15-1200
TAX TYPE: INCOME TAX
TAX YEAR: 2012 and 2013
DATE SIGNED: 5-23-2016
COMMISSIONERS: J. VALENTINE, M. CRGUN, R. ROCKWELL
EXCUSED: R. PERO
GUIDING DECISION

BEFORE THE UTAH STATE TAX COMMISSION

TAXPAYER-1 AND TAXPAYER-2, Petitioners, v. AUDITING DIVISION OF THE UTAH STATE TAX COMMISSION, Respondent.	**INITIAL HEARING ORDER** Appeal No. 15-1200 Account No. 4347 Tax Type: Income Tax Tax Year: 2012 and 2013 Judge: Phan

Presiding:
Jane Phan, Administrative Law Judge

Appearances:

For Petitioner:	TAXPAYER-1, By Telephone TAXPAYER-2, By Telephone
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 February 25, 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 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 June 17, 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. TAXPAYER-2 had filed Utah resident returns for the two years at issue. The amount of the audit deficiencies as calculated with interest as of 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 the tax years at issue 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 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

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

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

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, TAXPAYER-1 was a resident of Utah for individual income tax purposes for all of 2012 and 2013. The Taxpayers did not dispute

that TAXPAYER-2 was 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, although the Taxpayers had filed married filing joint federal returns for both years at issue. It was the Taxpayers' position that TAXPAYER-1 had moved to STATE-1 in 2012 and was no longer domiciled in the State of Utah after that move.

The facts presented at the hearing were that the Taxpayers had married in 2003 in STATE-2 under a provision available in that state called a Covenant Marriage, which placed certain obligations on the Taxpayers in the event they decided to divorce. This type of marriage was an optional type of marriage that was available to couples in STATE-2, in the alternative to the traditional option. The parties presented an information pamphlet titled Covenant Marriage in STATE-2[2] which explained that the court could only grant a divorce or legal separation of this type of marriage for certain, limited reasons. The Taxpayers argue that the STATE-2 Covenant Marriage statutes do not allow for one party to file for divorce or legal separation against the other unless certain conditions are met. The one condition the Taxpayers note is that one spouse may file for divorce against the other if the spouses have lived apart for at least two years.[3]

In 2005 the Taxpayers moved to Utah where they purchased a residence in Utah and resided together as a married couple until June 2012. At that point TAXPAYER-1 moved to STATE-1. He had obtained a STATE-1 Driver License by July 2012 and registered his vehicle in that state. He had rented an unfurnished apartment beginning June 1, 2012 and moved furnishings to STATE-1. TAXPAYER-2 stated that at the time she was trying to find employment in STATE-3. Had she been able to find employment there, it was her intention to move to STATE-3 without TAXPAYER-1. They argue that they began at this point to live separately and thus began the two year period which they contend was required under their STATE-2 Covenant Marriage before they could file for divorce or legal separation. They argue that this two year waiting period should be treated as a legal separation under Utah's domicile law at Utah Code Subsection 59-10-136(5).

It was not disputed that TAXPAYER-1 moved to STATE-1. He provided documentation that he entered into a lease for an apartment with a start date of June 1, 2012 and he received utility bills for that apartment and other mail including credit card bills addressed to him at that

[2] Respondent's Exhibit 6.

[3] Other reasons for which the courts would allow divorce or legal separation listed in the Covenant Marriage In STATE-2 pamphlet, Respondent's Exhibit 6, pages 46-47, are if the respondent to the divorce had been absent from the home where the married couple resided and has refused to return for one year. It also provides as a separate reason under which the court would grant the divorce to be if, "The spouses both agree to a divorce."

apartment address beginning in June 2012. He provided copies of his STATE-1 Driver license which shows an issue date of July 6, 2012. He provided a copy of his STATE-1 Voter Registration Card and evidence of both registering and insuring his vehicle in STATE-1. The Division did not submit information that refuted the position that TAXPAYER-1 moved to STATE-1 in 2012.

The Taxpayers explained that after TAXPAYER-1 had moved, TAXPAYER-2 stayed in their Utah residence for a period of time and prepared the house to sell. The Taxpayers pointed out that the housing market was still volatile in 2012 and they felt they had to fix it up to get it into saleable condition. They did sell their Utah residence in April 2013. After selling the Utah residence, TAXPAYER-2 rented an apartment for herself and pointed out that TAXPAYER-1 was not on her lease.

The Taxpayers had continued to file their federal individual income tax returns with the status of married filing joint for 2012 and 2013. They indicated that had they filed married filing separate they would have owed a much larger tax to the federal government.

The Division had noted that the Taxpayers rented storage units in Utah during the audit period. TAXPAYER-1 explained that they each had a storage unit in Utah and he had chosen a Utah storage unit because it was cheaper than leasing one in STATE-1.

The Taxpayers stated that they started negotiating divorce proceedings in the fall of 2014. They filed a joint petition for divorce in the State of STATE-1 in January 26, 2015 and the Decree of Divorce was entered on February 18, 2015. They acknowledged that in the STATE-1 divorce proceeding they did not have to establish to the court that they had been living separately for two years prior to filing for divorce.

It was the Division's position that under Utah Code §59-10-136(5), effective beginning for tax year 2012, that TAXPAYER-1 remained domiciled in Utah after June 2012 because TAXPAYER-2 was domiciled in Utah and they were not divorced or legally separated, nor had they filed separate federal returns for 2012 and 2013. Utah Code §59-10-103 provides that a resident individual is one who maintains a place of abode in this state and spends in the aggregate 183 days or more 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 Rule[4] and prior case law.[5] Prior to

[4] Utah Admin. Rule R865-9I-2.

[5] Based on the statute and rule in effect prior to the 2012 revision, the issue of domicile for Utah individual income tax purposes had 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

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 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 Division argues that the Taxpayers did not fall under the exceptions. They did not file a separate federal return, they were not divorced and it was the Division's position that the Taxpayers were not "legally separated."

Although the Taxpayers argue that the STATE-2 Covenant Marriage requirement of living apart for two years prior to filing for divorce should be construed as a legal separation, this is not persuasive. The pamphlet the parties provided explaining Covenant Marriage in STATE-2 clearly distinguishes between the two year waiting period and a legal separation, as the two year waiting period is also listed as one of a number of reasons the petitioning spouse can obtain a legal separation.[6] Further, it should be noted that the pamphlet states spouses could be divorced without a waiting period if "The spouses both agree to a divorce."[7] The two year waiting period under the STATE-2 Covenant Marriage laws is not the equivalent of a legal separation.

Upon reviewing the 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.[8] 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 moved to STATE-1 in June 2012 and the Taxpayers may have intended to end their marriage at some point in time thereafter, but they did not obtain legal divorce or "legal separation" until 2015. They did have the option of filing their federal return as married filing separate and then TAXPAYER-2 could have filed a separate Utah return. As noted by the Taxpayers, they did not do this because it would have increased their federal tax liability substantially.

(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 with the adoption of Sec. 59-10-136, findings in these cases may no longer apply beginning with tax year 2012.

[6] Respondent's Exhibit 6, pg. 49.
[7] Respondent's Exhibit 6, pg. 47.
[8] 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).

Penalties were not assessed with the audits. 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 of Utah Code §59-10-136 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.

Jane Phan
Administrative Law Judge

DECISION AND ORDER

Based on the foregoing, the Commission sustains the audit deficiencies as to the tax and interest for both tax years 2012 and 2013. 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 _____, 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.