

13-1095

TAX TYPE: INCOME TAX

TAX YEARS: 2009 and 2010

DATE SIGNED: 4-10-2015

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

EXCUSED: D. DIXON

GUIDING DECISION

BEFORE THE UTAH STATE TAX COMMISSION

TAXPAYER-1 AND TAXPAYER-2,

Petitioners,

vs.

AUDITING DIVISION OF THE
UTAH STATE TAX COMMISSION,

Respondent.

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

Appeal No. 13-1095

Account No. #####

Tax Type: Income Tax

Tax Years: 2009 and 2010

Judge: Phan

Presiding:

Robert Pero, Commissioner

Jane Phan, Administrative Judge

Appearances:

For Petitioner: REPRESENTATIVE FOR TAXPAYERS, CPA

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 December 9, 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 March 13, 2013, for tax years 2009 and 2010.¹ Taxpayers timely appealed the audits and the matter proceeded to the Formal Hearing.

2. The amount of the audit deficiency as shown on the Notices are as follows:

¹ Respondent’s Exhibit 4.

Tax	Penalties	Interest ²	Total as of Date of Notice	
2009	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$
2010	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$

3. In computing the audit tax due, the Division did allow a credit for the resident individual income taxes that TAXPAYER-1 had paid to STATE-1.³

4. No penalties were assessed for the 2009 tax year. For the 2010 tax year penalties were assessed with the audit including both a 10% failure to file and 10% failure to pay penalty under Utah Code Sec. 59-1-401.

5. The representative for the Division testified as to why failure to file and failure to pay penalties were assessed for the 2010 tax year. Taxpayer TAXPAYER-2 had filed a Utah Resident Individual Income Tax return for that year. The Division replaced her return with the joint non-filing estimate. Once that occurred the failure to file and failure to pay penalties were issued.

6. The audits were issued on the basis that TAXPAYER-1 was domiciled in Utah during all of 2009 and 2010 and so his income from STATE-1 was subject to Utah individual income tax. It was TAXPAYER-1 position that, although TAXPAYER-2 and their minor children were Utah Residents, he was a resident of STATE-1 for all of 2009 and 2010. At the Formal Hearing it was the Division’s contention that TAXPAYER-1 was a Utah resident based on his domicile and, therefore, the audits should be upheld.

7. The Taxpayers did not appear at the Formal Hearing, either in person or by Telephone. The Taxpayers’ representative did appear and proffered a factual history regarding the Taxpayers’ situation. A proffer, although allowed in the Initial Hearing, is only hearsay evidence at a Formal Hearing. The Tax Commission is prohibited from making a finding based solely on hearsay evidence under Utah Admin. Rule R861-1A-28(b). Some of the information provided by the Taxpayers’ representative was supported by documentary evidence and some by written statements from the Taxpayers, which information is listed in subsequent Findings of Fact. The representative’s proffer made at the Formal Hearing is the following:

TAXPAYER-1 had worked in CITY-1, STATE-1 in the STATE-1 school system from 1999 through 2005. CITY-1 was just across the border from CITY-2, Utah and he resided in a manufactured home which he owned in CITY-2 with his wife and children. TAXPAYER-1 had better employment opportunities in STATE-1 in his career field than in Utah, and in 2005 he found a better position near CITY-3, STATE-1. As this was a much farther drive from the

² These amounts represent the interest and the total as of the date the Notices were issued. Interest continues to accrue on the unpaid balance.

³ Respondent’s Exhibit 4.

residence in CITY-2, he started renting an apartment near his new employment in STATE-1. TAXPAYER-2 and the children remained in Utah. They had been trying to sell their manufactured home in CITY-2, starting in 2007 and through 2009. They thought that they had a buyer for the home in 2008, so they did purchase a new home that year and the family moved into the new home. The sale fell through on the manufactured home and the Taxpayers have ended up with both properties. TAXPAYER-1 lived in a rented apartment in STATE-1 for all of 2009 and 2010. He would return to Utah about twice per month to visit his family. He concluded that he was a resident of STATE-1. He had filed STATE-1 resident income tax returns, obtained an STATE-1 Driver License, registered to vote in STATE-1 and spent most of his time there. His job was in teaching and administration and was full time year round. TAXPAYER-2 considered herself a Utah resident and had filed Utah resident returns for the years 2009 and 2010 on the income which she earned. TAXPAYER-1 had worked full time in STATE-1 from 1998 through 2013. He did not work in Utah during any of these years. He is now working in STATE-2.

8. The Taxpayers had provided copies of tax returns which support some of the information proffered by the Taxpayers' representative. For the 2009 tax year TAXPAYER-1 filed an STATE-1 Resident Personal Income Tax Return, checking the status as "Married Filing Separate." However, on the return he had claimed five of their children as dependents.⁴ The Division asserts that this would have been an error if the children did not live with him. In 2010 TAXPAYER-1 had also filed an STATE-1 Resident Personal Income Tax Return, again as "Married Filing Separate." On the 2010 return he did not list any of the children as dependents.⁵

9. The Taxpayer TAXPAYER-1 had provided a letter dated March 26, 2013, in which he had explained some of the facts regarding his situation.⁶ In the letter he stated:

I have not been a Utah resident since November, 2005. I resigned my position in CITY-1, STATE-1 and have been working and living outside the state of Utah since November, 2005. I did so to work at better paying positions in STATE-1, and got residence status, voter registration and vehicle registration in STATE-1. Since that time, I have lived in remote areas of STATE-1, over 300 miles from CITY-2, Utah. I have had three temporary positions in the school districts of CITY-4, CITY-5, and CITY-6, STATE-1. Currently, I am working and residing at CITY-6, STATE-1 – 365 miles from CITY-2, Utah.

He also states in the letter, "I am in the STATE-1 State Retirement System, and will remain in this system, and work 12 more years in STATE-1 until retirement. My training is valid in the State of STATE-1, not Utah." In addition he explains about the difficulty in selling their first residence in CITY-2

4 Respondent's Exhibit 3, pg. AUD0037-0045.

5 Respondent's Exhibit 3, pg. AUD0046-48.

6 Respondent's Exhibit 4, pg. AUD0049.

and that they were unable to refinance it because it was a manufactured home. He said that they also had difficulty in finding responsible renters for the home and that they incurred considerable expenses, having to pay the mortgage on this property and its upkeep, as well as their new home in CITY-2.

10. TAXPAYER-1 has had a license to teach in STATE-1 from the STATE-1 Department of Education since at least 2008. The license is good for some types of classes through 2017 and a copy was provided.⁷ TAXPAYER-1 provided a letter from the Superintendent of Schools for the CITY-5 Unified School District in STATE-1 dated March 6, 2013, which stated that TAXPAYER-1 had been employed by that District for four years.⁸ TAXPAYER-1 was both a licensed educator and school administrator in STATE-1.⁹

11. As demonstrated by Utah Driver License Records, TAXPAYER-1 had a Utah Driver License from 1990 through March of 2009.¹⁰ TAXPAYER-1 represented in letters or answers to interrogatories which he provided to the Division prior to the hearing that he had obtained an STATE-1 Driver License in 2009 which he retained for several years, that he had registered to vote in STATE-1 and registered the vehicle which he used in STATE-1.¹¹ He did not provide any documents from STATE-1 on these points but they were not refuted by the Division.

12. In 2009 and 2010, TAXPAYER-1 rented an apartment in STATE-1. He provided copies of Lease Agreements, one effective January 1, 2009 through December 31, 2009 and one effective January 1, 2010 through December 31, 2010. These were each a single page and very informal, but indicate a "NAME" was leasing an apartment located at ADDRESS-1, CITY-5, STATE-1. For 2009 the lease was \$\$\$\$\$ per month and for 2010 \$\$\$\$\$ per month. For both years this lease included utilities and for both years indicated the term of the lease "can be less if NAME does not get an employment contract for the next school year."¹² No additional information was provided regarding this rental and it was unknown what type of accommodations they were, for instance whether this was a private room in a shared home or a small apartment that he had to himself.

13. During 2009, the Taxpayers had three minor children who resided full time with TAXPAYER-2 in Utah and attended public high school or middle school in Utah. In addition, they had one child attending UNIVERSITY, which is a public school and paying resident tuition. Another child

7 Respondent's Exhibit 6, pg. AUD0073 & 0079.

8 Respondent's Exhibit 6, pg. AUD0081.

9 Respondent's Exhibit 6, pg. AUD0082-0085.

10 Respondent's Exhibit 8.

11 Respondent's Exhibit 2, pg. AUD0028 & 0032, Exhibit 3, pg. AUD0036, Exhibit 4, pg. AUD0049.

12 Petitioner's Exhibit 1.

was attending a private university.¹³ For 2010, the only difference was that one of the children who had been in high school in 2009 was now also attending UNIVERSITY.¹⁴

14. The Division provided Motor Vehicle Registration Records. During the audit years, there were vehicles titled in TAXPAYER-1 name that were registered in Utah.¹⁵

15. The Taxpayers had provided copies of tax returns. The Taxpayers had filed their 2009 and 2010 federal income tax returns listing their address on the returns as ADDRESS-2, CITY-2, Utah ZIP CODE. They did not claim away from home expenses on their federal return. For 2009 the W-2 from the CITY-5 (X) School District, issued to TAXPAYER-1 listed the Utah address, although another W-2, issued to TAXPAYER-1 from COMMUNITY COLLEGE, did list an STATE-1 address for TAXPAYER-1.¹⁶ For his STATE-1 returns, TAXPAYER-1 had filed listing his STATE-1 Address.¹⁷

16. In order to determine where the Taxpayer, TAXPAYER-1, was domiciled during the audit years, a factor to note is whether he established a domicile in Utah prior to the audit years. It is undisputed that he was a Utah resident from 1999 to 2005.¹⁸ Based on the testimony from the representative for the Division he had filed Utah resident returns up through tax year 2008.

17. In one of the responses to interrogatories, TAXPAYER-2 provided this information about her intent. She stated, "I will move to STATE-1 as soon as I can: a. Sell the two houses we own; b. Finish my commitment to my children; c. Find adequate housing in STATE-1; d. Match my skill set with a comparable job in STATE-1."¹⁹

18. There is no dispute that TAXPAYER-1 had a physical presence in STATE-1 during 2009 and 2010. The Taxpayer did take steps to establish an STATE-1 domicile by obtaining a Driver License, registering to vote and registering his vehicle in that state. He rented a place to stay while in STATE-1 and worked full time in STATE-1 during the years at issue. That he had a physical presence in STATE-1 is not in dispute. All his professional licensing was in STATE-1 and there is no reason to doubt his assertion that he was better off professionally working in that state's school system because trying to transfer his experience and credentials to Utah would result in a loss in pay and/or position. Even as of the date of the hearing he has not worked in Utah. He had filed STATE-1 Resident Income Tax Returns for the years at issue. However, the weight of the evidence does not establish that he did, in fact, have a specific intent to abandon his Utah domicile or the intent to remain in STATE-1 permanently. On this point it should be noted that TAXPAYER-1 most permanent home was the one he owned in Utah, where

13 Respondent's Exhibit 2, pg. AUD0029.

14 Respondent's Exhibit 2, pg. AUD0032.

15 Respondent's Exhibit 9.

16 Respondent's Exhibits 1 & 11.

17 Respondent's Exhibit 3.

18 See letter from TAXPAYER-1, dated February 5, 2012, Respondent's Exhibit 3, pg. AUD0036.

19 Respondent's Exhibit 7, pg. AUD0107.

his wife and minor children resided. He did rent some type of accommodation in STATE-1 in 2009 and 2010 for \$\$\$\$ and \$\$\$\$ respectively, all utilities included, but there was no information on the nature and quality of these accommodations. In fact, the single page leases for this accommodation tend to support that this was a temporary accommodation, noting “the term of this lease can be less” based on the employment contract. TAXPAYER-1 also had described his positions in STATE-1 as “three temporary positions.”

APPLICABLE LAW

Utah imposes income tax on individuals who are residents of the state, in Utah Code Sec. 59-10-104(1) (2009)²⁰ 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-2²¹ 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.

20 The Commission applies the substantive statutes that were in effect during 2009 and 2010. The Utah Individual Income Tax Act has been revised and provisions renumbered although the law as it relates to the issues in this appeal remained substantially the same for the years 2009 and 2010. For convenience the Commission cites to the 2009 provisions.

21 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. The revisions specifically apply in situations where one spouse remains in Utah and one spouse is claiming a tax domicile in another state.

(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.

CONCLUSIONS OF LAW

1. The issue in this appeal is whether TAXPAYER-1 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 STATE-1. From the evidence indicated in the findings above, TAXPAYER-1 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. One may be domiciled in the state regardless of the number of days spent in the state. Domicile is the place where an individual has a permanent home and to which he intends to return after being absent under Utah Administrative Rule R865-9I-2.

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.²² 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 Greyhound Lines, Inc.*, 583 P.2d 613 (Utah 1978)).

3. In this case there is no dispute that TAXPAYER-1 had been domiciled in Utah prior to the audit period. In his written representations, TAXPAYER-1 states that he changed his domicile from Utah to STATE-1 in 2005. However, he did continue to file Utah Resident Income Tax Returns through 2008. 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 the physical presence in STATE-1. The Division did not refute that he was living and working there full time in 2009 and 2010. The Taxpayer has also stated that he intended to finish out his career in STATE-1.²³ However, the Taxpayer continued to own and maintain a permanent home in Utah and this is where his wife and minor children resided. The question is whether he had the specific intent to abandon his Utah domicile and the intent to remain in the STATE-1 permanently.

4. The law in effect during 2009 and 2010 did make it possible for spouses to have tax domiciles in different states.²⁴ The Tax Commission has considered this question in prior cases, and though it is difficult for one spouse to establish that they did, in fact, abandon Utah and establish a domicile in another state, the Commission has found they are occasionally able to do so. For instance in *Utah State Tax Commission Order 99-0314* (1999)²⁵ the Commission found this to be the case. In *Appeal No. 99-0314* the spouses had resided in Utah together in a home they owned jointly for many years. The

²² 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).

²³ Although Utah Admin. Rule R865-9I-2 lists an intent to remain in a new domicile permanently, the courts 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).

²⁴ With the adoption of Utah Code Sec. 59-10-136, effective January 1, 2012, it would be much harder for a spouse to establish a separate domicile for tax purposes from where the other spouse and minor children resided.

²⁵ This and other Tax Commission decisions are available for review in a redacted format at tax.utah.gov/commission-office/decisions.

business at which the husband was employed closed in Utah and he was offered employment with that company in another state. At that time the wife's elderly mother was living with them in Utah and the mother refused to move. The wife stayed at the residence in Utah and took care of her mother. The husband moved to the new state and established a permanent residence for himself in that state, buying land in that state which he improved into a mobile home site. This included fencing, concrete walkways and a cinderblock foundation for the mobile home. He also obtained a Driver License, registered his vehicle and registered to vote all in the new state. He served on jury duty in the new state and he filed resident individual income tax returns in the new state. He visited his family in Utah when he could and his wife did visit him in the new state when she could. The facts in the subject case with the TAXPAYERS are not as strong for separate domiciles as in *Appeal No. 99-0314* because TAXPAYER-1 did not establish a permanent dwelling place for himself in STATE-1. TAXPAYER-1 did not purchase property in STATE-1 and make a residence for himself that was permanent. He was just leasing on a temporary or conditional basis and the nature of the leased accommodations is unclear. Additionally, the TAXPAYERS had minor children residing in Utah with TAXPAYER-2 in a residence that they owned. It does not appear that TAXPAYER-1 had established a permanent residence in STATE-1 and although he continued to work full time in STATE-1 he was in that state for the purposes of employment. In *Initial Hearing Order Appeal No. 12-747* (2012), the Commission concluded that the taxpayers had not established separate domiciles. In *Appeal No. 12-747*, those taxpayers had been living in Utah with their minor child in a home that they owned. Again there was a work situation with one spouse and an opportunity in a new state. The other spouse did not want to leave her job and preferred that the child remain in Utah schools. The husband moved to the new state but stayed in his fifth wheel in a travel trailer park on a month to month basis and other factors were considered to conclude he had not established domicile in the new state.

5. In the subject appeal, with TAXPAYER-1 situation with the school system there was an indication that contracts were awarded on a yearly basis and he described his work there as three temporary positions, although there was also his stated intent of finishing his career in STATE-1. TAXPAYER-1 living accommodations in STATE-1 did not support that he intended to remain permanently in STATE-1. TAXPAYER-1 has not shown that his presence in STATE-1 was for something other than work and the evidence supports that his permanent residence was actually his home in Utah.

6. The Tax Commission has authority to waive penalties under Utah Code Sec. 59-1-401(13) if reasonable cause is shown. In this case the penalties should be waived. For tax year 2010, TAXPAYER-2 filed a Utah Resident Return and TAXPAYER-1 did timely file an STATE-1 return on the basis that they were correctly filing under special instructions. In fact, it was the way the audit was

processed that the penalties were assessed because rather than amending TAXPAYER-2 return the Division “replaced” her return. When this occurs the penalty is automatic assessed based on the system. The TAXPAYER’S could have reasonably believed that there filings were correct and the penalties should be waived.

Jane Phan
Administrative Law Judge

DECISION AND ORDER

Based on the foregoing, the Commission sustains the audit assessment as to the tax and interest for the tax years 2009 and 2010. The Commission waives the penalties assessed for tax year 2010. 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.