

12-939  
TAX TYPE: INCOME TAX  
TAX YEAR: 2008  
DATE SIGNED: 2-19-2014  
COMMISSIONERS: B. JOHNSON, D. DIXON, M. CRAGUN, R. PERO  
GUIDING DECISION

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BEFORE THE UTAH STATE TAX COMMISSION

TAXPAYER-1 and TAXPAYER-2,  Petitioners,  vs.  AUDITING DIVISION OF THE UTAH STATE TAX COMMISSION,  Respondent.	<b>ORDER GRANTING SUMMARY JUDGMENT, DISMISSING APPEAL</b>  Appeal No. 12-939  Tax Type: Income Tax Tax Year: 2008  Judge: Phan
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Presiding:

D'Arcy Dixon, Commissioner  
Jane Phan, Administrative Law Judge

Appearances:

For Petitioners: REPRESENTATIVE FOR TAXPAYERS', Representative, By Telephone  
TAXPAYER-1, By Telephone  
For Respondent: REPRESENTATIVE FOR RESPONDENT, Assistant Attorney General  
RESPONDENT-1, Director, Auditing Division  
RESPONDENT-2, Manager, Income Tax Auditing

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission on a Hearing on Motion for Summary Judgment on November 14, 2013. Respondent ("Division") had filed its Motion for Summary Judgment and Memorandum in Support of the Motion on September 18, 2013. Petitioners ("Taxpayers") filed a Response to the Memorandum in Support of Motion on October 15, 2013. The Division filed its Reply Memorandum on October 29, 2013. The Motion presents a question of law to the Commission for consideration, whether Utah unemployment benefits received after a taxpayer is no longer a resident of Utah are Utah source income taxable to Utah. Pursuant to Utah Rule of Civil Procedure 56(c), summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

MATERIAL FACTS NOT IN DISPUTE

1. From approximately the second quarter of 2007 through mid-June 2008, TAXPAYER-1 lived in Utah and worked remotely from his Utah home for The COMPANY.

2. In mid June 2008 the Taxpayers moved to STATE and lived in STATE at least through the end of 2008. TAXPAYER-1 worked remotely out of his STATE home for The COMPANY from mid June 2008 to August 31, 2008.

3. TAXPAYER-1 was laid off from his job August 31, 2008.

4. In mid September 2008, TAXPAYER-1 filed for Utah unemployment benefits through the Utah Department of Workforce Services. TAXPAYER-1 claim was approved and he received \$\$\$\$ in Utah unemployment beginning from in September and going through December 2008, while he was living in STATE.

5. The Taxpayers filed a part-year resident Utah tax return on April 2, 2009. The return included unemployment compensation in the Utah portion of adjusted gross income.

6. On July 19, 2009, the Taxpayers filed an amended 2008 part-year resident Utah return that removed the unemployment compensation from the Utah portion of adjusted gross income and showed a refund was due. The amended return was processed and a refund was issued.

7. On February 6, 2012, the Division issued a Notice of Deficiency and Audit Change to the Taxpayers. In the Notice the Division imposed additional tax of \$\$\$\$ and interest of \$\$\$\$ for the 2008 tax year. No penalties were assessed with the audit. The Taxpayers filed a Petition for Redetermination on February 28, 2012.

APPLICABLE LAW

Utah Rule of Civil Procedure 56(c) provides that summary judgment is appropriate:

if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Utah Code §59-10-120 provides for the filing of party-year resident returns as follows:

(1) If an individual changes the individual's status during the taxable year from resident to nonresident or from nonresident to resident, the commission may by rule, made in accordance with Title 63G, Chapter 3, Utah Administrative Rulemaking Act, require the individual to file one return for the portion of the taxable year during which the individual is a resident and another return for the portion of the taxable year during which the individual is a nonresident.

(2) The taxable income of the individual described in Subsection (1) shall be determined as provided in this chapter for residents and for nonresidents as if the individual's taxable year for federal income tax purposes were limited to the period of the individual's resident and nonresident status respectively.

For the nonresident portion of the return, Utah Code 59-10-116 provides:

(1) Except as provided in Subsection (2), a tax is imposed on a nonresident individual in an amount equal to the product of the: (a) nonresident individual's state taxable income; and (b) percentage listed in Subsection 59-10-104(2).

(2) This section does not apply to a nonresident individual exempt from taxation under Section 59-10-104.1

Utah Code Sec. 59-10-117(1) provides items included in state taxable income in pertinent part as follows:

For purposes of Section 59-10-116, state taxable income includes those items includable in state taxable income attributable to or resulting from: . . . (b) the carrying on of a business, trade, profession, or occupation in this state.

The Tax Commission has adopted Utah Admin. Rule R865-9I-7 dealing with the change of status as resident or nonresident pursuant Utah Code Sec, 59-10-120. Utah Admin. Rule R865-9I-7(C) provides in pertinent part:

. . .

2) All FAGI derived from Utah sources while in a nonresident status, as determined under Section 59-10-117, shall be included in the Utah portion of FAGI.

#### DISCUSSION

The relevant facts to this decision are not complicated and were not in dispute. The parties present a legal question to the State Tax Commission that the Tax Commission has not previously addressed in another appeal as far as the parties are aware. The question is whether Utah unemployment benefits, which the Taxpayer received after moving to another state, are includable in the Taxpayer's Utah portion of federal adjusted gross income as income derived from Utah sources. It is the Division's contention in the Motion that the Utah unemployment benefits are taxable in Utah under Utah Code Sec. 59-10-117(1) as "state taxable income attributable to or resulting from: . . . (b) the carrying on of a business, trade, profession, or occupation in this state."

It was the Division's position that although the Taxpayer was living in STATE when he received Utah unemployment benefits from the Utah Department of Workforce Services his eligibility for the

amount of his unemployment benefits was based on wages he earned working in Utah. The Division notes, and it was not refuted, that under the Employment Security Act, found at Utah Code Title 35A, Chapter 4 and Utah Admin. Rule R994, employers contribute to the Utah Unemployment Compensation fund based on employees' Utah wages. The COMPANY would have been required to report TAXPAYER-1 wages to Utah and pay its contribution to the Utah employment fund only for the Utah wages. It would not be required under the Act to report to Utah the STATE wages and TAXPAYER-1 would not be eligible for Utah Workers Compensation Benefits from his employment in STATE. The amount of benefits paid to TAXPAYER-1 would have been based solely on his Utah wages.<sup>1</sup>

Additionally, the Division notes that eligibility for benefits and the amount of the benefits is based on workers having "sufficient wages during the base period," as well as being unemployed through no fault of their own, able to work full time and are available and actively seeking full-time work.<sup>2</sup> The base period is "the first four of the last five completed quarters prior to the filing date."<sup>3</sup> For TAXPAYER-1 claim filed in September 2008, the base period would have been April 1, 2007 through March 31, 2008, when TAXPAYER-1 was a Utah resident. It was the Division's position that even though TAXPAYER-1 moved to STATE in mid-June 2008, his benefits were based on wages he earned during this base period while living and working in Utah. Therefore, TAXPAYER-1 unemployment benefits were a direct result of his carrying on of his trade, profession or occupation in Utah.

Although the Division did not have prior Tax Commission decisions involving unemployment income, the Division did cite to cases that had some similarities. In *Tax Commission Order, Appeal No. 05-0853 (2006)*, the Commission concluded that deferred compensation, compensation for accrued leave and non-qualified stock options which were earned by the taxpayer from his employment in Utah, but were not received by that taxpayer until after he had moved from the state were taxable in Utah. In *Tax Commission Order, Appeal No. 06-1609 (2007)* the Commission held stock options given from a Utah employer "as incentive in connection with his employment" are Utah source even where the shares were sold after the taxpayer had changed his domicile from Utah to another state.<sup>4</sup>

The Division did take a look at how other states were treating state unemployment benefits paid out after the taxpayer had moved from the state. The Division indicated that it had not done an exhaustive

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<sup>1</sup> The Division cites to Utah Admin. Rule R994-204-201.

<sup>2</sup> Respondent's Memorandum , p. 6, Citing Claimant Guide, p.3, and Utah Code 35A-4-403.

<sup>3</sup> Respondent's Memorandum, p. 6, Citing Employer Handbook, p.27, and Utah Code 35A-4-201(1).

<sup>4</sup> In *Findings of Fact, Conclusions of Law and Final Decision, Appeal No. 03-1678 (2006)*, the Tax Commission concluded that payments made as part of severance settlement were Utah Source income where they were made to a taxpayer who had been employed and working in Utah, but had moved to a new domicile prior to the receipt of the payments. This decision was not cited by the Division, but is available at [tax.utah.gov/commission-office/decisions](http://tax.utah.gov/commission-office/decisions).

review of all fifty states and some states laws were not comparable to those in Utah. However, in its review the Division provided nine states that have clear policy regarding unemployment benefits.<sup>5</sup> Six of the nine states taxed their state's unemployment benefits even after the recipient had moved from the state as the Division is requesting in this matter. Three of the nine did not tax the benefits after the recipient had moved from the state, similar to what the Taxpayers are requesting.

The Taxpayers make several arguments for why TAXPAYER-1 Utah unemployment benefits paid to him when he was a resident of STATE should not be considered Utah source income. The Taxpayers point out that TAXPAYER-1 was not eligible to start receiving the benefits while he was residing in Utah because one of the criteria for eligibility was that he became unemployed through no fault of his own. It was an undisputed fact that TAXPAYER-1 moved from Utah to STATE, continued to work remotely for a few months and then became unemployed. Until he became unemployed, he points out that he did not qualify for the Utah unemployment benefits. He first became unemployed while a resident of STATE.

The Taxpayers argue that the unemployment benefits are really an insurance payment and note that they are not "earned income" according to the IRS for the purposes of determining eligibility for the Earned Income Tax Credit. Therefore, the Taxpayers argue they are not income attributable to the carrying on of a trade of business in Utah. They also point out that Utah retirement benefits are taxed only to the state of residency and assert that the unemployment benefits are similar to retirement benefits and should be treated the same. Retirement benefits received after someone moves from the state of Utah, even if they are derived from Utah employment, are not taxable to Utah. The Taxpayer also compares the situation to a person who is a resident of another state and works remotely from that other state for a Utah Company. It was his contention that Utah would not tax those wages.<sup>6</sup>

The Division challenges the application of the IRS definition of "earned income" as it relates to qualification for the federal Earned Income Tax Credit (EITC), as a basis to support the Taxpayers' position. For purposes of determining whether a taxpayer qualifies for the federal EITC a determination is made regarding what income is considered "earned income" and what income is not "earned income". The Taxpayers had provided a printout from the IRS Website regarding the EITC, which did include a discussion on "What is Earned Income" for the purposes of whether someone would qualify for the credit. In that discussion, the IRS Website listed "Examples of Income that is Not Earned Income" and provided

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<sup>5</sup> Division's Exhibit F.

<sup>6</sup> This was the Taxpayers' assertion and it should be noted that there are numerous fact scenarios, some of which may be taxable to Utah. See *Findings of Fact, Conclusions of Law, Final Decision, Appeal No. 10-2791 (2012)*.

on the list pay received for work while an inmate in a penal institution, interest and dividends, retirement income, social security, unemployment benefits, alimony and child support.<sup>7</sup> It was the Division's position the IRS's determination of 'earned income' for purposes of the EITC had no bearing on whether the income is Utah source under Utah Code Sec. 59-10-117.

Considering the parties' arguments regarding the applicability of the IRS definition of 'earned income', Utah Code Sec. 59-10-117(1) does not discuss income in terms of whether it was 'earned' as opposed to 'unearned' in the state of Utah. Instead the language chosen for the section is much broader, providing that state taxable income includes "income attributable to or resulting from: . . . (b) the carrying on of a business, trade, profession, or occupation in this state." The Division points out that Utah unemployment benefits are by law based exclusively on a worker's Utah wages. From a plain reading of the statutory provision, the unemployment benefits are attributable to the Taxpayer's carrying on of an occupation in Utah.

Considering the Taxpayer's argument that the unemployment benefits should be treated like retirement income, the Division points out that there is no rule or statute stating that unemployment benefits should be taxed to the state of domicile. The Division agrees that retirement income is similar in a way to unemployment benefits. The Division acknowledges that retirement income paid by a Utah employer to an individual no longer residing in Utah is not taxable to Utah. However, the Division notes this is not because retirement income is not Utah source income, but instead because federal law forbids it. The Division cites to United States Code, Chapter 4, Section 114, which provides, "No state may impose an income tax on any retirement income of an individual who is not a resident or domiciliary of such state . . . ." There is no state or federal law forbidding Utah from taxing its unemployment benefits paid to a taxpayer who has moved from the state. Additionally, other states are currently taxing the benefit in the same manner as the Division is proposing.

The Division also addressed the Taxpayers' scenario that income earned by an individual working remotely for a Utah firm, but living and working in another state, was not taxable to Utah. The Division notes that Utah Code Sec. 59-10-117(2)(c) states, "A salary, wage commission or compensation for personal services rendered outside this state may not be considered to be derived from Utah sources." These are not the facts before the Commission in this case. The Utah unemployment benefits at issue relate to the period that the Taxpayer was living and working in Utah. The Division points out that there is no Utah statute that supports the Taxpayer's contention that unemployment benefits are not Utah source

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<sup>7</sup> Division's Memorandum, pg. 8-9. The Division also provided as Exhibit E printouts from the IRS Website.

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income. In fact, the Utah unemployment benefits were clearly the result of carrying on of a business, trade, profession or occupation in Utah.

Upon review of the arguments presented by the parties in their written submissions and at the hearing the Commission concludes first that this is an issue appropriate for decision on summary judgment as it is primarily a legal issue and the relevant facts are not in dispute. Under Utah Code Sec. 59-10-117(1) Utah unemployment benefits, even though paid to Taxpayer when a resident of STATE, are “income attributable to or resulting from” the Taxpayer carrying on a trade, profession, or occupation in Utah. As such they are Utah source income and the Division has properly calculated the audit on this basis.

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Jane Phan  
Administrative Law Judge

ORDER

Based on the foregoing, Summary Judgment is granted in favor of the Division and the appeal dismissed. It is so ordered.

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 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. Sec. 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.