

14-1869

TAX TYPE: INCOME TAX

TAX YEAR: 2012

DATE SIGNED: 8-17-2015

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

GUIDING DECISION

BEFORE THE UTAH STATE TAX COMMISSION

TAXPAYER-1 & TAXPAYER-2,

Petitioner,

vs.

AUDITING DIVISION OF THE UTAH
STATE TAX COMMISSION,

Respondent.

INITIAL HEARING ORDER

Appeal No. 14-1869

Account No. #####

Tax Type: Income Tax

Tax Year: 2012

Judge: Phan

Presiding:

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 on May 18, 2015 for an Initial Hearing in accordance with Utah Code §59-1-502.5. Petitioners (“Taxpayers”) had filed an appeal under Utah Code §59-1-501, of a Utah Individual Income Tax audit deficiency for tax year 2012. The Notice of Deficiency and Audit Change had been issued on September 9, 2014. The amount of tax deficiency was \$\$\$\$\$ and interest as of the issuance of the notice was \$\$\$\$\$. Interest continues to accrue on any unpaid balance during the appeal process. No penalties were assessed with this audit.

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(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...

For 2012 Utah Code §59-10-103(1)(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:
 - (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.

Beginning for the 2012 tax year, a new law was adopted regarding the factors to be considered for determination of domicile at 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.

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

The Commission has been granted the discretion to waive penalties and interest. Utah Code Ann. §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.”

The Commission has promulgated Administrative Rule R861-1A-42 to provide additional guidance on the waiver of penalties and interest, as follows in pertinent part:

- (2) Reasonable Cause for Waiver of Interest. Grounds for waiving interest are more stringent than for penalty. To be granted a waiver of interest, the taxpayer must prove that the commission gave the taxpayer erroneous information or took inappropriate action that contributed to the error.

DISCUSSION

The Division based its audit on the assertion that under provisions set out at Utah Code Sec. 59-10-136, which was adopted effective beginning with the 2012 tax year, TAXPAYER-2 was a resident of Utah for individual income tax purposes during 2012. It was not disputed that TAXPAYER-1 had been a Utah resident during all of tax year 2012. In fact, TAXPAYER-1 had filed a Utah return for 2012. The Taxpayers had filed a joint federal return for the year 2012 and TAXPAYER-1 had filed a separate Utah return, in the same manner they had filed for tax year 2011. For 2011, they had filed relying on the special instruction for spouses who are domiciled in two different states. It was the Taxpayers' position that TAXPAYER-2 was a resident of STATE-1 in 2012 and he had been a resident in that state for sixteen years. As STATE-1 does not have a filing or income tax obligation, he did not file a return in STATE-1.

The issue in this appeal is whether TAXPAYER-2 was a "resident individual" in the state of Utah for the purposes of Utah Code Sec. 59-10-104 during 2012. Under Utah Code Sec. 59-10-103, a resident individual is one who maintains a permanent place of abode in this state and spends in the aggregate more than 183 days per year in Utah, or in the alternative a resident individual is one who is "domiciled" in Utah. Utah Code Sec. 59-10-136 substantially rewrote what constituted "domicile" from the definitions established under the prior Administrative Rule¹ and prior case law.² Prior to this 2012 revision, if one spouse was domiciled in Utah, and the other was able to show that they were, in fact, domiciled in another state, the spouses could file a joint federal return and separate state returns. At the hearing, the Division argues Utah Code Sec.

¹ Utah Admin. Rule R865-9I-2.

² Based on the statute and rule in effect prior to the 2012 revision, 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). Because of substantial changes made in 59-10-136, much of the findings in these cases would no longer apply beginning with tax year 2012.

59-10-136(5) prohibits a finding that one spouse can ever have tax domicile in a state other than Utah if one spouse is domiciled in Utah.

Specifically, Utah Code Sec. 59-10-136(5) provides, “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.” The subsection goes on to provide only two exceptions to this provision: 1) if the spouses are legally separated or divorced; or 2) the spouses claimed married filing separately status on their federal return for the tax year. Under the facts in this case the TAXPAYER’S did not fall under either of these two exceptions. They were legally married and they filed a joint federal return. It is the Division’s interpretation of the statute, that if one spouse was a Utah domiciliary, there is no need for weighing the ties to the state of Utah with ties to the other state or to consider the intent of the taxpayers.

Upon reviewing the new statute set out at Utah Code Sec. 59-10-136 and specifically Subsection 136(5) the Division’s interpretation is consistent with a plain reading of these provisions.³ Utah Code Sec. 59-10-136(5) provides a bright, clear line on domicile, which is a change from prior law and rules.

The facts in this case were not in dispute. TAXPAYER-1 had been a Utah resident for many years. She owned a house in Utah up until 2013. She had a daughter from a prior marriage who had graduated from high school in 2011, and was not attending a public college or other public higher education in 2012. This daughter was also living on her own in 2012, so was not claimed as a dependent on the Taxpayers’ return. TAXPAYER-1 worked in Utah, had a Utah driver license, registered vehicles in Utah, and registered to vote in Utah. She also received the primary residential exemption on her Utah residence.

TAXPAYER-1 and TAXPAYER-2 got married in 2011. After the marriage, TAXPAYER-1 was planning on moving to STATE-1. However, she could not sell her residence with the housing market falling in 2011 and 2012. Also it was difficult to find employment in STATE-1 in her career field. So although they were married, they continued to live in their separate residences in separate states. There was no intent on TAXPAYER-2 part to ever move to Utah. TAXPAYER-1 did sell her Utah home in 2013, rented an apartment for the rest of that

³ Regarding statutory language, the Utah Supreme Court has stated, “When interpreting statutory language, our primary objective is to ascertain the intent of the legislature. To discern legislative intent, we first look to the plain language of the statute. We presume that the legislature used each word advisedly and read each term according to its ordinary and accepted meaning.” (Internal Citations Omitted) *Ivory Homes v Tax Commission*, 2011 UT 54, ¶ 21, (2011).

year, while continuing to work at her Utah employment. Eventually she did find employment and moved to STATE-2 in 2014, which was a better location than Utah for TAXPAYER-2.

TAXPAYER-2 had been living in STATE-1 and has been a resident of STATE-1 for 16 years. He has had a STATE-1 driver license, registered vehicles and owned a home in STATE-1 for much of that time, although more recently he was sharing a residence with his father and brother. He did not intend to move to Utah. He was employed in STATE-1 and working primarily in that state. However, his work was of the type where he would have to travel to the various jobsites, mostly in STATE-1, but sometimes in other states. His work assignments were generally three weeks on the jobsite and one week off. Part of the week off he would generally spend with TAXPAYER-1 at her residence in Utah, but TAXPAYER-1 also sometimes visited him in STATE-1 on her weekends or time off work. TAXPAYER-2 had children from two prior marriages. He was the noncustodial parent of two boys who resided in CITY-1, Utah. One of the boys was living on his own and not claimed as a dependent on either parent's return. The other was claimed by his mother as a dependent. TAXPAYER-2 also had twin daughters from another marriage and they lived in CITY-2, STATE-1 with their mother. TAXPAYER-2 supports these children financially and the TAXPAYERS claimed these two as dependents on their federal return based on the Divorce Decree.

However, regardless of the facts and intent of TAXPAYER-2, he was legally married to TAXPAYER-1 in 2012, she was a resident and domiciliary of Utah in 2012 and they had filed a married filing joint status federal return for that year. Based on Utah Code Sec. 59-10-136(5), TAXPAYER-2 was domiciled in Utah and the audit should be sustained.

Jane Phan
Administrative Law Judge

DECISION AND ORDER

Based on the foregoing, the Tax Commission sustains the audit deficiency of Utah Individual Income Tax and the interest accrued thereon for tax year 2012. It is so ordered.

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, or emailed, 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

or emailed to:
taxappeals@utah.gov

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

DATED this _____ day of _____, 2015.

John L. Valentine
Commission Chair

Michael J. Cragun
Commissioner

Robert P. Pero
Commissioner

Rebecca L. Rockwell
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.