

15-850
TAX TYPE: INCOME TAX
TAX YEAR: 2011 & 2012
DATE SIGNED: 2-8-2016
COMMISSIONERS: M. CRAGUN, R. PERO, R. ROCKWELL
EXCUSED: J. VALENTINE
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. 15-850 Account No. ##### Tax Type: Income Tax Tax Year: 2011 and 2012 Judge: Phan
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Presiding:

Jane Phan, Administrative Law Judge

Appearances:

For Petitioner: TAXPAYER-1, By Telephone

For Respondent: RESPONDENT, Manager, Income Tax Auditing

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission on January 14, 2016 for an Initial Hearing in accordance with Utah Code §59-1-502.5. Petitioners (“Taxpayers”) appealed Utah individual income tax audit deficiencies under Utah Code §59-1-502 for tax years 2011 and 2012. Respondent (“Division”) had issued the Notices of Deficiency and Estimated Income Tax on April 14, 2015, on the basis that both of the Taxpayers were Utah resident individuals for income tax purposes. It was the Taxpayers’ position that TAXPAYER-1 was a resident of STATE-1 during 2011 and a part-year Utah resident in 2012. The amounts of the deficiencies as of the date the Notices of Deficiency were issued for each tax year are as follows:

	<u>Tax</u>	<u>Interest</u> ¹	<u>Penalties</u>	<u>Total</u>
2011	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$
2012	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$

APPLICABLE LAW

Utah imposes income tax on individuals who are residents of the state, in Utah Code Sec. 59-10-104(1) (2011 & 2012)² as follows:

. . . . a tax is imposed on the state taxable income of a resident individual as provided in this section

Resident individual is defined in Utah Code Sec. 59-10-103(1)(q) (2011 & 2012) 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 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.

For purposes of determining whether an individual is domiciled in this state the Commission had defined "domicile" in Utah Administrative Rule R865-9I-2(2011)³ which was effective for tax year 2011 as follows:

(1) Domicile.

a. 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.

b. 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.

(i) Tax Commission rule R884-24P-52, Criteria for Determining Primary Residence, provides a non-exhaustive list of factors or objective evidence determinative of domicile.

(ii) Domicile applies equally to a permanent home within and without the United States.

c. A domicile, once established, is not lost until there is a concurrence of the following three elements:

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

² For tax years 2011 and 2012 this provision was substantially the same.

³ Effective for tax year 2012 and following years the Utah Legislature substantially revised the provisions of the Utah Code regarding domicile, adopting Utah Code 59-10-136. These revisions are significant. The Commission applies the 2011 provisions for that tax year and the 2012 provisions for the 2012 tax year.

- (i) a specific intent to abandon the former domicile;
 - (ii) the actual physical presence in a new domicile; and
 - (iii) the intent to remain in the new domicile permanently.
- d. 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.

. . .

For the 2011 tax year, Utah Admin. Rule R884-24P-52 ("Rule 52") sets forth a non-exhaustive list of factors or objective evidence that may be determinative of domicile, as follows:

....

E. Factors or objective evidence determinative of domicile include:

1. whether or not the individual voted in the place he claims to be domiciled;
2. the length of any continuous residency in the location claimed as domicile;
3. the nature and quality of the living accommodations that an individual has in the location claimed as domicile as opposed to any other location;
4. the presence of family members in a given location;
5. the place of residency of the individual's spouse or the state of any divorce of the individual and his spouse;
6. the physical location of the individual's place of business or sources of income;
7. the use of local bank facilities or foreign bank institutions;
8. the location of registration of vehicles, boats, and RVs;
9. membership in clubs, churches, and other social organizations;
10. the addresses used by the individual on such things as:
 - a) telephone listings;
 - b) mail;
 - c) state and federal tax returns;
 - d) listings in official government publications or other correspondence;
 - e) driver's license;
 - f) voter registration; and
 - g) tax rolls;
11. location of public schools attended by the individual or the individual's dependents;
12. the nature and payment of taxes in other states;
13. declarations of the individual:
 - a) communicated to third parties;
 - b) contained in deeds;
 - c) contained in insurance policies;
 - d) contained in wills;
 - e) contained in letters;
 - f) contained in registers;
 - g) contained in mortgages; and
 - h) contained in leases.
14. the exercise of civil or political rights in a given location;

15. any failure to obtain permits and licenses normally required of a resident;
16. the purchase of a burial plot in a particular location;
17. the acquisition of a new residence in a different location.

....

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.

The applicable statutes specifically provide that the Taxpayer bears the burden of proof in proceedings before the Tax Commission. Utah Code Sec. 59-1-1417 provides:

In a proceeding before the commission, the burden of proof is on the petitioner. . .

The Tax Commission has authority to waive penalties under Utah Code Sec. 59-1-401(13) which provides:

Upon making a record of its actions, and upon reasonable cause shown, the commission may waive, reduce, or compromise any of the penalties or interest imposed under this part.

DISCUSSION

The Division based its audit on the assertion that both Taxpayers were residents of Utah for individual income tax purposes for both 2011 and 2012. It was the Taxpayers' assertion that TAXPAYER-1 was a resident of STATE-1 for all of 2011 and a part-year resident of STATE-1, part-year resident of Utah in 2012. They are in agreement that TAXPAYER-2 had remained a Utah resident for both years and she had filed a Utah resident separate return in 2011. The Taxpayers had filed a joint 2012 Utah resident individual return, rather than a part-year resident return, but had removed TAXPAYER-1, STATE-1 income as an equitable adjustment. If TAXPAYER-1 had been a part year resident for 2012 this would not have been the proper filing for that status. Regardless, the issue in this appeal is whether TAXPAYER-1 was a "resident individual" in the state of Utah for the purposes of Utah Code Sec. 59-10-104, for both 2011 and

2012, or whether he had changed his domicile to STATE-1. 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. The Division argues that TAXPAYER-1 was domiciled in Utah throughout 2011 and 2012. There were substantial revisions to the law defining domicile that became effective for the 2012 tax year. Therefore, in resolving this question the Commission must look at each year independently and apply the law in effect for that year.

Under the law in effect up through 2011, whether someone is a “resident individual” for state tax purposes has been addressed by the appellate courts in Utah.⁴ 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, ¶ 22 (Utah 2011) (Citations Omitted).

In this case, both Taxpayers had been filing Utah resident returns prior to 2011 and TAXPAYER-2 had continued to file as a Utah resident in 2011. They held Utah Driver Licenses, were residing in Utah and had registered their vehicle in Utah. It was clear that at some point for tax purposes they were subject to tax as Utah residents. For the 2011 tax year, once domicile had been established in Utah three things must be shown to establish a new domicile: 1) a specific intent to abandon the former domicile; 2) the actual physical presence in a new domicile; and 3) the intent to remain in the new domicile permanently. See Utah Admin. Rule R865-9I-2.

TAXPAYER-1 explained the Taxpayers’ situation at the hearing as follows. He had moved to the United States as a student on an F-1 Visa in 2003 and TAXPAYER-2 had moved to the United States in 2005 on the same type of Visa. He explained that this is a temporary visa for students and they have never had permanent residency status, so they both had considered their stay in the U.S. to be temporary in nature and after their studies they would likely return to FOREIGN COUNTRY. He stated that when they came to the U.S. they did not know if they would be able to obtain any type of work visa in the U.S. when they were done with their studies. While living in Utah, they had rented apartments, purchased a car which they registered in Utah

⁴ 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). However, all of these cases were based on the prior law that was effective up through 2011.

and obtained Utah Driver Licenses. They also had a child in Utah in 2007. It was TAXPAYER-1 statement that prior to 2012, the child spent much of his time in FOREIGN COUNTRY with his grandparents. In 2009 TAXPAYER-1 was accepted into a graduate program in STATE-1 where he could work as a graduate student on a research project. He moved to STATE-1 and rented an apartment there. The vehicle stayed in Utah with TAXPAYER-2. TAXPAYER-1 did not obtain a STATE-1 Driver License, but states that he did not drive in that state, that he used the public transportation system to get around. It was his acknowledgement that he considered STATE-1 to be a temporary place, but pointed out that he had considered Utah to be temporary as well due to the nature of his F-1 Visa. There was no individual income tax filing requirement in STATE-1, so TAXPAYER-1 did not have to file a return in that state or pay taxes on the income that he earned there. He did point out, however, that instead of income taxes, STATE-1 had a very high sales tax rate at 10%. So he felt that he had paid taxes in that state.

Meanwhile in 2011, TAXPAYER-2 had finished school and was able to find employment in CITY-1 and obtained a temporary work visa. She had started to work in this state and the couple's son returned to Utah to stay with his mother. TAXPAYER-1 returned to Utah in May 2012. In August 2012 the couple's son began to attend kindergarten in a public school in Utah.

The Taxpayers did file a joint Utah individual income tax return for 2012, but on that return had excluded the income earned by TAXPAYER-1 while he was in STATE-1 as an equitable adjustment. The Division's representative had pointed out at the hearing that an equitable adjustment was improper and the Division had denied the adjustment. Had the Division considered that TAXPAYER-1 was in fact a part-year resident of Utah and part-year resident of STATE-1, a different type of return filing and calculation would have had to be made which is different from how the Taxpayers had prepared this return.

Although in the United States on temporary visas, the Taxpayers would have to have a domicile in a state for tax purposes and clearly that domicile had been in Utah for a number of years. So looking at the law in effect for 2011, once Utah had been established for purposes of tax domicile, to show a new domicile in STATE-1, the Taxpayer would have to show: 1) a specific intent to abandon the former domicile; 2) the actual physical presence in a new domicile; and 3) the intent to remain in the new domicile permanently. See Utah Admin. Rule R865-9I-2 (2011). TAXPAYER-1 was unable to show the intent to remain in STATE-1 permanently as he went for a temporary purpose. So despite the argument that he was in Utah for a temporary purpose as well, he had established a domicile for tax purposes in Utah prior to this move to STATE-1. For further guidance the Commission looks to the factors listed at Utah Admin. Rule

R884-24P-52. These include things like where he had his Driver License, vehicle registration and where his spouse and children resided. All these things point to Utah. Based on these factors, TAXPAYER-1 was a domicile in Utah for tax purposes for all of 2011.

In 2012, the law was changed and provides a more clear line when one spouse is domiciled in Utah and the other is claiming to be domiciled in another state. Under Utah Code §59-10-136(5), effective beginning in tax year 2012, TAXPAYER-1 was domiciled in Utah because his spouse was domiciled in Utah. Utah Code §59-10-136 substantially rewrote what constituted “domicile” from the definitions established under the prior Administrative Rule and prior case law. Utah Code §59-10-136(5) now provides that if one spouse is domiciled in Utah, the other spouse is considered domiciled in Utah, unless they are divorced, legally separated or unless they filed a married filing separate federal return. Specifically, Utah Code §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.” Under the clear and direct language of Utah Code §59-10-136(5) TAXPAYER-1 was domiciled in Utah for Utah individual income tax purposes in 2012 because he was married to a Utah resident.

Penalties and interest were assessed with the audit for the 2011 tax year. In this case TAXPAYER-2 had filed a Utah married filing separate return for that tax year at issue. For the Division to change the status to a joint filing the return is reversed off of the system and the system then generates a penalty as if no return was filed. The Tax Commission may waive or reduce penalties under Utah Code §59-1-401(13) for reasonable cause and there is reasonable cause in this matter as TAXPAYER-2 had timely filed the return that she thought was proper and TAXPAYER-1 was not aware he should be filing a Utah return because he was living and working in STATE-1 that year. No penalties were assessed for the 2012 tax year. There is no basis for waiver of interest. As noted at Utah Administrative Rule R861-1A-42, for interest to be waived the taxpayer must prove “that the commission gave the taxpayer erroneous information or took inappropriate action that contributed to the error.” There was no showing of error on the part of the Tax Commission.

Jane Phan
Administrative Law Judge

DECISION AND ORDER

Based on the foregoing, the Commission sustains the audit deficiencies as to the Utah individual income tax and interest for tax years 2011 and 2012. The Commission waives the penalties assessed for 2011. 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
CITY-1City, 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 _____, 2016.

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.