

14-707  
TAX TYPE: INCOME TAX  
TAX YEAR: 2010  
DATE SIGNED: 7-7-2015  
COMMISSIONERS: J. VALENTINE, M. CRAGUN, R. PERO, R. ROCKWELL  
GUIDING DECISION

BEFORE THE UTAH STATE TAX COMMISSION

TAXPAYER-1 & TAXPAYER-2,

Petitioners,

vs.

AUDITING DIVISION OF THE UTAH  
STATE TAX COMMISSION,

Respondent.

**INITIAL HEARING ORDER**

Appeal No. 14-707

Account No. #####

Tax Type: Income Tax

Tax Year: 2010

Judge: Phan

**Presiding:**

Jane Phan, Administrative Law Judge

**Appearances:**

For Petitioner: TAXPAYER-1, By Telephone Conference Call

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 April 13, 2015 for an Initial Hearing in accordance with Utah Code §59-1-502.5. Petitioners (“Taxpayers”) are contesting an audit assessment issued against them for the tax year 2010. Respondent (“Division”) had issued an audit deficiency on February 25, 2014, on the basis that the Taxpayers were full-year residents of Utah during 2010. The amount of the audit deficiency is as follows:

Tax Year	Audit Tax	Interest <sup>1</sup>	Penalties	Total As of Date of Notice
2010	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$\$	\$\$\$\$\$

APPLICABLE LAW

Utah imposes income tax on individuals who are residents of the state, in Utah Code Sec. 59-10-104(1) (2010)<sup>2</sup> as follows:

1 Interest continues to accrue until the balance is paid in full.

2 The Commission applies the substantive statutes that were in effect during 2010. The Utah Individual

...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.

For purposes of determining whether an individual is domiciled in this state the Commission has defined "domicile" in Utah Administrative Rule R865-9I-2<sup>3</sup> 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.

(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. . .

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Income Tax Act has been revised and provisions renumbered subsequent to 2010.

<sup>3</sup> 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 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.”

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 audits on the assertion that the Taxpayers were residents of Utah for individual income tax purposes for all of 2010. The Taxpayers were married in July 2010. It was their position that TAXPAYER-2 had been a resident of Utah up until July 2010 when she moved to STATE-1 and that TAXPAYER-1 had been a resident of STATE-1 for all of 2010, having moved from Utah to STATE-1 in 2009. The Taxpayers had filed a joint Non-Resident or Part Year Resident Utah return and a joint federal return for 2010. However, they had claimed \$\$\$\$\$ in Utah source income on their Utah return while they had claimed \$\$\$\$\$ in Federal Adjusted Gross income. The Taxpayers had also filed a STATE-1 return.

There were two different issues addressed at the hearing. The first was the Division’s position that the Taxpayers remained domiciled in Utah for all of tax year 2010 and, therefore, were Utah resident individuals for the purposes of Utah Code Sec. 59-10-104. The Division’s audit assessment was on that basis. As resident individuals all income was taxable to Utah, but a credit would be allowed for individual income taxes paid to STATE-1. The second issue argued by the Division was the point that even if the Taxpayers were considered to be part-year residents of Utah and part year residents of STATE-1, the Utah return that they had filed had been incorrect and would have to be adjusted. The Taxpayers had not claimed on their Utah return, nor on their federal return, \$\$\$\$\$ in wage income paid to TAXPAYER-2 in 2010 for work she had performed in Utah prior to moving to STATE-1 and had failed to include Utah Unemployment Insurance income in the amount of \$\$\$\$\$ as Utah source income.<sup>4</sup> So assuming the Taxpayers’ had been

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<sup>4</sup> The Tax Commission has previously considered whether unemployment benefits paid by the Utah Department of Workforce Services to a taxpayer after the taxpayer had moved from the state of Utah would be Utah source income and concluded that it was in Utah State Tax Commission, *Order Granting Summary Judgment, Dismissing Appeal, Appeal No. 12-939* (February 19, 2014). This and other Tax Commission

correct in filing a Part-Year Resident return, these items of income should have been included on the Taxpayers' TC-40B as Utah source income.

This is a situation where the Taxpayers' 2010 return first came to the Division's attention because the Internal Revenue Service audited the Taxpayers' federal return and concluded that they had left out of their federal adjusted gross income the \$\$\$\$ in wages that were paid to TAXPAYER-2. It was undisputed that she had earned these wages while she was still a resident of Utah. The IRS increased the Taxpayer's federal adjusted gross income from \$\$\$\$ to \$\$\$\$ to account for this income. During the hearing, the Taxpayer explained that they had not received TAXPAYER-2 W-2 from BUSINESS-1 and this income had been left off their returns.

The facts presented at the hearing by TAXPAYER-1 were that he and TAXPAYER-2 had been Utah residents for a number of years. TAXPAYER-1 owned a townhome in CITY-1, Utah. He had a Utah Driver License, was registered to vote in Utah and registered his vehicle in Utah. Up until September 2009 he was working in Utah. However, the employer that he had been working for in Utah was bought out by an STATE-1 company. He was offered a position in CITY-2, STATE-1 and started working at that location in September 2009. He states that when he first went to STATE-1 he had stayed in company housing for 90 days, then he moved into a shared housing situation until TAXPAYER-2 moved out to STATE-1 in July. When she moved to STATE-1 they signed a nine month lease on an apartment. They obtained marriage licenses in STATE-1 and were married there. However, they did not obtain driver licenses in STATE-1, register to vote in the state or even register vehicles in that state due to the employment not working out as originally planned.

He states that it was their intent to remain permanently in STATE-1 and they were going to buy a house there. He left Utah thinking this would be a permanent move with a permanent employment position. He had tried to list his CITY-1 townhouse for sale in 2009, but he indicated because the market had declined so much he owed more on the property than the value, so he took it off the market and did not try to sell the CITY-1 residence during 2010.

However, despite the original plans, his STATE-1 employer was bought out again and the Division he worked for ended up back in Utah. By February 2011, the Taxpayers were back in Utah, but living in a rental in CITY-3, not the townhome owned by TAXPAYER-1 in CITY-1. While they were in STATE-1 they did not obtain STATE-1 driver licenses, register to vote or even register their vehicles in that state. Much of TAXPAYER-1 mail continued to be sent to an address in CITY-4, Utah, which was his parents address. TAXPAYER-1 stated that the reason for

this was that when he first went to STATE-1 he was residing in temporary housing and his parents address was a permanent address for him where he could get mail.

The first issue to consider 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 2010, or whether he had abandoned his Utah domicile and actually established one in STATE-1. It was not disputed that TAXPAYER-2 was a resident of Utah up until July 2010. 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. As TAXPAYER-1 did not meet the 183 day test, the Commission considers the second test, whether he remained domiciled in Utah during the entire 2010 tax year. The question of whether one 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.<sup>5</sup> As discussed by the courts, 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, prg. 22 (Utah 2011) (Citations Omitted).

In this appeal, as the Taxpayers had been domiciled in Utah prior to the tax year at issue the Commission must consider the provisions of Utah Admin. Rule R865-9I-2, which state that 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. In this case TAXPAYER-1 did have the physical presence in STATE-1 for all of 2010 and TAXPAYER-2 from July forward for that year, meeting the second prong of that test. TAXPAYER-1 states that he intended that this be a permanent move to STATE-1, but by the time they had moved from STATE-1 back to Utah, they had not taken all of the steps that would be typical for establishing a permanent domicile in another state, like getting a driver licenses in that state and registering vehicles in that state. The Taxpayers did file a joint STATE-1 return. TAXPAYER-1 had stayed

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<sup>5</sup> 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).

in temporary housing until July, when the Taxpayers leased a more permanent apartment. The Taxpayers still owned the townhouse in CITY-1, but explained that they could not sell this property because they were “underwater.” They had continued to receive the primary residential exemption for this property in Utah. However, if this was TAXPAYER-2 residence while in Utah until July 2010 or if it was leased so that it was someone else’s primary residence it could still qualify for the exemption.

After reviewing the factors presented there is enough information to show that the Taxpayers were part-year Utah and Part-Year STATE-1 residents for 2010. The information does indicate that they were in the process of moving to STATE-1. They intended it to be a permanent move, had the physical presence, TAXPAYER-2 moved to that state and they had started steps toward establishing domicile in that state like renting a long term apartment. They did not have enough time to get driver licenses or register vehicles in that state before TAXPAYER-1 employment situation had changed. The Taxpayers did file a joint federal return. Because TAXPAYER-2 was a part year resident of Utah and part year of STATE-1, they could not file separate Utah returns using special instructions. It is appropriate that they should be taxed as part-year residents with the income properly sourced between Utah and STATE-1. However, as part-year Utah residents, they did not claim on their Utah return all the income that should have been sourced to Utah. They should have listed on TC-40B as Utah income TAXPAYER-2 Utah wage income in the amount of \$\$\$\$ and Utah unemployment income of \$\$\$\$\$. The audit should be adjusted on this basis.

Jane Phan  
Administrative Law Judge

DECISION AND ORDER

Based on the foregoing, the audit should be adjusted to indicate the Taxpayers were part-year Utah residents and their income tax adjusted based on their Utah source income and STATE-1 income as indicated above for the 2010 tax year. 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.**