

1991

# James O'Rourke, Beverly O'Rourke v. Utah State Tax Commission : Brief of Respondent

Utah Supreme Court

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UTAH SUPREME COURT

BRIEF

910198

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IN THE SUPREME COURT OF THE STATE OF UTAH

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JAMES AND BEVERLY O'ROURKE,

Petitioner,

vs.

UTAH STATE TAX COMMISSION,

Respondent.

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Appeal No. 910198

Priority #15

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BRIEF OR RESPONDENT

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APPEAL FROM THE DECISION OF THE UTAH STATE  
TAX COMMISSION ISSUED APRIL 2, 1991

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UTAH

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BRIEF OR RESPONDENT

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JURISDICTIONAL STATEMENT

The Utah Supreme Court has jurisdiction over this matter pursuant to Utah Code Ann. § 63-46b-16 (1987 & Supp. 1991) and Utah Code Ann. § 78-2-2(3)(e)(ii) (Supp. 1991).

ISSUES PRESENTED

The following issues are presented by this appeal for review by the Utah Supreme Court:

1. Whether James O'Rourke was domiciled in Utah during 1983 through 1988, thereby being subject to Utah individual income tax.

2. Whether the Utah State Tax Commission is estopped from assessing taxes against James O'Rourke due to statements of one of its employees.



This case was initiated after January 1, 1988, therefore the applicable standard of review of the Commission's action is set out in the Utah Administrative Procedures Act, Utah Code Ann. § 63-46b-16 (1989) which provides:

(4) The appellate court shall grant relief only if, on the basis of the agency's record, it determines that a person seeking judicial review has been substantially prejudiced by any of the following:

(a) the agency action, or the statute or rule on which the agency action is based, is unconstitutional on its face or as applied;

(b) the agency has acted beyond the jurisdiction conferred by any statute;

(c) the agency has not decided all of the issues requiring resolution;

(d) the agency has erroneously interpreted or applied the law;

(e) the agency has engaged in an unlawful procedure or decision-making process, or has failed to follow prescribed procedure;

(f) the persons taking the agency action were illegally constituted as a decision-making body or were subject to disqualification;

(g) the agency action is based upon a determination of fact, made or implied by the agency, that is not supported by substantial evidence when viewed in light of the whole record before the court;

(h) the agency action is;

(i) an abuse of the discretion delegated to the agency by statute;

(ii) contrary to a rule of the agency;

(iii) contrary to the agency's prior practice, unless the agency justifies the inconsistency by giving

facts and reasons that demonstrate a fair and rational basis for the inconsistency; or  
(iv) otherwise arbitrary or capricious.

Utah Code Ann. § 63-46b-16 (1989). See Morton International v. Utah State Tax Commission, 163 Utah Adv. Rep. 34 (Utah June 24, 1991).

#### DETERMINATIVE STATUTES AND RULES

##### Statutes

Utah Code Ann. § 59-10-103(1)(j) (Supp. 1991):

"Resident individual" means:

(i) 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; or

(ii) an individual who is not domiciled in this state but maintains a permanent place of abode in this state and spends in the aggregate 183 or more days of the taxable year in this state. . . .

Utah Code Ann. § 59-10-543 (1987):

In any proceeding before the commission under this chapter, the burden of proof shall be upon the petitioner  
. . . .

Utah Code Ann. § 63-46b-16 (1989):

(1) As provided by statute, the Supreme Court or the Court of Appeals has jurisdiction to review all final agency action resulting from formal adjudicative proceedings.  
. . . .

(4) The appellate court shall grant relief only if, on the basis of the agency's record, it determines that a person seeking judicial review has been substantially prejudiced by any of the following:  
. . . .

(d) the agency has erroneously interpreted or applied the law;

. . . . .

(g) the agency action is based upon a determination of fact, made or implied by the agency, that is not supported by substantial evidence when viewed in light of the whole record before the court;

### Rules

#### Utah Administrative Code R861-1-7A (1991):

G. Burden of Proof. The petitioning party shall have the burden of proof to establish that his petition should be granted.

H. Degree of Proof. The degree of proof in a hearing before the Commission shall be the same as in a judicial proceeding brought in the state courts of Utah.

#### Utah Administrative Code R865-9-2I(D) (1991):

"Domicile" means the place where an individual has a true, fixed, permanent home and principal establishment, and to which place he has (whenever he is absent) the intention of returning. It is the place in which a person has voluntarily fixed the habitation of himself and family, not for a mere special or temporary purpose, but with the present intention of making a permanent home. After domicile has been established, two things are necessary to create a new domicile: first, an abandonment of the old domicile; and second, the intention and establishment of a new domicile. The mere intention to abandon a domicile once established is not of itself sufficient to create a new domicile; for before a person can be said to have changed his domicile, a new domicile must be shown.

### STATEMENT OF THE CASE

This case is an appeal from a final order of the Utah State Tax Commission which held that James O'Rourke (hereafter

"Mr. O'Rourke") was domiciled in Utah, thereby subjecting him to Utah individual income tax.

Based upon information that Mr. O'Rourke was a resident individual for purposes of state income tax, the Auditing Division of the Utah State Tax Commission assessed Mr. O'Rourke for individual income tax for the period of time from 1983 through 1988. Mr. O'Rourke filed an undated Petition for Redetermination asking the Tax Commission to review the actions of the Auditing Division. An amended petition dated March 6, 1990 was filed by Mr. O'Rourke's counsel.

A formal hearing was held before the Tax commission on January 14, 1991, during which testimony was presented by Mr. O'Rourke and the Auditing Division. The Tax Commission issued its decision dated April 2, 1991, finding that Mr. O'Rourke was domiciled in Utah during the years 1983 through 1988, and was therefore subject to Utah individual income tax.

#### STATEMENT OF FACTS

1. During the period of time from 1983 through 1988, the O'Rourkes did not file Utah state income tax returns. Federal income tax returns were filed by the O'Rourkes during the audit period showing a filing status as "married filing joint return" and identifying their address as 3712 East Viewcrest Circle, Salt Lake City, Utah. (R. at 158, 166, 181, 193, 203,

and 215) The state of Florida does not assess individual income tax.

2. James O'Rourke was a pilot for Eastern Airlines during the audit period. He had been a Captain with Eastern since approximately January of 1980. (Tr. at 12) As a captain, his W-2 income for the audit period was \$94,148.88 in 1983, \$96,589.93 in 1984, \$111,216.22 in 1985, \$99,911.37 in 1986, \$93,125.92 in 1987, and \$90,908.75 in 1988 (R. at 158, 166, 181, 193, 203, and 215)

3. Beverly O'Rourke was not employed during the audit period. (Tr. at 9)

4. In 1980, while the O'Rourkes and their four children were residing in Miami, Florida, they decided to move from Miami because of the growing problem of crime in the Miami area. (Tr. at 14)

5. From January, 1981 through May, 1981, the O'Rourkes purchased two parcels of property totalling approximately 40 acres in central Florida which contained approximately 32 acres of orange groves. (Tr. at 14, 15, 20, 64, 65) Their stated intent was to build a home on the central Florida property. (Tr. at 18-19)

6. As a result of freezes in 1981, 1983, and 1984, the orange groves on the O'Rourke's property were severely

damaged and failed to produce the marketable crops they had anticipated. (Tr. at 20, 30, and 33-34) The O'Rourkes sold 10 acres of their central Florida property in 1984. (Tr. at 34-35) The balance of the central Florida property was sold in 1987. (Tr. at 39)

7. In mid-1982, the O'Rourkes sought to locate their family in a city where there were cultural opportunities, no "big-city" problems, a reasonable weather pattern, educational opportunities, recreational opportunities, and which was near the Eastern Airlines route system. They considered moving to the central Florida area, Albuquerque, Colorado Springs, Salt Lake City, Phoenix, or Seattle. (Tr. at 24, 378) They personally inspected approximately 14 or 15 houses in the central Florida area. (Tr. at 23) They eventually decided on Salt Lake City.

8. The O'Rourkes sold their home in Miami, Florida in July, 1982. (Tr. at 63)

9. The O'Rourkes purchased a home at 3712 East Viewcrest Circle in the Olympus Cove area of Salt Lake City in August of 1982. (Tr. at 25-26) They purchased the home for \$125,000, making a \$45,000 down payment and financing \$80,000 over 30 years. (Tr. at 64, R. at 381) During the first eight months of occupancy, they spent approximately \$9,000 or \$10,000 to rebuild the kitchen and add a bathroom to their Salt Lake City

home. (Tr. at 52-53 and 65-67) The O'Rourkes and their children occupied this home from August, 1982 through June, 1989.

10. In approximately April, 1983, the O'Rourkes purchased a home at 8531 South 1575 East in Salt Lake City for occupancy by James O'Rourke's parents who had moved to Salt Lake City several months earlier. In connection with this purchase, they refinanced their Olympus Cove home. The second home was purchased for \$50,000 with the O'Rourkes making a \$10,000 down payment and financing \$40,000 over 30 years. (R. at 382) The O'Rourkes made substantial improvements to this home by adding a garage, adding a sliding door and deck, and redoing the home's plumbing and electrical wiring. (Tr. at 29)

11. In August, 1982 when the O'Rourkes moved to Utah, they had a daughter age 18, a daughter age 16, and a son and daughter (twins) age 13. Upon moving to Utah, the 16 year old daughter attended Skyline High School and the twins attended Churchill Junior High School and later Skyline High School. (Tr. at 83-84, R. at 389)

12. During the audit period, the O'Rourkes registered and licensed six automobiles in the state of Utah. (R. at 386) They also paid personal property taxes in the state of Utah on these vehicles.

13. During the audit period, the O'Rourkes maintained local bank accounts in the state of Utah from which household expenses and bills were paid. (Tr. at 79)

14. During the audit period, Beverly O'Rourke maintained a Utah driver's license, was a member of local church, and registered to vote in the state of Utah. (Tr. at 85)

15. James O'Rourke's employment as a pilot for Eastern Airlines required that he have an Eastern Airlines hub city designated as his "home base" from which his flight assignments would originate and terminate. During the audit period, his "home base" was originally New York City, then changed to Houston, and later changed to Atlanta. (Tr. at 80, 91-96)

16. As a pilot, Mr. O'Rourke was guaranteed ten to 11 days per month off of work. (Tr. at 13) Generally, when he had the opportunity, he returned to Salt Lake City. (Tr. at 99-100) During the audit period, Mr. O'Rourke spent an average of 112 days per year in Utah. (Tr. at 53)

#### SUMMARY OF ARGUMENT

When considered as a whole, the O'Rourke's activities demonstrate that their state of domicile is Utah. The O'Rourkes made an informed decision to move to Utah with indefinite plans regarding their wishes to return to Florida. Upon arrival, they purchased a home, enrolled their children in local schools, and



otherwise enjoyed the benefits of living in Utah. The fact that Mr. O'Rourke's employment required that he be away from his home and family for an extended period each year should not influence the decision on domicile. It is clear that the O'Rourkes established their home in Utah and intended to remain in Utah for an indefinite time.

Sound public policy dictates that the Tax Commission should not be estopped from making an otherwise proper assessment for taxes due to an incorrect determination made by an employee based on minimal facts. The Commission should be permitted to exercise the authority it has been granted in administering the tax code and should not be bound by unappealed decision of its subordinates. This approach is consistent with rulings relating to statements of agents of the Internal Revenue Service.

#### ARGUMENT

##### **I. The O'Rourkes Did Not Meet Their Burden of Proof at the Hearing.**

In the hearing below, the O'Rourkes had the burden of establishing that their petition for relief from income taxes should be granted. Utah Code Ann. § 59-10-543 (1987). The question in this case was whether Mr. O'Rourke's domicile was in Utah. The evidentiary weight necessary to establish domicile is by a preponderance. 25 Am. Jur. 2d Domicile § 91 (1966). Therefore, Mr. O'Rourke was required below to show by a

preponderance of the evidence that he was not a resident of (i.e. was not domiciled in) Utah during the audit years.

A. Mr. O'Rourke Had to Show That Florida Was His "True, Fixed, Permanent Home and Principal Establishment"

Utah imposes an individual income tax on "resident individuals." Utah Code Ann. § 59-10-103 provides:

(j) "Resident individual" means:

(i) 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; or

(ii) an individual who is not domiciled in this state but maintains a permanent place of abode in this state and spends in the aggregate 183 or more days of the taxable year in this state. For purposes of this Subsection (ii), a fraction of a calendar day shall be counted as a whole day.

There is little question that Beverly O'Rourke and the O'Rourke children would be considered resident individuals since they lived in Utah for the majority of each calendar year during the audit period. Because of the requirements of his employment, James O'Rourke did not spend at least 183 days per year at his home in Salt Lake City. This apparently necessitates a finding that he was domiciled in Utah in order to be considered a resident individual.

Utah Administrative Code R865-9-2I (D) provides the following definition of domicile: "'Domicile' means the place where an individual has a true, fixed, permanent home and principal establishment, and to which place he has (whenever he is absent) the intention of returning." The evidence was very clear that Mr. O'Rourke had a permanent home in Utah from 1982 until 1989 where his family lived. Not only was the home in Utah his principle residence during this period, it was also the home to which he returned whenever absent.

Mr. O'Rourke's task at the Commission level was to show by a preponderance that Florida, and not Utah, was his "true, fixed, permanent home . . .to which place he has (whenever absent) the intention of returning." He offered the purchase of an orange grove as evidence of his commitment to Florida. Final Decision at 2-3. He insisted that throughout the audit period his intention was always to return to Florida. The Commission considered this evidence but was persuaded by other factors that Florida was not the "true, fixed and permanent home." The Commission was influenced by the reality that the O'Rourke's home was in Utah. Mr. O'Rourke purchased a home in Utah, he moved his family to Utah, he remodeled the Utah home, he moved his parents to Utah, and he lived in Utah for six years. Final Decision at 2-5. The Commission also gave weight to the fact that there was no

home in Florida during this period for the O'Rourke's to reside in or to return to. Final Decision at 8. Although Mr. O'Rourke presented evidence that his true home to which he always intended to relocate was in Florida, in the Commission's eyes, he did not meet his burden by the preponderance.

B. Mr. O'Rourke Had to Show That Utah Was a Home for a "Special or Temporary Purpose" and That He Had No "Present Intention of Making a Permanent Home" in Utah

Mr. O'Rourke made his home in Utah for over six years from 1982 to 1989. Final Decision at 4. During this time, he "purchased a home in Utah, . . . expended a significant amount of money in improving that home; . . . moved his wife and children with him to Utah, . . . [had his] children attend[] Utah schools; . . . purchased a second home in Utah into which his parent moved; . . . registered [his automobiles] in Utah; and . . . returned [to Utah] whenever absent." Final Decision at 8, 9. It appears very clear from this evidence that Mr. O'Rourke's permanent home during this time was in Utah.

Mr. O'Rourke argued that he did not intend Utah to be his permanent home, but that it was a temporary home until he could financially afford to return to Florida. Final Decision at 8. The Tax Commission listened to this argument, but again it was not persuaded. The Commission was troubled by the fact that the O'Rourke's remained in Utah for a long time without a definite

time to return to Florida. Final Decision at 8. It was also troubled by the vagueness of the O'Rourke's intention which seemed more like a hope than a firm plan. Final Decision at 7. Finally, the fact that Mr. O'Rourke paid no income tax to any state during this audit period (Florida has no income tax, see Tr. at 88) left the Commission uneasy. Final Decision at 5.

The Commission decided that the O'Rourke's permanent home was in Utah during this period. Utah Admin. Code R865-9-2I(D) provides that domicile is "a place in which a person has voluntarily fixed the habitation of himself and family, not for a mere special or temporary purpose, but with the present intention of making a permanent home." The Commission chose to give the O'Rourke's claim of wanting to return to Florida only little weight and to consider instead that Mr. O'Rourke and his family owned a home and lived in Utah over a six year period with an unknown departure date. These facts compelled the conclusion that Mr. O'Rourke had a present intention to make Utah his permanent home.

C. The O'Rourkes Had to Show That They Had Not Abandoned their Old Domicile and That They Lacked the Intent to Establish a New Domicile.

In the administrative context, the petitioner carries the burden of proving that his petition should be granted. Utah Code Ann. § 59-10-543 (1987). Mr. O'Rourke is claiming that

despite all appearances, his domicile is not in Utah but in Florida. To defeat the audit's presumption of correctness, Mr. O'Rourke must show that he did not abandon his domicile as appearances suggest and he did not intend to establish a new domicile in Utah. "Domicile is presumed to follow residency and the burden of proof is on the person contending to the contrary." Allen v. Greyhound Lines, Inc., 583 P.2d 613, 615 (Utah 1978).

The Commission considered Mr. O'Rourke's testimony "that it was always his intention to construct a home on the Eustis property and live in Florida permanently." Final Decision at 7. It also heard the testimony that he "never intended to make Utah his permanent home." Final Decision at 8. The Commission gave some--but not conclusive--weight to the stated intentions. "Declarations of intention or purpose are, of course, admissible, but they must give way to definite and unequivocal acts and conduct." New York Trust Co. v. Riley, 16 A.2d 772, 784 (Del. 1940); "[t]he actual fact as to the place of residence and decedent's real attitude and intention with respect to it as disclosed by his entire course of conduct are the controlling factors in ascertaining his domicile." Texas v. Florida, 306 U.S. 398, 425 (1939). The Commission heard evidence on all issues relevant to the issue of domicile and found the following factors to be decisive:

[Mr. O'Rourke's] actions in Utah sufficiently demonstrate his intention to make Utah his domicile while here. In support of that finding are the facts that he purchased a home in Utah, and then expended a significant amount of money in improving that home; he moved his wife and children with him to Utah, and while here, his children attended Utah schools; he purchased a second home in Utah into which his parents moved; his automobiles were registered in Utah; and, that it was his Utah home to which he returned whenever absent from it.

Final Decision at 8, 9. There were other factors weighing against this finding and other factors not mentioned in the Commission's Decision and Order which further supported it. For example, case law states "the practical general rule that a man's home is where his family is" has so few exceptions, that the place of the family's residence is prima facie evidence of the husband's. Waushara County v. Calumet County, 238 Wis. 230, 298 N.W. 613 (1941). During the hearing it became clear that the O'Rourke family considered Utah to be their state of residence. The O'Rourke's oldest daughter attended the University of Utah, claimed resident-status, and paid resident-tuition. Tr. at 83. Other evidence showed that Mrs. O'Rourke obtained a driver's license in Utah, had membership in a local church in Utah, registered to vote and voted in Utah. Tr. at 85. Moreover, there was evidence that at various times throughout the audit period, the O'Rourkes owned, registered and drove in Utah six different cars. Tr. at 80-81. These are typical factors which

courts have given weight in determining a person's domicile. See Unaue v. Unaue, 532 N.Y.S. 2d 769, 774-75 (A.D. 2 Dept. 1988).

The Tax Commission reviewed the testimony and other evidence and determined that the O'Rourkes had abandoned their domicile in Florida and had established a new domicile in Utah. Final Decision at 8. Utah Admin. Code R865-9-2I(D) states "two things are necessary to create a new domicile: first, an abandonment of the old domicile; and second, the intention and establishment of a new domicile." On a review of all the evidence, the Commission determined that these two conditions had been met. There were ample grounds in the Commission's decision to support its conclusion and ample additional grounds in the record-- including a greater reliance on the residence and activity of Mr. O'Rourke's family in Utah as indicative that Mr. O'Rourke's domicile was also in Utah.

**II. The Commission is not estopped from reconsidering Mr. O'Rourke's tax status.**

The O'Rourkes would have the Tax Commission estopped from hearing evidence concerning their tax liability. They claim that the statement of an auditor should preclude the Commission from further review into their income tax liability. The facts giving rise to the estoppel argument were as follows:

1. The Tax Commission sent Mr. O'Rourke a letter requesting verification of his taxable status. Tr. at 60.



2. Mr. O'Rourke and tax agent Robert Laird met and discussed his tax status for the 1984 tax year. Tr. at 60.
3. Mr. Laird saw Mr. O'Rourke's Florida Driver's License and on that basis determined that he was not a Utah resident. Mr. Laird wrote the notation: "N/A" on the letter. Tr. at 60.
4. Mr. Laird indicated that Mr. O'Rourke would not be liable for taxes in future years either. Tr. at 60 - 61.
5. Mr. Brent Barney, tax audit manager and Mr. Laird's supervisor, re-initiated an audit on Mr. O'Rourke's tax status and performed additional research. Tr. at 110.

Mr. O'Rourke now asserts that Mr. Laird's statements should be binding on the Tax Commission. This position is unrealistic. The record shows that Mr. Laird decided the question of domicile based on limited information. The record also indicates that his supervisor took steps to review Mr. Laird's decision. Presumably that review resulted in the Tax Commission's present assessment against the O'Rourkes. The Tax Commission should not be precluded from correcting mistakes of its agents.

A. The Tax Commission Has the Duty to Administer the Tax Law

The legislature has commissioned the Tax Commission "to administer and supervise the tax laws of the state," Utah Code Ann. § 59-1-210 (5) (1987), and to "exercise all powers necessary in the performance of its duties." Utah Code Ann. § 59-1-210

(25) (1987). In this case, a taxpayer and his family owned a home and lived in Utah for extensive periods without paying state income tax. Although the tax agent determined from limited information that this taxpayer, James O'Rourke, did not owe taxes, it was the Tax Commission's duty to investigate further when more information became available.

B. The Tax Commission is Not Bound in the Traditional Sense by the Conduct of its Agents

Because the Tax Commission has been given the public charge to administer the taxation laws for the benefit of all the citizens, the law allows it considerable leeway to perform these duties. Importantly, it is rarely bound by the principles of estoppel which apply between private parties. This is so because:

When the Government is unable to enforce the law because the conduct of its agents has given rise to an estoppel, the interest of the citizenry as a whole in obedience to the rule of law is undermined. It is for this reason that it is well settled that the Government may not be estopped on the same terms as any other litigant.

Heckler v. Community Health Services, 467 U.S. 51, 60 (1984).

The Tax Commission, therefore, is not easily estopped from "administer[ing] and supervis[ing] the tax laws," and should not be estopped in this case.

This court has recently recognized the Tax Commission as the ultimate authority on issues of taxation. In Morton

International v. Utah State Tax Commission, 163 Utah Adv. Rep. 34 (Utah June 24, 1991), the Utah Supreme Court did not permit the inconsistent policies of Tax Commission auditors to preclude the Commission from making tax rulings. "To hold otherwise would be to bind the Commission by the unappealed decisions of its subordinates. It is the Commission that has been granted authority to administer the tax code." Id., 163 Utah Adv. Rep. at 41. When the positions taken by the Tax Commission and its auditors are inconsistent, the position of the auditors must give way. This holding "recognizes the Commission's authority over its own employees," Id., 163 Utah Adv. Rep. at 41, and the Commission's right to review and resolve mistakes of its agents.

In Utah State University v. Sutro & Co., 646 P.2d 715, 721 (Utah 1982), the Utah Supreme Court affirmed that "the rule which precludes the assertion of estoppel against the government is sound and generally should be applied . . . ." The court noted it would make an exception to the general rule "where the interests of justice mandate," Id., however, this case is not such an instance. Mr. O'Rourke lived in Utah, owned property in Utah, and utilized the services of the government and the benefits of the state of Utah for an extended period of time. Mr. O'Rourke took advantage of these privileges over a six year period and his family benefitted from these privileges

continually over the same period. The equities in this case require that Mr. O'Rourke be subject to Utah state income taxes as a resident individual.

C. In the Federal System, the Statements of IRS Agents Do Not Estop the IRS from Correcting Mistakes

It is helpful to analogize with the federal tax system where:

an Internal Revenue Service agent does not have authority to make a final determination binding on the government, and therefore an erroneous statement made by an agent cannot be considered as binding. When prior inconsistent advice has been given, the estoppel doctrine does not prevent the Internal Revenue Service from correcting errors of law.

Louderback v. United States, 500 F. Supp. 575, 579 (D. Colo. 1980) (citations omitted). In the federal tax context when an agent has given misinformation, a court's:

consideration of the interests of justice and fairness . . . does not rely upon any legal concept of estoppel or reliance. . . . [T]he United States Government will not be bound or estopped by a position taken or misinformation given by one of its employees or agents, nor is a taxpayer reliance argument availing.

Herbert v. United States, 662 F. Supp. 573, 583 (S.D.N.Y. 1987) (citations omitted). These decisions rely upon the importance of the tax collector-function and the public need that these

functions are performed properly. The Utah State Tax Commission requires similar leeway to perform its functions and should not be precluded from correcting its agents mistakes.

#### CONCLUSION


When considered as a whole, the O'Rourke's activities demonstrate that their state of domicile is Utah. The O'Rourkes made an informed decision to move to Utah with indefinite plans regarding their wishes to return to Florida. Upon arrival, they purchased a home, enrolled their children in local schools, and otherwise enjoyed the benefits of living in Utah. The fact that Mr. O'Rourke's employment required that he be away from his home and family for an extended period each year should not influence the decision on domicile. It is clear that the O'Rourkes established their home in Utah and intended to remain in Utah for an indefinite time.

Sound public policy dictates that the Tax Commission should not be estopped from making an otherwise proper assessment for taxes due to an incorrect determination made by an employee based on minimal facts. The Commission should be permitted to exercise the authority it has been granted in administering the tax code and should not be bound by unappealed decision of its subordinates. This approach is consistent with rulings relating

to statements of agents of the Internal Revenue Service.

The Tax Commission respectfully requests that its decision be upheld.

DATED this 7<sup>th</sup> day of October, 1991.

  
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MARK E. WAINWRIGHT  
Assistant Attorney General  
Attorney for Respondent

**CERTIFICATE OF MAILING**

I hereby certify that on the date subscribed below, I mailed four true and correct copies of the foregoing BRIEF OF RESPONDENT, postage prepaid, to the following;

Stephen R. Cochell  
HANSEN JONES & LETA  
50 West Broadway, Suite 600  
Salt Lake City, Utah 84101

DATED this 2<sup>th</sup> day of October, 1991

A handwritten signature in cursive script, appearing to read "Mark E. Knight", is written over a horizontal line.