his W-2s were mailed to that Utah address.<sup>8</sup>

13. It was his testimony he found ISLAND to be "perfect" and he originally intended to stay there as long as he could. He states that he went scuba diving and built a sailboat. The island had wildlife and fish. He also testified that his mom came out to visit him while he was there and his future wife came out twice to visit.

14. During the two years he spent on ISLAND, he had only two to three weeks vacation in total, which were not all spent in Utah.

15. However, during his second year on the island, he started looking for employment elsewhere. He testified that he had traveled to STATE-3 for a work assignment and while there he rented a car and drove for six days straight. He realized he had island fever as the ISLAND is a very small island. He also met his future wife during this trip. He testified another factor which helped him change his mind about staying was that the thought that his employer was defrauding the government. He states that he was not looking to return to Utah and was trying to find employment in STATE-3, but the economy was bad there. He also started looking for employment in COUNTRY, as his future wife was COUNTRY.

16. He left after his second year on ISLAND and returned to his mother's residence in Utah. He had been unable to find a job. While in Utah he applied for a Visa so he could work in COUNTRY, but it took a year to obtain the Visa and in the mean time he ended up working for the Federal Government in STATE-4.

17. The Taxpayer did not claim, and asserts he would not have qualified to claim, away from home expenses on his federal return for his living expenses on ISLAND.

18. As all the property on ISLAND is owned by the Government and the housing is available only for employees who are working on the island, or the temporary researchers or tourists, the Division points out that the Taxpayer could not have planned to reside there permanently because he could not have purchased a residence on the island and would not have a place to live when his employment ended. It is the Division's position that he could not have retired on the island and, therefore, could not actually establish a permanent place of abode on the island.

19. The work position in ISLAND was the most permanent employment that the Taxpayer had for years. Unlike his three prior jobs which were temporary six to nine month positions, this was a job at which the Taxpayer might have been employed for many years. Upon his moving to ISLAND, it appears to be the first time in years that the Taxpayer had established a residence for himself, fixing up a home on the island and buying furniture, rather than staying in the barracks. The years prior to this the

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<sup>8</sup> Respondent's Exhibit 6.

Taxpayer seemed to be in a very transitional phase of his life, staying with his parents and working temporary jobs. Considering the contrast between his transitional actions during the years 2002 through 2005 when he resided in Utah, his actions in 2006 to establish a domicile certainly indicate a more permanent intent. Obviously, the Taxpayer could not have obtained a Driver License or registered to vote on ISLAND, because those types of services were not available on the small island.

APPLICABLE LAW

Utah imposes income tax on individuals who are residents of the state, in Utah Code Sec. 59-10-104(1) (2007)<sup>9</sup> 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)<sup>10</sup> 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.

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<sup>9</sup> The Utah Individual Income Tax Act has been revised and provisions renumbered during the audit period although the law as it relates to the issues in this appeal remained substantially the same for the years 2006 and 2007.

<sup>10</sup> In 2011 the Utah Legislature substantially revised the provisions of the Utah Code regarding domicile, adopting Utah Code 59-10-136. These revisions are significant and this decision, therefore, should not be considered to provide guidance for tax year 2011 and later years.

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. . .

The Tax Commission has authority to waive penalties under Utah Code Sec. 59-1-401(13) which provides:

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.

#### CONCLUSIONS OF LAW

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. 59-10-104 for the audit years, or whether he was a resident of the ISLAND. From the evidence indicated in the findings above, the Taxpayer did not spend in the aggregate more than 183 days per year in Utah during the audit period. A resident individual, in the alternative, is one who is "domiciled" in the State of Utah. See Utah Code Sec. 59-10-103.

2. 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 courts in Utah.<sup>11</sup> 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, 22 (Utah 2011) citing *Clements*, 893 P.2d at 1081 (citing *Allen v*

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<sup>11</sup> 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).

*Greyhound Lines, Inc.*, 583 P.2d 613 (Utah 1978)). In this matter it is the Taxpayer's testimony that he changed his domicile from Utah to ISLAND. The totality of the facts supports this contention.

3. In this case there is no dispute that the Taxpayer had been domiciled in Utah. After his divorce he moved to Utah and stayed with his parents from 2002 to 2005 until he could find new employment and possibly figure out the next step in his life. Although this move may have been more for a transitional purpose, he did obtain a Utah Driver License, register his car and file Utah resident returns on his income from temporary employment. Utah was his only place of residency at that time as it is apparent that he abandoned his residency in STATE-1 and did not establish one in any location other than 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 Taxpayer has the burden of proof in this proceeding under Utah Code Sec. 59-1-1417. It is clear that the Taxpayer had a physical presence in ISLAND. The Division did not refute that the Taxpayer was living and working there full time in 2006 and 2007. The Taxpayer has established that he had the intent when he started out in 2006 to remain on ISLAND indefinitely.<sup>12</sup> Additionally, the Taxpayer had not really established a permanent place of abode for himself in Utah. When in this state, he stayed with his parents. This is different from many domicile cases considered by the Commission where a taxpayer claims to have moved to another state or country, but continues to maintain a residence in Utah. When the Taxpayer left Utah, he did not continue to maintain a residence in Utah. The Taxpayer has provided sufficient evidence to establish that he was no longer domiciled in Utah during 2006 and 2007.

4. The Tax Commission has authority to waive penalties under Utah Code Sec. 59-1-401(13) if reasonable cause is shown. In this case as the Commission findings are that the Taxpayer was not domiciled in Utah, the tax amount will be abated, so there would be no remaining penalties and interest.

Jane Phan  
Administrative Law Judge

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<sup>12</sup> Although Utah Admin. Rule R865-9I-2 lists an intent to remain in a new domicile permanently, the courts that have noted, "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 an intent to remain for an indefinite period." *Clements v State Tax Comm'n*, 893 P.2d 1078, 1081 (Utah App. 1995). See also, *O'Rourke v State Tax Comm'n*, 830 P.2d 230 (Utah 1992).

DECISION AND ORDER

Based on the foregoing, the Commission finds that the Taxpayer was not domiciled in Utah and was not a Utah resident individual for the tax years 2006 and 2007. The audit is to be abated. It is so ordered.

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 2015.

John L. Valentine  
Commission Chair

D'Arcy Dixon Pignanelli  
Commissioner

Michael J. Cragun  
Commissioner

Robert P. Pero  
Commissioner

**Notice of Appeal Rights:** You have twenty (20) days after the date of this order to file a Request for Reconsideration with the Tax Commission Appeals Unit pursuant to Utah Code Ann. §63G-4-302. A Request for Reconsideration must allege newly discovered evidence or a mistake of law or fact. If you do not file a Request for Reconsideration with the Commission, this order constitutes final agency action. You have thirty (30) days after the date of this order to pursue judicial review of this order in accordance with Utah Code Ann. §59-1-601 et seq. and §63G-4-401 et seq.