

15-1154

TAX TYPE: INCOME TAX

TAX YEAR: 2012 & 2013

DATE SIGNED: 2-1-2016

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. 15-1154

Account No. #####

Tax Type: Income Tax

Tax Year: 2012 and 2013

Judge: Phan

Presiding:

Jane Phan, Administrative Law Judge

Appearances:

For Petitioner: TAXPAYER-2
TAXPAYER-1

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”) are appealing an audit deficiency of additional Utah Individual Income tax, penalties and interest issued against them by Respondent (“Division”) for tax years 2012 and 2013. The Notices of Deficiency and Estimated Income Tax were issued on May 18, 2015. It was the Division’s position with the audit that both Taxpayers were domiciled in Utah for tax years 2012 and 2013. It was the Taxpayers’ position that while TAXPAYER-2 was a Utah resident, TAXPAYER-1 was a resident of STATE-1. The amount of the audit deficiencies as calculated with interest as to the date of the Notices are as follows:

Year	Tax	Interest	Penalties	Total as of Date of Notice ¹
2012	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$
2013	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$

APPLICABLE LAW

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

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;

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

- (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 §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 §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 became effective with the 2012 tax year, that TAXPAYER-1 was a resident of Utah for individual income tax purposes during 2012 and 2013. It was not disputed that had been a Utah resident in 2012 and 2013. In fact, TAXPAYER-2 had filed Utah resident returns for 2012 and 2013, with the status of married filing separate. The Taxpayers had filed joint federal returns for both years at issue. TAXPAYER-2 had filed a married filing separate return like she had for prior years relying on the Special Instructions provisions for when one spouse was a resident of another state. The Taxpayers pointed out that they had been audited in 2007 and at that time the Tax Commission had determined that while TAXPAYER-2 was a Utah resident, TAXPAYER-1 was not a Utah resident and so they were qualified to file under the Special Instructions provisions, which is how they had been filing each year. These Special Instruction provisions were no longer in effect for 2012 and going forward but the Taxpayers were not aware of this change.

It was the Taxpayers' position that nothing had changed with their situation in 2012 and 2013. TAXPAYER-2 had been originally from STATE-2 and her children from a prior marriage, who were adults, and grandchildren continue to reside in the STATE-2 area. In 2006 she obtained employment at UNIVERSITY and moved to Utah in July 2006. She bought a residence in CITY-1, Utah prior to her marriage to TAXPAYER-1. She obtained a Utah Driver License, registered her vehicle in Utah and registered to vote in Utah. She received the primary residential exemption on her Utah residence. She considered herself to be a Utah resident.

TAXPAYER-1 has been a lifelong resident of STATE-1. The only time he had resided in Utah was in the 1970's when he attended the UNIVERSITY-2, and he pointed out that he had to pay nonresident tuition. He stated that for 20 years encompassing the audit period he resided at the same residence in STATE-1, which is a home that he owned at ADDRESS-1 in CITY-2. His brother and mother live nearby and he had an adult son sometimes living in the home with him. During the audit years, neither of the Taxpayers had minor children. TAXPAYER-1 had provided copies of his STATE-1 Driver License which he has held since 1968. He provided copies of utility bills for his STATE-1 residence and evidence that he had licensed his vehicle in STATE-1. Although TAXPAYER-1 travels for work to jobsites and during the audit period had

worked primarily in STATE-3 and STATE-4, he did not work in Utah. He also stated that over the years he had not worked in Utah and had no Utah source income.

TAXPAYER-2 stated at the hearing that TAXPAYER-1 had told her before they got married that he would never move to Utah. When they got married in 2006 or 2007 she continued to live in her residence in Utah and work full time in Utah. TAXPAYER-1 continued to reside in STATE-1. On weekends or time off from work, she would travel to STATE-1 or he would visit her in Utah. TAXPAYER-1 stated that when he was off from his job, he had some additional responsibilities in STATE-1 taking care of his mother who was going through cancer treatments and his brother and adult son who also needed assistance for other reasons at this time.

In 2013 TAXPAYER-2 did end up finding employment in STATE-1, sold her Utah home and the couple purchased a new home together in STATE-1.

The Taxpayers explained that they thought it was unfair that the new law was passed effective 2012 but it was not publicized. They point out that they were both educated people and they just had not heard anything about the new law until they were contacted by the Division with the audit. They stated that had they known they would have complied with the provisions or they may have filed separate federal returns. Because they did not know about these statutory provisions, they felt it was unfair to be charged penalties and interest as well. They also indicated that Utah's domicile provisions are now different than other states. They wondered how it could be constitutional for the state of Utah to tax TAXPAYER-1 when he was not a resident of Utah and none of his income was from Utah sources. TAXPAYER-2 mentioned that she had contacted her Congressman about the law and he had referred her to her state legislator.

It was the Division's position that the audit was due to a law change. Under Utah Code §59-10-136(5), effective beginning in tax year 2012, TAXPAYER-1 was domiciled in Utah because TAXPAYER-2 was domiciled in Utah. Utah Code §59-10-103 provides that 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 §59-10-136 substantially rewrote what constituted "domicile" from the definitions established under the prior Administrative Rule² and prior case law.³ Prior to this 2012 revision, if one spouse was domiciled in Utah, and the other was able to

² Utah Admin. Rule R865-9I-2.

³ 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*

show that they were, in fact, domiciled in another state, the spouses could file a joint federal return and separate state returns using Special Instructions. Utah Code §59-10-136(5) now provides that if one spouse is domiciled in Utah, the other spouse is 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.” The Taxpayers did not fall under either of these two exceptions. They were legally married and they filed a joint federal return.

Upon reviewing the new statute set out at Utah Code §59-10-136 and specifically Subsection 136(5) the Division’s interpretation is consistent with a plain reading of these provisions.⁴ Utah Code §59-10-136(5) provides a bright, clear line on domicile, which is a change from prior law and rules. TAXPAYER-1 had been a lifelong resident of STATE-1, never worked in Utah, had no intent to move to Utah and no intent to become a resident of Utah. Regardless of these factors, under the clear and direct language of Utah Code §59-10-136(5) he was domiciled in Utah for Utah individual income tax purposes for 2012 and 2013 because he was married to a Utah resident.

Penalties and interest were assessed with the audit. The Division’s representative did not argue that the penalties be upheld. In this case TAXPAYER-2 had filed a Utah married filing separate return for both tax years 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 returns that she thought were proper and TAXPAYER-1 was not aware he should be filing Utah returns. 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.” This audit arose from a change in the law, specifically the adoption by the Utah Legislature of Utah Code §59-10-

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.

⁴ 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).

136, and the Tax Commission is applying the new law as it was written. There was no showing of error on the part of the Tax Commission.

Based on the law that became effective for tax year 2012, the tax and interest assessment should be upheld. There is cause for waiver of the penalties.

Jane Phan
Administrative Law Judge

DECISION AND ORDER

Based on the foregoing, the Commission sustains the audit deficiencies as to the tax and interest due and waives the penalties for both tax years 2012 and 2013. It is so ordered. The Division is to give the Taxpayers a statement listing the revised total amount due with the updated interest.

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 _____, 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.

