

13-1609
TAX TYPE: INCOME TAX
TAX YEAR: 2012
DATE SIGNED: 6-17-2014
COMMISSIONERS: B. JOHNSON, M. CRAGUN, R. PERO
EXCUSED: D. DIXON
GUIDING DECISION

BEFORE THE UTAH STATE TAX COMMISSION

<p>TAXPAYER,</p> <p style="text-align: center;">Petitioner,</p> <p>vs.</p> <p>TAXPAYER SERVICES DIVISION OF THE UTAH STATE TAX COMMISSION,</p> <p style="text-align: center;">Respondent.</p>	<p style="text-align: center;">INITIAL HEARING ORDER</p> <p>Appeal No. 13-1609</p> <p>Account No. #####</p> <p>Tax Type: Income Tax</p> <p>Tax Year: 2012</p> <p>Judge: Marshall</p>
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Presiding:

Jan Marshall, Administrative Law Judge

Appearances:

For Petitioner: TAXPAYER, *Pro Se*
For Respondent: REPRESENTATIVE FOR RESPONDENT, Assistant Attorney
General
RESPONDENT-1, Assistant Director, Taxpayer Services Division
RESPONDENT-2, Taxpayer Services Division

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission on March 20, 2014 for an Initial Hearing in accordance with Utah Code Ann. §59-1-502.5. The Petitioner (“Taxpayer”) is appealing changes made to his 2012 individual income tax return by the Respondent (“Division”). At issue is whether the Taxpayer, a servicemember, was a resident of Utah for tax purposes during the 2012 tax year.

APPLICABLE LAW

Under Utah Code Ann. §59-10-104(1), tax is imposed on the state taxable income of a resident individual.

The term “state taxable income” is defined in Utah Code Ann. §59-10-103(1)(w), below in pertinent part:

- (i) subject to Section 59-10-1404.5, for a resident individual, means the resident individual's adjusted gross income after making the:
 - (A) additions and subtractions required by Section 59-10-114; and
 - (B) adjustments required by Section 59-10-115...

“Resident individual” is defined in Utah Code Ann. §59-10-103(1)(q), as follows:

- (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 the 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 place of abode in this state; and
 - (II) Spends in the aggregate 183 or more days of the taxable year in this state.

The factors considered for determination of domicile are addressed in Utah Code Ann. §59-10-136, as set forth below:

- (1) (a) An individual is considered to have domicile in this state if:
 - (i) except as provided in Subsection (1)(b), a dependent with respect to whom the individual or the individual's spouse claims a personal exemption on the individual's or individual's spouse's federal individual income tax return is enrolled in a public kindergarten, public elementary school, or public secondary school in this state; or
 - (ii) the individual or the individual's spouse is a resident student in accordance with Section 53B-8-102 who is enrolled in an institution of higher education described in Section 53B-2-101 in this state.
- (b) The determination of whether an individual is considered to have domicile in this state may not be determined in accordance with Subsection (1)(a)(i) if the individual:
 - (i) is the noncustodial parent of a dependent:
 - (A) with respect to whom the individual claims a personal exemption on the individual's federal individual income tax return; and
 - (B) who is enrolled in a public kindergarten, public elementary school, or public secondary school in this state; and
 - (ii) is divorced from the custodial parent of the dependent described in Subsection (1)(b)(i).
- (2) There is a rebuttable presumption that an individual is considered to have domicile in this state if:
 - (a) the individual or the individual's spouse claims a residential exemption in accordance with Chapter 2, Property Tax Act, for that individual's or individual's spouse's primary residence;
 - (b) the individual or the individual's spouse is registered to vote in this state in accordance with Title 20A, Chapter 2, Voter Registration; or
 - (c) the individual or the individual's spouse asserts residency in this state for purposes of filing an individual income tax return under this chapter, including asserting that the individual or the individual's spouse is a part-year resident of this state for the portion of the taxable year for which the individual or the individual's spouse is a resident of this state.

- (3) (a) Subject to Subsection (3)(b), if the requirements of Subsection (1) or (2) are not met for an individual to be considered to have domicile in this state, the individual is considered to have domicile in this state if:
- (i) the individual or the individual's spouse has a permanent home in this state to which the individual or the individual's spouse intends to return after being absent; and
 - (ii) the individual or the individual's spouse has voluntarily fixed the individual's or the individual's spouse's habitation in this state, not for a special or temporary purpose, but with the intent of making a permanent home.
- (b) The determination of whether an individual is considered to have domicile in this State under Subsection (3)(a) shall be based on the preponderance of the evidence, taking into consideration the totality of the following facts and circumstances:
- (i) whether the individual or the individual's spouse has a driver license in this state;
 - (ii) whether a dependent with respect to whom the individual or the individual's spouse claims a personal exemption on the individual's or individual's spouse's federal individual income tax return is a resident student in accordance with Section 53B-8-102 who is enrolled in an institution of higher education described in Section 53B-2-101 in this state;
 - (iii) the nature and quality of the living accommodations that the individual or the individual's spouse has in this state as compared to another state;
 - (iv) the presence in this state of a spouse or dependent with respect to whom the individual or the individual's spouse claims a personal exemption on the individual's or individual's spouse's federal individual income tax return;
 - (v) the physical location in which earned income as defined in Section 32(c)(2), Internal Revenue Code, is earned by the individual or the individual's spouse;
 - (vi) the state of registration of a vehicle as defined in Section 59-12-102 owned or leased by the individual or the individual's spouse;
 - (vii) whether the individual or the individual's spouse is a member of a church, a club, or another similar organization in this state;
 - (viii) whether the individual or the individual's spouse lists an address in this state on mail, a telephone listing, a listing in an official government publication, other correspondence, or another similar item;
 - (ix) whether the individual or the individual's spouse lists an address in this state on a state or federal tax return;
 - (x) whether the individual or the individual's spouse asserts residency in this state on a document, other than an individual income tax return filed under this chapter, filed with or provided to a court or other governmental entity;
 - (xi) the failure of an individual or the individual's spouse to obtain a permit or license normally required of a resident of the state for which the individual or the individual's spouse asserts to have domicile; or
 - (xii) whether the individual is an individual described in Subsection (1)(b).

- (4) (a) Notwithstanding Subsections (1) through (3) and subject to the other provisions of this Subsection (4), an individual is not considered to have domicile in this state if the individual meets the following qualifications:
 - (i) except as provided in Subsection (4)(a)(ii)(A), the individual and the individual's spouse are absent from the state for at least 761 consecutive days; and
 - (ii) during the time period described in Subsection (4)(a)(i), neither the individual nor the individual's spouse:
 - (A) return to this state for more than 30 days in a calendar year;
 - (B) claim a personal exemption on the individual's or individual's spouse's Federal individual income tax return with respect to a dependent who is enrolled in a public kindergarten, public elementary school, or public secondary school in this state, unless the individual is an individual described in Subsection (1)(b);
 - (C) are resident students in accordance with Section 53B-8-102 who are enrolled in an institution of higher education described in Section 53B-2-101 in this state;
 - (D) claim a residential exemption in accordance with Chapter 2, Property Tax Act, for that individual's or individual's spouse's primary residence; or
 - (E) assert that this state is the individual's or the individual's spouse's tax home for federal individual income tax purposes.
- (b) Notwithstanding Subsection (4)(a), an individual that meets the qualifications of Subsection (4)(a) to not be considered to have domicile in this state may elect to be considered to have domicile in this state by filing an individual income tax return in this state as a resident individual.
- (c) For purposes of Subsection (4)(a), an absence from the state:
 - (i) begins on the later of the date:
 - (A) the individual leaves this state; or
 - (B) the individual's spouse leaves this state; and
 - (ii) ends on the date the individual or the individual's spouse returns to this state if the individual or the individual's spouse remains in this state for more than 30 days in a calendar year.
- (d) An individual shall file an individual income tax return or amended individual income tax return under this chapter and pay any applicable interest imposed under Section 59-1-402 if:
 - (i) the individual did not file an individual income tax return or amended individual income tax return under this chapter based on the individual's belief that the individual has met the qualifications of Subsection (4)(a) to not be considered to have domicile in this state; and
 - (ii) the individual or the individual's spouse fails to meet a qualification of Subsection (4)(a) to not be considered to have domicile in this state.
- (e) (i) Except as provided in Subsection (4)(e)(ii), an individual that files an individual income tax return or amended individual income tax return under Subsection (4)(d) shall pay any applicable penalty imposed under Section 59-1-401.

- (ii) The commission shall waive the penalties under Subsections 59-1-401(2), (3), and (5) if an individual who is required by Subsection (4)(d) to file an individual income tax return or amended individual income tax return under this chapter:
 - (A) files the individual income tax return or amended individual income tax return within 105 days after the individual fails to meet a qualification of Subsection (4)(a) to not be considered to have domicile in this state; and
 - (B) within the 105-day period described in Subsection (4)(e)(ii)(A), pays in full the tax due on the return, any interest imposed under Section 59-1-402, and any applicable penalty imposed under Section 59-1-401, except for a penalty under Subsection 59-1-401(2), (3), or (5).
- (5) (a) If an individual is considered to have domicile in this state in accordance with this section, the individual's spouse is considered to have domicile in this state.
- (b) For purposes of this section, an individual is not considered to have a spouse if:
 - (i) the individual is legally separated or divorced from the spouse; or
 - (ii) the individual and the individual's spouse claim married filing separately filing status for purposes of filing a federal individual income tax return for the taxable year.
- (c) Except as provided in Subsection (5)(b)(ii), for purposes of this section, an individual's filing status on a federal individual income tax return or a return filed under this chapter may not be considered in determining whether an individual has a spouse.
- (6) For purposes of this section, whether or not an individual or the individual's spouse claims a property tax residential exemption under Chapter 2, Property Tax Act, for the residential property that is the primary residence of a tenant of the individual or the individual's spouse may not be considered in determining domicile in this state.

Administrative Rule R865-9I-2 provides additional guidance on the determination of resident individual status for military personnel, as follows in relevant part:

- (2) Determination of resident individual status for military persons.
 - (a) The status of a military serviceperson as a resident individual or a nonresident individual is determined as follows.
 - (i) A resident individual in active military service does not lose his status as a resident individual if the resident individual's absence from the state is a result of military orders.
 - (ii) A nonresident individual in active military service who is stationed in Utah does not become a resident individual for income tax purposes if the nonresident presence in Utah is due solely to military orders.
 - (b) Subject to federal law, an individual in active military service may change from a resident individual to a nonresident individual or from a nonresident individual to a resident individual if he establishes that he satisfies the conditions of Section 59-10-136.
 - (c) A nonresident individual serviceperson is exempt from Utah income tax only on his active service pay. All other Utah source income received by

the nonresident individual serviceperson is subject to Utah income tax as provided by Section 59-10-116.

The Servicemembers Civil Relief Act also governs the residence of a servicemember for tax purposes in 50 U.S.C. §571, below in pertinent part:

- (a) Residence of domicile.
 - (1) In general. A servicemember shall neither lose nor acquire a residence or domicile for purposes of taxation with respect to the person, personal property, or income of the servicemember by reason of being absent or present in any tax jurisdiction of the United States solely in compliance with military orders...
- (b) Military service compensation. Compensation of a servicemember for military service shall not be deemed to be income for services performed or from sources within a tax jurisdiction of the United States if the servicemember is not a resident or domiciliary of the jurisdiction in which the servicemember is serving in compliance with military orders.

Under Utah Code Ann. §59-1-1417(1), the burden of proof is generally upon the petitioner in proceedings before the commission, as follows:

- (1) In a proceeding before the commission, the burden of proof is on the petitioner except for determining the following in which the burden of proof is on the commission:
 - (a) whether the petitioner committed fraud with intent to evade a tax, fee, or charge;
 - (b) whether the petitioner is obligated as the transferee of property of the person that originally owes a liability or a preceding transferee, but not to show that the person that originally owes a liability is obligated for the liability; and
 - (c) whether the petitioner is liable for an increase in a deficiency if the increase is asserted initially after a notice of deficiency is mailed in accordance with Section 59-1-1405 and a petition under Part 5, Petitions for Redetermination of Deficiencies, is filed, unless the increase in the deficiency is the result of a change or correction of federal taxable income;
 - (i) required to be reported; and
 - (ii) of which the commission has no notice at the time the commission mails the notice of deficiency.

DISCUSSION

The Taxpayer filed a non-resident Utah individual income tax return for the 2012 tax year on February 23, 2013. Taxpayer claimed a subtraction from income for non-resident active duty military pay, resulting in a refund amount of \$\$\$\$\$. The return was reviewed, and the subtraction from income was removed because the Taxpayer's W-2 reported Utah wages. The Taxpayer filed a Petition for Redetermination asserting that he was not a resident of Utah for tax purposes during the 2012 tax year. The Division's representative stated that the Notice of Change indicates that

the Taxpayer's filing status is a non-resident based on the return; however, all of the 2012 income is the Taxpayer's military income and is treated as Utah sourced. The Taxpayer did not work in STATE-1 and/or earn additional income. To date, the military has not issued a corrected W-2 showing that taxes should not have been withheld for Utah.

The Taxpayer was eighteen years old when he joined the Army in December of 2008. He was unmarried and did not have dependents, but was a resident of Utah. The "Certificate of Release or Discharge From Active Duty" provided by the Taxpayer shows that CITY-1 was his place of entry into active duty, and that his home of record at the time of entry was in CITY-2, Utah. The Taxpayer was stationed in CITY-3, STATE-2, and stated that at the time he joined the military, he intended to return to Utah. The Taxpayer filed resident Utah individual income tax returns while he was in the military until 2011. The Taxpayer stated that he filed a non-resident return for the 2011 tax year and received a refund of the amounts withheld. He stated that he filed in the same way for the 2012 tax year, but his return was changed and he did not receive all of his withholding as a refund.

The Taxpayer stated that he believes he should have filed as a part-year resident for the 2010 tax year, and as a non-resident for the years after. He explained that in May of 2010 his father moved to CITY-4, Utah, and then to CITY-5, STATE-1. He stated that his immediate family had moved to STATE-1, and at that time he intended to move to STATE-1 once he left the military. He stated that he notified his chain of command and registered the vehicles he owned in STATE-1. The Taxpayer provided copies of receipts for vehicle registration dating back to September 15, 2010 for a YEAR AND MAKE OF TRUCK and dating back to October 24, 2011 for a YEAR MAKE AND MODEL OF CAR. The Taxpayer stated that in 2010 he spent ten days in Utah for Christmas, he was not in Utah at all in 2011, and in 2012 he was in Utah for three days for his grandfather's funeral and four days for Christmas. Since his immediate family moved to STATE-1, the Taxpayer stated that he spent about thirty non-consecutive days in STATE-1 prior to leaving the military. The Taxpayer obtained a STATE-1 driver license sometime in 2012, and registered to vote in STATE-1 in 2013. The Taxpayer noted that he had never registered to vote in Utah. The Taxpayer has retained the same NAME OF BANK account that he opened in Utah in 2006. Finally, the Taxpayer's federal returns filed for both the 2011 and 2012 tax years reflected a STATE-1 address, as did his Utah income tax returns.

The Taxpayer maintains that the military made a mistake not changing his paperwork to reflect that his permanent address had changed to STATE-1 and continuing to withhold Utah income tax. He does not recall whether he specifically filed a Form DD2058 "State of Legal Residence Certificate" with the Army changing his legal residence to STATE-1, but stated that he

did file multiple forms with the military. He stated that he looked through his paperwork, but was unable to find a copy of a Form DD2058.

The Taxpayer cited to 27 CFR 478.11 for the position that “legal residency” or “domicile” referring to the place where a military member intends to return and live after discharge or retirement. However, 27 CFR 478.11 provides definitions for terms used with regard to commerce in firearms and ammunition. The Taxpayer also noted that the Servicemembers Civil Relief Act allows for taxes to be paid and vehicles to be registered in the state where the servicemember is a resident. He also noted that under Administrative Rule R861-9I-2, a member of the military may change their residency if certain conditions are satisfied. The Taxpayer believes he has satisfied those conditions as he started registering vehicles in STATE-1; his immediate family moved to STATE-1; and he both had the intention to, and did move to, STATE-1 when he completed his military service. He noted that he exited the military on June 20, 2012 and moved to CITY-5. He argued that at most he could only be considered a part-year resident of Utah.

The Division’s representative stated that the Division’s position is that at the very least the Taxpayer was a part-year resident of Utah. The Division’s representative argued that it is undisputed the Taxpayer was domiciled in Utah when he joined the military, and that under Utah Code Ann. §59-10-136, domicile is a fact based determination. It is the Division’s position that the Taxpayer did not have a physical presence in STATE-1 prior to his release from the military, which is required to establish a new domicile in STATE-1. The Division provided a copy of Form DD2058 and noted that it provides, “[t]he formula for changing your State of legal residence/domicile is simply stated as follows: physical presence in the new State with the simultaneous intent of making it your permanent home and abandonment of the old State of legal residence/domicile.” In her pre-hearing brief, the Division’s representative cited to Administrative Rule R865-9I-2(2), which provides that a resident individual in military service does not lose his or her status if the absence from the state is a result of military orders. Further, she noted that a resident individual in active military service may change his or her status if the conditions of Utah Code Ann. §59-10-136 are established.

It is undisputed that the Taxpayer was a resident and domiciliary of Utah at the time he joined the military. Under both Administrative Rule R865-9I-2 and the Servicemembers Civil Relief Act, a domicile is not lost because of an absence from the State due to military orders. However, under Subsection (2)(b) of Administrative Rule R865-9I-2, an individual in military service may change their domicile if the requirements of Utah Code Ann. §59-10-136 are met.

The Taxpayer does not meet the standard set forth in Subsection (1) of §59-10-136 as he does not have any dependents for which he claimed a personal exemption enrolled in school in Utah, nor was the Taxpayer enrolled in an institution of higher education in Utah. The rebuttable presumption of domicile under Subsection (2) is not met, as the Taxpayer did not claim a residential exemption, he was not registered to vote, nor he did not assert residency in Utah for purposes of filing an individual income tax return. Subsection (3) provides that if an individual has a permanent home in this state and has voluntarily fixed his or her habitation with the intent of making a permanent home, they are considered to be domiciled in Utah, and sets forth a number of facts and circumstances to be considered in making a determination of domicile. The Taxpayer does not have a permanent home in Utah, and of the circumstances enumerated in Subsection (3)(b), they do not indicate Utah was his domicile. As of April 2011, the Taxpayer no longer held Utah driver license; he had no dependents enrolled in Utah schools, he had no living accommodations in Utah, he did not have a spouse or other immediate family members in Utah, he was not physically located in Utah, his vehicles were registered in STATE-1, and he listed the STATE-1 address on his tax returns and military documents. Additionally, Subsection (4) provides that an individual is not considered to be domiciled in Utah if they are absent from the state for at least 761 days. The Taxpayer has been absent from Utah since joining the military in December of 2008, and he has not spent more than thirty days in Utah in a calendar year since. In fact, the Taxpayer had spent only seventeen days in Utah since that time. Notably, the Taxpayer spent approximately thirty days in STATE-1 during that time.

The Division relies on the fact that Utah tax was withheld from the Taxpayer's military wages because the Taxpayer had not filed a Form DD2058. The Taxpayer maintains that he did file multiple documents with the military to change his residency, and argued that the military was in error not changing his domicile. The Taxpayer stated that he looked for, but could not find a copy of a Form DD2058 that he had filed. Regardless, the filing of that form, while it could have alleviated the issue before the Commission because Utah tax would not have been withheld, is not a requirement for the Taxpayer to change his domicile. Subsection (2)(b) of Administrative Rule R865-9I-2 requires only that the provisions of Utah Code Ann. §59-10-136 be met to change the domicile of a military servicemember. Had the legislature intended the filing of Form DD2058 to be a requirement to change domicile, they could have included that provision in the statute.¹

¹ It is noted that Indiana has included such a provision in 45 IAC 3.1-1-23(5), which provides, "Indiana residents who become members of the military service remain Indiana residents regardless of their geographical assignments. Military members can change their legal residence only by filing Form DD2058, State of Legal Residence Certificate.

The Taxpayer changed his domicile from Utah to STATE-1, and was not domiciled in Utah during the 2012 tax year. He no longer had ties to Utah; his immediate family had moved to STATE-1, he registered his vehicles in STATE-1, he spent more time in STATE-1 than Utah when he was on leave from the military, he did not have a Utah driver license after April of 2011, and was not registered to vote in Utah. Under Administrative Rule R865-9I-2(2)(c), a nonresident individual serviceperson is exempt from Utah income tax on his active service pay.

Jan Marshall
Administrative Law Judge

DECISION AND ORDER

Based on the foregoing, the Commission finds the Taxpayer was not domiciled in Utah, and thus his active service pay is exempt from Utah income tax.

This decision does not limit a party's right to a Formal Hearing. However, this Decision and Order will become the Final Decision and Order of the Commission unless any party to this case files a written request within thirty (30) days of the date of this decision to proceed to a Formal Hearing. Such a request shall be mailed to the address listed below and must include the Petitioner's name, address, and appeal number:

Utah State Tax Commission
Appeals Division
210 North 1950 West
Salt Lake City, Utah 84134

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

DATED this _____ day of _____, 2014.

R. Bruce Johnson
Commission Chair

D'Arcy Dixon Pignanelli
Commissioner

Michael J. Cragun
Commissioner

Robert P. Pero
Commissioner

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

