

14-30

TAX TYPE: INCOME TAX

TAX YEAR: 2008 and 2012

DATE SIGNED: 9-21-2015

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

EXCUSED: R. ROCKWELL

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. 14-30

Account No. #####

Tax Type: Income Tax

Tax Year: 2008 and 2012

Judge: Phan

Presiding:

Robert Pero, Commissioner

Jane Phan, Administrative Law Judge

Appearances:

For Petitioner: TAXPAYER-1
TAXPAYER-2

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 June 8, 2015, 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. On November 13, 2013, Respondent (“Division”) issued Notices of Deficiency and Audit Change against Petitioners (“Taxpayers”) for tax years 2008 and 2012. Taxpayers timely appealed the audits and the matter proceeded to the Formal Hearing at the request of the Division.

2. The amount of the Utah Individual Income Tax audit deficiencies as shown on the Notices are as follows:

	Tax	Penalties	Interest	Total as of Date of Notice ¹
2008	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$
2012	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$

3. At the Formal Hearing, the representatives for the Division conceded that the Taxpayers were not Utah resident individuals for the 2008 tax year. Therefore, the Division agreed that the audit for the 2008 tax year should be abated in its entirety. The Division had requested the Formal Hearing because of a representation made in the Initial Hearing decision regarding the 2012 tax year.

4. For the 2012 tax year, the Taxpayers had filed a nonresident Utah Individual Income Tax Return.² It is the Taxpayers' position that they were residents of STATE-1 for all of 2012, but they also resided part-time in Utah and had received payments for some part-time employment. They claimed this as Utah source income on their Utah nonresident return.

5. On their Utah nonresident return, which had been filed electronically, the Taxpayers failed to check the box on Part 7, Property Owner's residential Exemption Termination Declaration, to note that their Utah residence was no longer their primary residence.³

6. In the Utah 2012 Individual Income Tax TC-40 Forms & Instructions, page 13,⁴ it states:

Utah law requires you to notify the county when you have a primary residential property on which you have claimed the homeowner's exemption and to which you are no longer entitled. In addition, you must make a declaration on your Utah income tax return, stating you no longer qualify for the homeowner's exemption on your primary residence.

7. The Division provided a letter and other documents from Salt Lake County which indicate the property at ADDRESS-1, CITY-1, UT, had received the primary residential exemption for tax years 2008 through 2015.⁵ It was undisputed that the Property Owners owned this property from 2008 through 2014, and they had not rented it out to a third party. Additionally, the Property Owners resided at this property when they were in Utah.

8. It was the Taxpayers' position that they had moved to STATE-1 in 2008 and the Division concedes that for 2008 they were domiciled in STATE-1. The Taxpayers owned a home in CITY-2, STATE-1, which they had purchased in 2000. They had purchased the CITY-1, Utah property in 2003 and continued to reside primarily in Utah until 2007 after they had both retired from their employment in Utah. By 2008 they had moved to STATE-1 and made their domicile there. They had obtained STATE-1 driver licenses, registered to vote and registered vehicles in STATE-1.

¹ These amounts represent the interest and the total as of the date the Notice was issued. Interest continues to accrue on the unpaid balance.

² Respondent's Exhibit 4.

³ Respondent's Exhibit 4.

⁴ Respondent's Exhibit 1.

⁵ Respondent's Exhibit 3.

9. The Taxpayers testified that they felt they would not be able to sell their Utah residence for what they owed on it in 2008 because of the market crash, so they did not list the property for sale at that time. The Taxpayers held onto the property and continued to receive the primary residential exemption for this property until they sold it. They did not rent out their Utah property to a tenant. They did list their Utah residence for sale in 2013 and sold it in February 2014. After they sold their Utah residence they bought a more expensive residence in CITY-2, STATE-1.

10. In 2012 the Taxpayers came back to Utah and stayed in their Utah residence during the summer from approximately June through November. TAXPAYER-1 worked part-time during the summer as a grounds keeper at GOLF COURSE and TAXPAYER-2 also worked very briefly at the golf course. Their W-2s indicated \$\$\$\$\$ paid to TAXPAYER-1 and \$\$\$\$\$ paid to TAXPAYER-2.

11. The Taxpayers purchased a vehicle in Utah in 2012 and registered the vehicle in Utah.

12. The Taxpayers had no children in school and were not themselves enrolled in an institution of higher education in Utah during 2012.

13. The Taxpayers testified they were unaware that they should have reported on their 2012 return they were no longer eligible to receive the primary residential exemption for their Utah residence. They testified that they had relied on an accountant to prepare their returns and they were not told that they needed to fill out Section 7 of the return. They also testified their accountant did not advise them that if they were no longer Utah residents for individual income tax purposes, they would need to notify Salt Lake County to remove the primary residential exemption from their Utah residence.

APPLICABLE LAW

Tax is imposed on the state taxable income of a “resident individual.” *See* Utah Code §59-10-104(1).

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

- (i) subject to Section 59-10-1404(3)⁶, 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...

For both 2008 and 2012, Utah Code §59-10-103(q) defines “resident individual” 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:

⁶ For the 2012 tax year, the definition of “state taxable income” was subject to Utah Code Ann. §59-10-1404.5, rather than §59-10-1404(3), otherwise the provision reads the same.

- (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.

For the 2008 tax year, further guidance on the determination of resident individual status is provided in Administrative Rule R865-9I-2, as set forth below, in relevant part:

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 the purposes of establishing domicile, an individual's intent will not be determined by the individual's statement, or the occurrence of any one fact or circumstance, but rather on the totality of the facts and circumstances surrounding the situation.
 - a) Tax Commission rule R884-24P-52, Criteria for Determining Primary Residence, provides a non-exhaustive list of factors or objective evidence determinative of domicile.
 - b) Domicile applies equally to a permanent home within and without the United States.
 3. A domicile, once established, is not lost until there is a concurrence of the following three elements:
 - a) A specific intent to abandon the former domicile;
 - b) The actual physical presence in a new domicile; and
 - c) The intent to remain in the new domicile permanently.
 4. An individual who has not severed all ties with the previous place of residence may nonetheless satisfy the requirement of abandoning the previous domicile if the facts and circumstances surrounding the situation, including the actions of the individual, demonstrate that the individual no longer intends the previous domicile to be the individual's permanent home, and place to which he intends to return after being absent.
- B. Permanent place of abode does not include a dwelling place maintained only during a temporary stay for the accomplishment of a particular purpose. For purposes of this provision, temporary may mean years.

For the 2012 tax year, the factors to be considered for determination of domicile are addressed in Utah Code §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.

Under Utah law taxpayers are required to notify the county and make a declaration on their Utah return if they no longer qualify to receive a primary residential exemption at Utah Code §59-2-103.5(5) as follows:

Except as provided in Subsection (6), if a property owner no longer qualifies to receive a residential exemption authorized under Section 59-2-103 for that property owner's primary residence, the property owner shall:

- (a) file a written statement with the county board of equalization of the county in which the property is located: (i) on a form provided by the county board of equalization; and
- (ii) notifying the county board of equalization that the property owner no longer qualifies

to receive a residential exemption authorized under Section 59-2-103 for that property owner's primary residence; and
(b) declare on the property owner's individual income tax return under Chapter 10, Individual Income Tax Act, for the taxable year for which the property owner no longer qualifies to receive a residential exemption authorized under Section 59-2-103 for that property owner's primary residence, that the property owner no longer qualifies to receive a residential exemption authorized under Section 59-2-103 for that property owner's primary residence.

The Commission has been granted the discretion to waive penalties and interest. Utah Code §59-1-401(13) provides, "Upon making a record of its actions, and upon reasonable cause shown, the commission may waive, reduce, or compromise any of the penalties or interest imposed under this part."

Utah Code §59-1-1417 provides, "[i]n a proceeding before the commission, the burden of proof is on the petitioner..."

CONCLUSIONS OF LAW

1. The issue in this appeal is whether the Taxpayers were "resident individuals" in the State of Utah for the purposes of Utah Code Sec. 59-10-104 for the 2012 tax year, or whether they were resident individuals in STATE-1. Under Utah law a person is a resident individual if they are domiciled in Utah, or, in the alternative, if they maintain a permanent place of abode in Utah and spend in the aggregate more than 183 days per year in Utah. See Utah Code Sec. 59-10-103. In this case it was not suggested that the Taxpayers spent more than 183 days in Utah, instead, the Division argued the Taxpayers were domiciled in Utah.

2. Utah law regarding whether or not one was domiciled in this state changed substantially effective for the 2012 tax year with the adoption of Utah Code Sec. 59-10-136. Although the Commission has considered in numerous prior appeals whether someone is a "resident individual" for state tax purposes and the issue has also been previously addressed by the courts in Utah,⁷ most of the Commission's prior decisions and all of the court cases have addressed the pre 2012 law.

3. In this matter, the Taxpayers owned a Utah residence in 2012, the year at issue, and they had received for that residence the primary residential exemption as provided in Utah Code Sec. 59-2-103. Based on this factor, under Utah Code Sec. 59-10-136(2)(a), there is a rebuttable presumption that the Taxpayers were domiciled in Utah during 2012.

4. Furthermore, if the Taxpayers no longer considered their Utah residence to be their primary residence, they had the affirmative requirement to notify Salt Lake County that they no longer

⁷ The issue of domicile for Utah individual income tax purposes has been considered by the Utah Supreme Court and the Court of Appeals in a number of cases, but these cases involved the laws in effect prior to the 2012 revision. See *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).

qualified for the primary residential exemption on the property pursuant to Utah Code Sec. 59-2-103.5(5). As noted by the Division at the hearing in this matter, the Utah 2012 Individual Income Tax TC-40 Forms and Instructions contained an instruction that if the taxpayer no longer qualified for the primary residential exemption the taxpayer must notify the county in which the property is located. Further, Utah's 2012 Individual Income Tax Return, Part 7, contained the requirement that a taxpayer must check if they no longer qualify for a residential property exemption. The Taxpayers failed to take these affirmative actions.

5. Under Utah Code Sec. 59-10-136(2)(a) the Taxpayers are presumed domiciled in Utah because they received the primary residential exemption on their Utah residence for the 2012 tax year. Utah Code Sec. 59-10-136(2)(a) indicates that although a presumption of domicile, it is a rebuttable one, but does not provide guidance on what factors should be considered to rebut this presumption. Utah Code Sec. 59-10-136(3) provides a list of common domicile factors based on the preponderance of the evidence, including things like where the taxpayer has his or her driver license, registers vehicles and the address used for tax returns among other factors. However, Subsection 136(3)(a) specifically makes it clear these factors are applied only if the requirements of Subsections 136(1) or (2) are not met. In this appeal Subsection 59-10-136(2) has been met because the Taxpayers received the primary residential exemption on their Utah residence. Upon review of Subsections 136(2) and 136(3) it does not follow that the legislature intended that the way to rebut the presumption of Utah domicile set out in Subsection 59-10-136(2)(a) was by showing a preponderance of the factors listed in Subsection 136(3), because it would make Utah Code Sec. 59-10-136(2)(a) as its own separate factor irrelevant. In regards to statutory interpretation the court noted in *Ivory Homes, Ltd, v. Utah State Tax Comm'n*, 2011 UT 54, ¶ 21, “We presume that the legislature used each word advisedly and read each term according to its ordinary and accepted meaning.” However, “our plain language analysis is not so limited that we only inquire into individual words and subsections in isolation; our interpretation of a statute requires that each part of a section be construed in connection with every other part of section so as to produce a *harmonious whole*.” (Emphasis in Original, Internal Citations Omitted.)

6. Therefore, having made the fact that a taxpayer receives a primary residential exemption on a Utah residence a rebuttable presumption separate from Subsection 59-10-136(3) indicates the intent was something more stringent than a preponderance of the evidence of the common domicile factors listed in Subsection 136(3). It follows that to rebut the presumption set out at Subsection 136(2)(a) a taxpayer would have to show something other than a preponderance of the domicile factors, for example that the taxpayer had taken the proper steps to notify the County that they no longer qualified for the exemption and the County then in error continued to leave the property in that status, or that there was a tenant in the property and the tenant used it as his or her primary residence, which would allow the

property to qualify based on the tenant's use. There was no tenant at the Taxpayer's residence and the Taxpayers did not attempt to notify the County that they no longer qualified for the exemption. In addition, in 2012 a number of the domicile factors noted in Utah Code Sec. 136(3) did point to a Utah domicile for that year.⁸ The Taxpayers have failed to provide information to rebut the presumption set out at Utah Code Section 59-10-136(2)(a) they were domiciled in Utah. They acknowledged receiving the primary exemption, but testified that they were not aware they were required to notify the County to have the exemption removed. They also state reliance on their accountant. Ignorance of the law or reliance on a tax advisor is not basis to abate tax or interest. Penalties were not assessed for the 2012 tax year.

After reviewing the law and the evidence presented at the hearing, the audit deficiency against the Taxpayers for tax year 2012 should be sustained.

Jane Phan
Administrative Law Judge

DECISION AND ORDER

Based on the foregoing, the Commission sustains the Division's audit deficiency of Utah Individual Income Tax, and the interest accrued thereon, issued against the Taxpayers for tax year 2012. Per the Division's agreement, the audit for the 2008 year is abated in its entirety. It is so ordered.

DATED this _____ day of _____, 2015.

John L. Valentine
Commission Chair

Michael J. Cragun
Commissioner

Robert P. Pero
Commissioner

Rebecca L. Rockwell
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.

⁸ The Commission may want to consider adopting a rule to provide guidance on what factors would rebut this presumption.

