

13-1560
TAX TYPE: INCOME TAX
TAX YEAR: 2009
DATE SIGNED: 4-28-2014
COMMISSIONERS: B. JOHNSON, M. CRAGUN, R. PERO
EXCUSED: D. DIXON
GUIDING DECISION

BEFORE THE UTAH STATE TAX COMMISSION

<p>TAXPAYER-1 and TAXPAYER-2, Petitioners, vs. AUDITING DIVISION OF THE UTAH STATE TAX COMMISSION, Respondent.</p>	<p style="text-align: center;">INITIAL HEARING ORDER</p> <p>Appeal No. 13-1560</p> <p>Account No. #####</p> <p>Tax Type: Income Tax</p> <p>Tax Year: 2009</p> <p>Judge: Phan</p>
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Presiding:

Jane Phan, Administrative Law Judge

Appearances:

For Petitioner: REPRESENTATIVE FOR TAXPAYER, Tax Preparer
TAXPAYER-1

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 on February 4, 2014, for an Initial Hearing in accordance with Utah Code §59-1-502.5. Petitioners (Taxpayers) are appealing an audit deficiency of Utah individual income tax, penalties and interest for 2009. The Notice of Deficiency and Audit Change had been issued on March 27, 2013. Taxpayers timely appealed the audit. The amount of the audit deficiency as shown on the Notice is as follows:

	Tax	Penalties	Interest	Total as of Notice ¹
2009	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$

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) (2009)² as follows:

...a tax is imposed on the state taxable income of a resident individual as provided in this section...

Resident individual is defined in Utah Code Sec. 59-10-103(1)(q) (2009) 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(2009)³ 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 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.

² The Tax Commission applies the law in effect during the audit period.

³ This rule was codified at Utah Code. Sec. 59-10-136 with substantial amendments after the 2009 tax year at issue in this appeal.

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

Respondent (“Division”) based its audit on the assertion that Taxpayers were residents of Utah for individual income tax purposes for all of 2009. It was the Taxpayers’ position that they were part year residents of Utah during 2009, that they had moved from Utah and were residents of STATE for a portion of tax year 2009. They had filed a Part-Year Resident Utah Return in 2009 on that basis. One item on the audit that was no longer contested by the taxpayers was the denial by the Division of the Health Benefit Plan Credit. At the hearing the Taxpayers no longer argued that they were entitled to this credit.

The issue in this appeal is whether Taxpayers were “resident individuals” in the state of Utah for the purposes of Utah Code Sec. 59-10-104 for the entire 2009 tax year, or whether they changed their domicile to STATE for part of the year. Under Utah Code Sec. 59-10-103, a resident individual is one who maintains a permanent place of abode in this state and spends in the aggregate more than 183 days per year in Utah, or in the alternative a resident individual is one who is “domiciled” in Utah. In this matter the Division argues that the Taxpayer was domiciled in Utah throughout the entire tax year 2009. The question of whether one 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, 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) (Citations Omitted).

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 this case the Taxpayers had been domiciled for some time 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.

It was not disputed that the Taxpayers were residents and domiciled in Utah up until the end of April 2009. They resided at an apartment they rented in CITY-1. TAXPAYER-1 worked for a company in CITY-1. TAXPAYER-1 was a licensed pilot and wanted to be able to work full time as a pilot, but was not able to do so with this job. TAXPAYER-2 was working as a nurse. Their children were very young at this time, with one being 2 years old and one being 3 months old. TAXPAYER-1 had worked as a pilot in a seasonal position in CITY-2, STATE during the summer of 2008. When that company called and offered TAXPAYER-1 a full time position flying in CITY-2 in 2009, he said that he and TAXPAYER-2 decided that they would move there permanently. Working as a pilot was what TAXPAYER-1 wanted for himself as a career. It was their thought that the pay would be enough with his employment, that TAXPAYER-2 would not have to work and could stay home with the two children. TAXPAYER-1 stated that they moved from their apartment in CITY-1, which was a month to month rental, and sold or gave away everything that would not fit into the back of his pick-up truck. He and his brother-in-law drove the pick-up truck and car to STATE. TAXPAYER-2 and the children flew up to CITY-2. The family moved to CITY-2, STATE, at the end of April or first of May. They owned no property in Utah and did not maintain a residence in Utah after they moved.

In STATE they rented a house on ISLAND for \$\$\$\$\$ per month, where they stayed from May 2009 to September 1, 2009. They indicate it was a six-month lease. TAXPAYER-1 stated that they had settled in at the residence in CITY-2 and were getting involved in the community. They provided an email from NAME, the manager of BUSINESS in STATE which confirmed that in 2009 TAXPAYER-1 was hired to be a full time pilot for the company and that TAXPAYER-2 and the children lived with him in STATE. They also submitted an email from their clergy indicating that the TAXPAYERS lived in STATE from May until September 2009. They did have check stubs indicating rent paid in STATE.

However, in CITY-2 the recession hit hard in the summer of 2009 and there was not as much work as they had anticipated. TAXPAYER-1 stated that his job was \$\$\$\$\$ base pay per month and then \$\$\$\$\$ per flight hour. He was expecting to fly 120 hours per month during the summer, which he did in May and June, but for July he had only 80 flight hours and August even less at 60 flight hours. He acknowledged that most of the work was during the summer months and there would be less flying in the winter. The Taxpayers did not obtain STATE Driver

Licenses, register to vote in STATE or register their vehicles in STATE. TAXPAYER-1 stated that he was initially too busy flying during the work week. Then he had made an appointment in August to get this done, but they ended up deciding to move back to Utah and never did get these things in STATE. He stated that his pilot license was federal, so there was no need to change it from state to state.

At the end of August he got a job offer back in Utah from another company as a pilot. Because the flight hours had decreased and were far below what the family was expecting, they had thought this new Utah job sounded more stable and would be better pay than what TAXPAYER-1 was now making. The family moved back to Utah from STATE in September 2009. He states because they had no residence in Utah, they moved in with TAXPAYER-2 parents.

The promised job in Utah did not turn out and TAXPAYER-1 looked for work for the rest of 2009. TAXPAYER-1 did not start working again until 2010, when he went back to STATE and started flying in January 2010 for the same employer as in 2009. TAXPAYER-2 was able to go back to work for her previous employer in Utah and she and the children stayed in Utah in 2010. The Taxpayers' representative indicated that for 2010 the Taxpayers had filed a full year Utah resident return, as they had for tax year 2008. It was only for this period in 2009, when the whole family had moved to STATE that they considered themselves non residents of Utah. These filings are a strong contemporaneous indication of the Taxpayers intent.

Upon review of the facts presented by the parties this is a difficult case due to the short time period that the Taxpayers were in STATE and also due to the fact that employment in STATE is often seasonal. The Taxpayers were only there during the summer months. To show that they changed their domicile, the Taxpayers must establish they had a specific intent to abandon the former domicile; the actual physical presence in a new domicile; and the intent to remain in the new domicile permanently. See Utah Admin. Rule R865-9I-2. However, the facts in this case differ from many heard at the Tax Commission where the Taxpayers owned and maintained a home in Utah during the entire tax years at issue and that home is primarily where one spouse and the children reside, while the other spouse claims to have established a domicile in STATE. In this case the Taxpayers' actions show intent to abandon Utah as a domicile. They did not maintain a Utah residence. They packed up their belongings and the whole family moved from the state. They have been able to establish a physical presence in STATE with the evidence submitted at the hearing for the months of May through September.

The question is whether the Taxpayers had the intent to remain in the new domicile permanently or if the intent was to stay for the summer. If they had obtained STATE Driver

Licenses and registered their vehicles that would help establish intent, but they did not get around to doing this before they changed their minds and moved. However, moving their belongings and the entire family to STATE and setting up a house there does weigh toward intent to establish the domicile in STATE. Because if the intent was seasonal employment, with the newborn baby it seems it would have been easier for TAXPAYER-2 and the children to remain in Utah and for TAXPAYER-1 to go by himself to STATE and work on seasonal basis, like he had the year before and then again the year after. As noted by the Taxpayers' representative, sometimes these moves do not work out as planned. Given that there was no evidence to refute that the Taxpayers gave away and then packed up all their remaining belongings, moved to STATE into a house there and did not maintain a Utah residence, the weight of the evidence supports their position that they were part year residents of Utah during the 2009 tax year.

Jane Phan
Administrative Law Judge

DECISION AND ORDER

Based on the foregoing, the Division is to adjust the audit on the basis that the Taxpayers were part-year residents during 2009 and residents of STATE from May 1 through September 1, 2009. 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

Appeal No. 13-1560

Failure to request a Formal Hearing will preclude any further appeal rights in this matter.

DATED this _____ day of _____, 2014.

R. Bruce Johnson
Commission Chair

D'Arcy Dixon Pignanelli
Commissioner

Michael J. Cragun
Commissioner

Robert P. Pero
Commissioner

Notice of Payment Requirement: Any balance due as a result of this order must be paid within thirty (30) days of the date of this order, or a late payment penalty could be applied.