

14-706  
TAX TYPE: INCOME TAX  
TAX YEARS: 2006, 2008, 2009, 2010 and 2011  
DATE SIGNED: 5-21-2015  
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,<br><br>Petitioner,<br><br>vs.<br><br>AUDITING DIVISION OF THE UTAH<br>STATE TAX COMMISSION,<br><br>Respondent. | <b>INITIAL HEARING ORDER</b><br><br>Appeal No. 14-706<br><br>Account No. #####<br>Tax Type: Income Tax<br>Tax Year: 2006, 2008, 2009, 2010 and<br>2011<br><br>Judge: Phan |
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**Presiding:**

Jane Phan, Administrative Law Judge

**Appearances:**

For Petitioner: REPRESENTATIVE FOR TAXPAYER, Representative  
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 on January 26, 2015 for an Initial Hearing in accordance with Utah Code §59-1-502.5. Petitioner (“Taxpayer”) is contesting an audit assessment issued against him for the tax years 2006 through 2011. Respondent (“Division”) had issued audit deficiencies on February 18, 2014, on the basis that the Taxpayer was a resident of Utah for all tax years at issue. For tax years 2006 and 2008-2010 the amounts of the deficiencies were based on the Division changing the Taxpayer’s filing status from non/part year resident to full year resident. The Taxpayer had filed nonresident returns for each of these years; however, it appears that these returns were not filed until 2013.<sup>1</sup> For the 2011 tax

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<sup>1</sup> The Taxpayer’s returns for the years 2008 through 2010 as provided by the Division have been stamped as received October 29, 2013, and the date indicated as signed was June 7, 2013. There is no indication of

year, the Division had filed a Notice of Deficiency and Estimated Income Tax audit, as no Utah return had been filed by the Taxpayer. The amount of the audit deficiency for each year is as follows:

| Tax Year | Audit Tax  | Interest <sup>2</sup> | Penalties  | Total As of Date of Notice |
|----------|------------|-----------------------|------------|----------------------------|
| 2006     | \$\$\$\$\$ | \$\$\$\$\$            |            | \$\$\$\$\$                 |
| 2008     | \$\$\$\$\$ | \$\$\$\$\$            |            | \$\$\$\$\$                 |
| 2009     | \$\$\$\$\$ | \$\$\$\$\$            |            | \$\$\$\$\$                 |
| 2010     | \$\$\$\$\$ | \$\$\$\$\$            |            | \$\$\$\$\$                 |
| 2011     | \$\$\$\$\$ | \$\$\$\$\$            | \$\$\$\$\$ | \$\$\$\$\$                 |

APPLICABLE LAW

Utah imposes income tax on individuals who are residents of the state, in Utah Code Sec. 59-10-104(1) (2009)<sup>3</sup> as follows:

...a tax is imposed on the state taxable income of every resident individual...

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<sup>4</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.

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the date filed on the copy of the 2006 return provided. The Taxpayer did not raise the issue of the statutory assessment limitation period set out at Utah Code Secs. 59-1-1410 and 59-10-536 and under these provisions there are a number of exceptions to the general three-year period to issue an assessment.

2 Interest continues to accrue until the balance is paid in full.

3 The Commission applies the substantive statutes that were in effect during the audit period. The Utah Individual Income Tax Act has been revised and provisions renumbered throughout the audit period although the law as it relates to the issues in this appeal remained substantially the same for the years 2006 through 2011. For convenience the Commission cites to the 2009 provisions.

4 Effective January 1, 2012, the Utah Legislature substantially revised the provisions of the Utah Code regarding residency and 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 2012 and later years.

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.

. . .

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.

The Commission has been granted the discretion to waive penalties and interest. Utah Code §59-1-401(13) 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."

The Commission has promulgated Administrative Rule R861-1A-42 to provide additional guidance on the waiver of penalties and interest, as follows in pertinent part:

- (2) Reasonable Cause for Waiver of Interest. Grounds for waiving interest are more stringent than for penalty. To be granted a waiver of interest, the taxpayer must prove that the commission gave the taxpayer erroneous information or took inappropriate action that contributed to the error.
- (3) Reasonable Cause for Waiver of Penalty. The following clearly documented circumstances may constitute reasonable cause for a waiver of penalty:

- (a) Timely Mailing...
- (b) Wrong Filing Place...
- (c) Death or Serious Illness...
- (d) Unavoidable Absence...
- (e) Disaster Relief...
- (f) Reliance on Erroneous Tax Commission Information...
- (g) Tax Commission Office Visit...
- (h) Unobtainable Records...
- (i) Reliance on Competent Tax Advisor...
- (j) First Time Filer...
- (k) Bank Error...
- (l) Compliance History...
- (m) Employee Embezzlement...
- (n) Recent Tax Law Change...

### DISCUSSION

The Division based its audits on the assertion that the Taxpayer was a resident of Utah for individual income tax purposes for all of 2006 and 2008-2011. The Taxpayer was married all of these years to TAXPAYER-2 and they had filed joint returns together. The only residence they owned during these years was in Utah, all their financial mail was addressed to the Utah address and they maintained Utah Driver Licenses. During the audit years the income was earned by TAXPAYER-1 and he will be referred to as “Taxpayer” in this order. It was the Taxpayer’s position at the hearing that he was not a Utah Resident during any of these years, that he had left Utah to work in the Northeast in 2000 and had not returned to Utah since that time, other than for short visits. 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 had abandoned his Utah domicile and actually established one in another state. 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 the alternative, that the Taxpayer remained domiciled in Utah during the entire audit period. 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 courts in Utah.<sup>5</sup> As discussed by the courts, the fact finder may determine intent “based on the ‘totality of

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<sup>5</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).

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).

In this appeal the Taxpayer and TAXPAYER-2 had been domiciled for many years 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 Taxpayer has provided conflicting information regarding where he was domiciled during the appeal process and from that, it is difficult to conclude whether he had intended to abandon his Utah domicile, or that he had ever established a permanent residence in another state to meet the physical presence requirement or intent to remain permanently in the other state.

The Taxpayer and TAXPAYER-2 owned a residence jointly in Utah at ADDRESS-1, CITY-1, Utah and were both undisputedly residents of Utah at least prior to 2000 and continued to own this home jointly throughout the audit period. They had Utah driver licenses and were registered to vote in Utah. The Taxpayer states that around 2000 he left Utah to work as a pneumatic pipe fitter in hospital construction. He worked, however, out of a Utah chapter of a BUSINESS, in CITY, Utah.<sup>6</sup> This was the type of job that required travel from job site to job site. None of the employment during the audit years was in Utah. By 2006 the couple's children were no longer minors. In the responses to the Domicile Survey, the Taxpayer submitted the information that he and TAXPAYER-2 had left Utah together and resided in their RV at the various jobsites. The Taxpayer stated that his domicile was in the state of STATE-1. The Taxpayer stated at the hearing that their son, who was an adult at this time, was residing in their CITY-1 residence. They had all of their mail sent to that address and he would forward it to them. The Taxpayer and TAXPAYER-2 retained their Utah driver licenses and did not register to vote in any other state. They provided a list of where they had residence in 2006 and 2008 through 2010. This list indicated that both the Taxpayer and TAXPAYER-2 had resided in RV parks in the following cities and for the following durations:<sup>7</sup>

January 1 - February 18, 2006 – CITY-2, STATE-1  
February 18 – End of 2006 - CITY-3, STATE-2

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<sup>6</sup> Respondent's Exhibit pgs AUD000016 & 000017.

<sup>7</sup> Respondent's Exhibit pg. AUD000019.

April 2008 – June 2, 2008 - CITY-4  
June 2 to July 22, 2008 – CITY-3, STATE-2  
July 11, 2008 to August 5, 2008 – CITY-13, STATE-3  
August 5, 2008 to September 6, 2008 – CITY-5, STATE-3  
September 6, 2008 to October 13, 2008 – CITY-7, STATE-4  
October 13, 2008 to November 18, 2008 - CITY-7, STATE-3  
November 18, 2008 through December 3, 2008 – CITY-5, STATE-3  
December 3, 2008-February 21, 2009 – CITY-8, STATE-1  
February 21, 2009 –April 7, 2009 – Various hotels in STATE-6, STATE-3, STATE-4  
April 7, 2009 – CITY-2, STATE-1  
January 24, 2010 – February 6 - CITY-3, STATE-2  
February 6, 2010-March 28, 2010-CITY-9, STATE-5  
March 28, 2010-August 5, 2010 – CITY-10, STATE-5  
August 5, 2010 –August 20, 2010 – CITY-9, STATE-5  
August 20, 2010 –September 27, 2010 – CITY-10, STATE-5  
September 27, 2010 –November 13, 2010 – CITY-11, STATE-5  
November 13, 2010 – end of year – Various hotels in CITY-12, STATE-5

From the hearing it is clear that the Taxpayer never actually established a permanent domicile in the state of STATE-1. He did not buy property or even lease a permanent place to reside in that state. So he did not maintain a residence in STATE-1 where he would have had a place to return to after being absent due to working in other states. In fact, the only permanent residence in any state for the Taxpayer and TAXPAYER-2, owned or even leased by them was their home in CITY-1, Utah during all of this time.

The Taxpayer had provided another document dated October 27, 2013,<sup>8</sup> which listed a breakdown of the income that he had earned in each state for each year at issue, a statement of where he asserts he was domiciled and where he asserts TAXPAYER-2 resided. Although on this list there was some portion of income earned in STATE-1 every year, except for one of the years, most of his income was earned in other states. For 2006, the Taxpayer had earned most his income in STATE-2. It was the Taxpayer's statement that he was based in and resided in STATE-1, which has no income tax. He had filed nonresident returns in STATE-2, STATE-8 and STATE-3 that year. This statement said that TAXPAYER-2 traveled back and forth between Utah and STATE-1 in 2006, although the prior statement indicated that she traveled with the Taxpayer to the various jobsites noted above, most of which were not in STATE-1. Where she stayed in STATE-1 was unclear except for those times when the Taxpayer was in STATE-1 with the RV, because they did not have a residence in that state.

For 2008, again the Taxpayer states that he was based in and residing in STATE-1. For this year again most of the income was earned in STATE-2. He had filed nonresident returns in

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<sup>8</sup> Respondent's Exhibit AUD000025-27.

STATE-2, STATE-4 and STATE-3. He did receive \$\$\$\$ in STATE-1 State Unemployment that year. Again the same statement was provided about TAXPAYER-2 traveling back and forth between Utah and STATE-1.

For 2009, the Taxpayer claims he was based in and residing in STATE-1, most of his wages in this year were earned in STATE-1. He did file STATE-2, STATE-4 and STATE-3 nonresident returns. For this year it states that TAXPAYER-2 was primarily at the residence in CITY-1, Utah. For 2010 most of the Taxpayer's wages were from STATE-5. He claimed to still be based in and residing in STATE-1. It indicates that TAXPAYER-2 was again mostly in CITY-1, Utah. He filed a nonresident, STATE-5 return. For 2011, again most of the wages were from STATE-5 and he filed a STATE-5 nonresident return. He had some income from STATE-1, STATE-9 and STATE-10, but did not file returns in any of those states because there is no state income tax. Again there was a small amount of unemployment from the state of STATE-1.

Based on this information, although the Taxpayer and TAXPAYER-2 did not own or maintain a residence in STATE-1, register to vote in STATE-1, obtain STATE-1 Driver Licenses, or have their mail sent to STATE-1 they claim to be residents of the state. The Taxpayer did work each year in that state, but worked mostly outside of that state during the audit period. They filed nonresident returns in the other states that had an income tax, claiming to be residents of STATE-1. All of their yearend financial mail was sent to their address in CITY-1, Utah. For their Federal Tax Returns and Nonresident returns in the various states in which the Taxpayer had worked, which were all filed jointly, they listed their address as the Utah residence.

STATE-1 does not have a state income tax. In this earlier information the Taxpayer is claiming a residence for tax domicile purposes in a state with which he has few ties. The Taxpayer did provide that he had registered his personal vehicle in STATE-1 State in 2006. Although he registered the vehicle in STATE-2 in 2008 and 2011.

At the Initial Hearing, the Taxpayer seemed to be claiming that he had established a domicile in STATE-2. However, it should be noted that STATE-2 does have a state income tax and the Taxpayer did not during the years at issue file a resident return in STATE-2. When he worked in STATE-2 he filed nonresident STATE-2 returns. He states at the hearing that he and TAXPAYER-2 had separated prior to the audit period, that she remained in Utah at their residence in CITY-1 and did not travel with him to his jobsites. She did not work; he supported her financially. He also stated that the only reason they had remained married was to keep her on his health insurance because she had health problems and would not have been able to get health insurance separately during the audit years. An Affidavit from TAXPAYER-2 was provided which stated that "my husband (TAXPAYER) and I have not lived together in Utah since March

18, 2004. TAXPAYER-1 works and maintains his own separate residence outside the State of Utah.” She goes on to state she maintains her residence in Utah and that TAXPAYER-1 had spent less than 10 days a year in CITY-1 since 2000. At the hearing, the Taxpayer makes a new assertion. He claims that from April 2008, he was residing with a woman in STATE-2 when he was not working. An affidavit from NAME-1 was provided in which she stated, “I, NAME-1, state that TAXPAYER-1 has not lived or resided in Utah since 2000. TAXPAYER has been a close friend since 2005. To my knowledge, he has lived and worked on the west coast since 2000. His primary residence is my address since April 2008.” She gives her address as ADDRESS-2, CITY-14, STATE-2. The Taxpayer also provided that he had obtained residence fishing or shellfish licenses in STATE-2 from 2008 going forward. He did provide an affidavit from a neighbor of the residence in CITY-1, NAME-2, who stated that the Taxpayer has not lived or residence in Utah since 2000.

The Division provided copies of the various states’ returns filed by the Taxpayer and TAXPAYER-2. All the tax returns listed the couples address at their home in CITY-1, Utah. The W-2 and other tax documents had listed that address.<sup>9</sup> The Division also provided a copy of the Taxpayer and TAXPAYER-2’S driver license records which showed Utah licenses throughout the audit period.<sup>10</sup>

Upon review of the facts presented by the parties the audit should be upheld. Under the Taxpayer’s first theory, that he abandoned his Utah residence and became a resident of STATE-1, the Taxpayer never did actually establish a permanent residence in STATE-1 to establish a physical presence in that state. Nor did he take steps consistent with the intent to remain in the new domicile permanently. These would be things like getting a driver license, voter registration, register vehicles, establish ties to the community, transfer licensing or professional associations, like his union membership. The Taxpayer did not meet the requirements of Utah Admin. Rule R865-9I-2 which require that the taxpayer show: 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. The Taxpayer in this matter appears to be asserting STATE-1 as his residence, but as noted by the court, “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 (Utah 2011). There are no activities that support the Taxpayer’s assertion that he established a domicile in STATE-1.

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<sup>9</sup> Respondent’s Exhibit AUD000032-123.

<sup>10</sup> Respondent’s Exhibit AUD000010-13.



The Taxpayer's second, alternative assertion appears to be that he had established domicile in STATE-2, where he was residing with a woman in that state beginning in 2008. In fact, the Taxpayer appears to have more ties with STATE-2 and possibly at some point after the audit period obtained a Driver License in that state. However, the evidence submitted is limited and contradicted by his prior information. The affidavits he provides are not particularly forthcoming on information,<sup>11</sup> there is not enough evidence to support this theory given that the Taxpayer had consistently filed during the audit period nonresident returns in STATE-2. STATE-2 has a state income tax and STATE-1 does not. If the Taxpayer was, in fact, a resident of STATE-2 he should have filed an STATE-2 resident return and claimed on that return the income he earned in the other states, including the income he earned in STATE-1.

For the 2011 year a penalty has been assessed for failure to file and failure to pay. There is sufficient information for waiver of this penalty as the Tax Commission has previously concluded waiver where a Taxpayer was filing returns in the states in which he or she was working and may reasonably not have understood they were still domiciled in Utah.

The audits should be sustained for tax years 2006, 2008 through 2010 in the entirety. The 2011 audit should be sustained as to the tax and interest, but the penalty waived.

Jane Phan  
Administrative Law Judge

#### DECISION AND ORDER

Based on the forging, the Tax Commission sustains the audits for tax years 2006 and 2008 through 2010. The Tax Commission sustains the audit for tax year 2011 as to the tax amount and the interest. The Commission waives the penalties for 2011. 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, or emailed, 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

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<sup>11</sup> If the matter went to a Formal Hearing, the Taxpayer could arrange to have the witnesses present either in person or by telephone to testify under oath, subject to cross examination.

Salt Lake City, Utah 84134

or emailed to:  
taxappeals@utah.gov

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

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 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.**