

15-1266

TAX TYPE: INCOME TAX

TAX YEAR: 2012, 2013 & 2014

DATE SIGNED: 10-3-2016

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

GUIDING DECISION

BEFORE THE UTAH STATE TAX COMMISSION

PETITIONER, Petitioner, v. AUDITING DIVISION OF THE UTAH STATE TAX COMMISSION, Respondent.	FINDINGS OF FACT, CONCLUSIONS OF LAW, AND FINAL DECISION Appeal No. 15-1266 Account No. ##### Tax Type: Income Tax Tax Years: 2012, 2013 & 2014 Judge: Phan
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Presiding:

Michael Cragun, Commissioner
Jane Phan, Administrative Law Judge

Appearances:

For Petitioner: REPRESENTATIVE FOR PETITIONER, Representative¹
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 for a Formal Hearing on June 30, 2016, in accordance with Utah Code §59-1-501 and §63G-4-201 et seq. Based upon the evidence and testimony presented at the hearing, the Tax Commission hereby makes its:

FINDINGS OF FACT

1. Petitioner is appealing an individual income tax audit deficiency issued against him for tax years 2012, 2013 and 2014. Respondent (“Division”) issued the Notices of Deficiency and Audit Change on June 18, 2015. Petitioner had returned the Notices with the words “Hereby Disputed” written over the Notices.² An appeal was opened and the matter proceeded to this Formal Hearing.

¹ REPRESENTATIVE FOR PETITIONER is Petitioner’s Spouse. Although the Utah Audits were issued against Petitioner as married filing separate audits, Petitioner had submitted a signed and notarized statement dated October 26, 2015, which authorized REPRESENTATIVE FOR PETITIONER to represent him in this appeal.

² Respondent’s Exhibit AUD 000006-000012.

2. The Notices of Deficiency indicated audit tax, penalties and interest due for each of the tax years. A \$500 penalty was assessed for each tax year under Utah Code Subsection 59-1-401(9). Interest was calculated and assessed from the due date of each return through the July 18, 2015 payment date listed in the Notices and continues to accrue on the unpaid balance. The audit total due for each year with interest calculated up through the Notice payment date is as follows:

Tax Year	Audit Tax	Interest	Penalty	Total as of Date of Notices
2012	\$\$\$\$\$	\$\$\$\$\$	\$500.00	\$\$\$\$\$
2013	\$\$\$\$\$	\$\$\$\$\$	\$500.00	\$\$\$\$\$
2014	\$\$\$\$\$	\$\$\$\$\$	\$500.00	\$\$\$\$\$

3. Petitioner had filed Utah resident individual income tax returns for each year 2012 through 2014, but claimed on the returns “-0-” on Line 4 –Federal Adjusted Gross Income.³ The returns claimed a refund of all Utah income tax withheld and paid to the state by Petitioner’s employer.

4. The Division reviewed information from the Internal Revenue Service which indicated that Petitioner had received “wages, tips and other compensation” from his employer in each of the years at issue, as well as some other income. The amount of the “wages, tips and other compensation” reported by his employer, BUSINESS-1 or BUSINESS-1 as paid to Petitioner for each of the years was as follows:⁴

Reported by BUSINESS-1 as Paid to Petitioner:

2012	\$\$\$\$\$
2013	\$\$\$\$\$
2014	\$\$\$\$\$

5. Petitioner’s representative did not refute that Petitioner lived in a residence that was located in Utah during 2012 through 2014. She stated, “We are human beings that live in Utah.” She acknowledged that Petitioner had a “job” at BUSINESS-1 in CITY-1, Utah and that he “exchanges his time for compensation.” She did not dispute that he received from BUSINESS-1 the amounts listed above. Petitioner did not claim to be a resident of any other state. She also argues that Utah is a “right to work” state and rights cannot be taxed.

6. Petitioner did not challenge the amount of the “earnings” he had received from BUSINESS-1 during the years 2012 through 2014.

³ Respondent’s Exhibit 000026-000041.

⁴ Respondent’s Exhibit 000056-000075.

APPLICABLE LAW

The Utah Legislature has imposed an individual income tax for resident individuals. This is set out at Utah Code § 59-10-104 (2014)⁵ as follows:

(1) For taxable years beginning on or after January 1, 2008, a tax is imposed on the state taxable income of a resident individual as provided in this section.

(2) For purposes of Subsection (1), for a taxable year, the tax is an amount equal to the product of: (a) the resident individual's state taxable income for that taxable year; and (b) 5%.

...

"Taxable income" or "State taxable income" is defined in Utah Code §59-10-103(1)(w) (2014) as follows:

- (i) subject to Section 59-10-1404.5, for a resident individual means the resident individual's adjusted gross income after making the:
 - (A) additions and subtractions required by Section 59-10-114; and
 - (B) adjustments required by Section 59-10-115...

"Adjusted gross income" is defined in Utah Code §59-10-103(1)(a) (2014), which states:

"Adjusted gross income": (i) for a resident or nonresident individual, is as defined in Section 62, Internal Revenue Code; . . . "

At 26 U.S.C. §62(a) the Internal Revenue Code defines "adjusted gross income" as "gross income" minus certain deductions.

"Gross income" is defined at Section 61 of the Internal Revenue Code. 26 U.S.C. §61(a) provides:

- (a) Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, including (but not limited to) the following items:
 - (1) Compensation for services, including fees, commissions, fringe benefits, and similar items;
 - (2) Gross income derived from business;
 - (3) Gains derived from dealings in property;
 - (4) Interest;
 - (5) Rents;
 - (6) Royalties;
 - (7) Dividends;
 - (8) Alimony and separate maintenance payments;
 - (9) Annuities;
 - (10) Income from life insurance and endowment contracts;
 - (11) Pensions;
 - (12) Income from discharge of indebtedness;
 - (13) Distributive share of partnership gross income;
 - (14) Income in respect of a decedent; and
 - (15) Income from an interest in an estate or trust.

⁵ This decision cites to the substantive 2014 provisions. However, for the years 2012 through 2014, the provisions were substantially the same.

Resident individual is defined in Utah Code §59-10-103(1)(q)(i) (2014) as follows:

"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 place of abode in this state; and (II) spends in the aggregate 183 or more days of the taxable year in this state.

...

For tax years 2012-2014, Utah Code §59-10-136 sets out the tests for whether an individual is domiciled in this state as follows:

- (1) (a) An individual is considered to have domicile in this state if:
 - (i) except as provided in Subsection (1)(b), a dependent with respect to whom the individual or the individual's spouse claims a personal exemption on the individual's or individual's spouse's federal individual income tax return is enrolled in a public kindergarten, public elementary school, or public secondary school in this state; or
 - (ii) the individual or the individual's spouse is a resident student in accordance with Section 53B-8-102 who is enrolled in an institution of higher education described in Section 53B-2-101 in this state.
- (b) The determination of whether an individual is considered to have domicile in this state may not be determined in accordance with Subsection (1)(a)(i) if the individual:
 - (i) is the noncustodial parent of a dependent:
 - (A) with respect to whom the individual claims a personal exemption on the individual's federal individual income tax return; and
 - (B) who is enrolled in a public kindergarten, public elementary school, or public secondary school in this state; and
 - (ii) is divorced from the custodial parent of the dependent described in Subsection (1)(b)(i).
- (2) There is a rebuttable presumption that an individual is considered to have domicile in this state if:
 - (a) the individual or the individual's spouse claims a residential exemption in accordance with Chapter 2, Property Tax Act, for that individual's or individual's spouse's primary residence;
 - (b) the individual or the individual's spouse is registered to vote in this state in accordance with Title 20A, Chapter 2, Voter Registration; or
 - (c) the individual or the individual's spouse asserts residency in this state for purposes of filing an individual income tax return under this chapter, including asserting that the individual or the individual's spouse is a part-year resident of this state for the portion of the taxable year for which the individual or the individual's spouse is a resident of this state.
- (3) (a) Subject to Subsection (3)(b), if the requirements of Subsection (1) or (2) are not met for an individual to be considered to have domicile in this state, the individual is considered to have domicile in this state if:

- (i) the individual or the individual's spouse has a permanent home in this state to which the individual or the individual's spouse intends to return after being absent; and
 - (ii) the individual or the individual's spouse has voluntarily fixed the individual's or the individual's spouse's habitation in this state, not for a special or temporary purpose, but with the intent of making a permanent home.
- (b) The determination of whether an individual is considered to have domicile in this State under Subsection (3)(a) shall be based on the preponderance of the evidence, taking into consideration the totality of the following facts and circumstances:
- (i) whether the individual or the individual's spouse has a driver license in this state;
 - (ii) whether a dependent with respect to whom the individual or the individual's spouse claims a personal exemption on the individual's or individual's spouse's federal individual income tax return is a resident student in accordance with Section 53B-8-102 who is enrolled in an institution of higher education described in Section 53B-2-101 in this state;
 - (iii) the nature and quality of the living accommodations that the individual or the individual's spouse has in this state as compared to another state;
 - (iv) the presence in this state of a spouse or dependent with respect to whom the individual or the individual's spouse claims a personal exemption on the individual's or individual's spouse's federal individual income tax return;
 - (v) the physical location in which earned income as defined in Section 32(c)(2), Internal Revenue Code, is earned by the individual or the individual's spouse;
 - (vi) the state of registration of a vehicle as defined in Section 59-12-102 owned or leased by the individual or the individual's spouse;
 - (vii) whether the individual or the individual's spouse is a member of a church, a club, or another similar organization in this state;
 - (viii) whether the individual or the individual's spouse lists an address in this state on mail, a telephone listing, a listing in an official government publication, other correspondence, or another similar item;
 - (ix) whether the individual or the individual's spouse lists an address in this state on a state or federal tax return;
 - (x) whether the individual or the individual's spouse asserts residency in this state on a document, other than an individual income tax return filed under this chapter, filed with or provided to a court or other governmental entity;
 - (xi) the failure of an individual or the individual's spouse to obtain a permit or license normally required of a resident of the state for which the individual or the individual's spouse asserts to have domicile; or
 - (xii) whether the individual is an individual described in Subsection (1)(b).
- (4) (a) Notwithstanding Subsections (1) through (3) and subject to the other provisions of this Subsection (4), an individual is not considered to have domicile in this state if the individual meets the following qualifications:
- (i) except as provided in Subsection (4)(a)(ii)(A), the individual and the individual's spouse are absent from the state for at least 761 consecutive days; and
 - (ii) during the time period described in Subsection (4)(a)(i), neither the individual nor the individual's spouse:
 - (A) return to this state for more than 30 days in a calendar year;
 - (B) claim a personal exemption on the individual's or individual's

- spouse's Federal individual income tax return with respect to a dependent who is enrolled in a public kindergarten, public elementary school, or public secondary school in this state, unless the individual is an individual described in Subsection (1)(b);
- (C) are resident students in accordance with Section 53B-8-102 who are enrolled in an institution of higher education described in Section 53B-2-101 in this state;
 - (D) claim a residential exemption in accordance with Chapter 2, Property Tax Act, for that individual's or individual's spouse's primary residence; or
 - (E) assert that this state is the individual's or the individual's spouse's tax home for federal individual income tax purposes.
- (b) Notwithstanding Subsection (4)(a), an individual that meets the qualifications of Subsection (4)(a) to not be considered to have domicile in this state may elect to be considered to have domicile in this state by filing an individual income tax return in this state as a resident individual.
- (c) For purposes of Subsection (4)(a), an absence from the state:
- (i) begins on the later of the date:
 - (A) the individual leaves this state; or
 - (B) the individual's spouse leaves this state; and
 - (ii) ends on the date the individual or the individual's spouse returns to this state if the individual or the individual's spouse remains in this state for more than 30 days in a calendar year.
- (d) An individual shall file an individual income tax return or amended individual income tax return under this chapter and pay any applicable interest imposed under Section 59-1-402 if:
- (i) the individual did not file an individual income tax return or amended individual income tax return under this chapter based on the individual's belief that the individual has met the qualifications of Subsection (4)(a) to not be considered to have domicile in this state; and
 - (ii) the individual or the individual's spouse fails to meet a qualification of Subsection (4)(a) to not be considered to have domicile in this state.
- (e) (i) Except as provided in Subsection (4)(e)(ii), an individual that files an individual income tax return or amended individual income tax return under Subsection (4)(d) shall pay any applicable penalty imposed under Section 59-1-401.
- (ii) The commission shall waive the penalties under Subsections 59-1-401(2), (3), and (5) if an individual who is required by Subsection (4)(d) to file an individual income tax return or amended individual income tax return under this chapter:
- (A) files the individual income tax return or amended individual income tax return within 105 days after the individual fails to meet a qualification of Subsection (4)(a) to not be considered to have domicile in this state; and
 - (B) within the 105-day period described in Subsection (4)(e)(ii)(A), pays in full the tax due on the return, any interest imposed under Section [59-1-402](#), and any applicable penalty imposed under Section [59-1-401](#), except for a penalty under Subsection [59-1-401](#)(2), (3), or (5).
- (5) (a) If an individual is considered to have domicile in this state in accordance

- with this section, the individual's spouse is considered to have domicile in this state.
- (b) For purposes of this section, an individual is not considered to have a spouse if:
 - (i) the individual is legally separated or divorced from the spouse; or
 - (ii) the individual and the individual's spouse claim married filing separately filing status for purposes of filing a federal individual income tax return for the taxable year.
 - (c) Except as provided in Subsection (5)(b)(ii), for purposes of this section, an individual's filing status on a federal individual income tax return or a return filed under this chapter may not be considered in determining whether an individual has a spouse.
- (6) For purposes of this section, whether or not an individual or the individual's spouse claims a property tax residential exemption under Chapter 2, Property Tax Act, for the residential property that is the primary residence of a tenant of the individual or the individual's spouse may not be considered in determining domicile in this state.

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

Utah Code Sec. 59-1-401(9) provides for a penalty of \$500 as follows:

If a person, in furtherance of a frivolous position, has a prima facie intent to delay or impede administration of a law relating to a tax, fee, or charge and files a purported return that fails to contain information from which the correctness of reported tax, fee, or charge liability can be determined or that clearly indicates that the tax, fee or charge liability shown is substantially incorrect, the penalty is \$500.

DISCUSSION

The Tax Commission had previously held a Formal Hearing on an appeal filed by Petitioner for the 2010 tax year and issued in that appeal its *Findings of Fact, Conclusions of Law and Final Decision, Appeal No. 14-1220*, (August 26, 2016) in which it addressed many of the same arguments regarding the taxability of Petitioner’s income from his employment and issues regarding the deficiency and assessment of taxes. As noted in that decision, which is incorporated herein by this reference, the compensation that Petitioner receives from his employer for his “job” is subject to Utah individual income tax.

Petitioner’s representative argued that Petitioner was not a “taxpayer” under Utah Code Subsection 59-10-103(1)(x). That definition provides that ““taxpayer” means any individual, estate, trust, or beneficiary of an estate or trust, that has income subject in whole or part to the tax imposed by this chapter.” Petitioner is an individual. Petitioner is also a Utah “resident individual” because he is domiciled in Utah under Utah Code Subsection 59-10-103(1)(q) and Section 59-10-136. As a resident individual, he is subject to tax under Utah Code Section 59-10-104 which provides “a tax is imposed on

the state taxable income of a resident individual⁶ as provided in this section.” This makes Petitioner a “taxpayer” under Utah Code Subsection 59-10-103(1)(x).

At issue in this appeal is the \$500 penalty imposed by the Division for each tax year under Utah Code Subsection 59-1-401(9). This section provides, “If a person, in furtherance of a frivolous position, has a prima facie intent to delay or impede administration of a law relating to a tax, fee, or charge and files a purported return that fails to contain information from which the correctness of reported tax, fee, or charge liability can be determined or that clearly indicates that the tax, fee or charge liability shown is substantially incorrect, the penalty is \$500.”

The Division’s representative stated that Petitioner’s return claiming \$0 taxable income was frivolous. The Division points out that the Courts have held the argument that wages or compensation for services are not taxable is a frivolous position citing to *United States v. Mann*, 884 F.2d 532 (10th Cir. 1989);⁷ *Stelly v. Commissioner*, 761 F.2d 1113 (5th Cir. 1985); and *Granzow v. C.I.R.*, 739 F.2d 265 (7th Cir. 1984).⁸ The Division points out that it takes time on the part of the Division to audit these frivolous returns and determine the actual tax liability. Because the Petitioner had intentionally filed the frivolous returns that impeded the administration of the tax law and the liability shown by Petitioner on his returns was substantially incorrect, the Division requested the \$500 penalties be upheld.

The representative for Petitioner pointed to the decision from the Utah Court of Appeals in *Putvin v. Utah State Tax Com’n*, 837 P.2d 589 (1992). In that case, which involved sales tax on two motor vehicles, the Tax Commission had reduced the penalties from a 15% penalty to a 10% negligence penalty finding “that Putvin could have had a reasonable belief he was not a Utah resident under the circumstances of the case.” The court states in *Putvin* that the penalties in that case were assessed under Utah Code Subsection 59-1-401(3)(a)(1992). The current provisions of the penalties at issue in *Putvin* are found at Utah Code Subsections 59-1-401(7)(a)(i) and (ii). These are a 10% negligence penalty if any portion of the underpayment is due to negligence under Subsection 59-1-401(7)(a)(i) and a 15% penalty if any portion of the underpayment is due to intentional disregard of law or rule under 59-1-401(7)(a)(ii). In

⁶ Under Utah Code Subsection 59-10-103(1)(q), Petitioners are “resident individuals” because they are domiciled in Utah. For tax years 2012-2014, what constitutes domicile is set out at Utah Code Section 59-10-136.

⁷ In *United States v. Mann*, 884 F.2d 532 (10th Cir. 1989), Mann offered many theories as to why he was not required to file income tax returns. The court stated, “His many theories include the asserted beliefs that 1) the United States Supreme Court has declared that the sixteenth amendment applies only to corporations, 2) the Internal Revenue Service (IRS) has no jurisdiction over him, 3) he is not a “person” within the meaning of 26 I.R.C. §7203, 4) wages are not income, 5) federal reserve notes are not legal tender, and 6) the income tax is voluntary.” The court in *Mann* responded to these assertions as follows, “. . . each of the views offered by Mann, whether found in his published materials or articulated additionally at trial, falls somewhere on a continuum between untrue and absurd.”

⁸ In *Stelly v. Commissioner*, 761 F.2d 1113, 1115 (1985) the 5th Circuit stated, “it is clear beyond peradventure that the income tax on wages is constitutional.” The Seventh Circuit held in *Granzow v. C.I.R.*, 739 F.2d 265, 267 (1984), “It is well settled that wages received by taxpayers constitute gross income within the meaning of Section 61(a) of the Internal Revenue Code . . . and that such gross income is subject to taxation.”

Putvin the Tax Commission did not abate the penalty but had reduced it from the 15% to the 10% penalty. The issue was whether *Putvin* was a nonresident of Utah under the Utah Sales and Use Tax Act. There were factors that support a move out of state as well as those showing *Putvin* was still a Utah resident. In this matter, the \$500 penalty imposed is under Utah Code 59-1-401(9), a different provision of the law, and it should be upheld for the reasons noted by the Division.

CONCLUSIONS OF LAW

1. Petitioner was a “resident individual” of Utah during tax years 2012 through 2014. As a resident individual, a tax is imposed on his “state taxable income” pursuant to §59-10-104.

2. The earnings or compensation that the Petitioner received from his employer are “gross income” under Section 61, Internal Revenue Code, which means it is “state taxable income” under Utah Code §59-10-103. “State taxable income” is defined as the resident individual’s “adjusted gross income.” See Utah Code §59-10-103(1). Utah Code §59-10-103(1)(a) provides that “adjusted gross income” is as defined in the Internal Revenue Code as “gross income.” “Gross Income” is defined by Section 61, Internal Revenue Code to be “all income from whatever source derived, including (but not limited to) the following items: (1) Compensation for services, including fees, commissions, fringe benefits and similar items”

3. The Division’s audit is based on the reported income that was undisputed by the Petitioner and should be upheld. Under Utah Code §59-1-1417 Petitioner has the burden of proof to show that the audit was incorrect.

4. The \$500 penalty imposed by the Division under Utah Code Subsection 59-1-401(9) was supported in this matter. Petitioner intentionally filed returns in furtherance of the frivolous position that wages or compensation he received from his employment were not taxable income. The returns impeded the administration of the tax laws because they required time for employees of the Division to audit the returns and determine a correct liability. Further, the returns clearly indicate that the tax or liability shown on the returns were substantially incorrect.

Upon review of the facts and the law in this appeal, the audit assessments against the Petitioner of tax, interest and penalties should be upheld for each of the years at issue.

Jane Phan
Administrative Law Judge

DECISION AND ORDER

Based on the foregoing, the Utah State Tax Commission sustains the Individual Income Tax Audit Deficiencies including tax, interest and penalties imposed against Petitioner for tax years 2012, 2013 and 2014. It is so ordered.

DATED this _____ day of _____, 2016.

John L. Valentine
Commission Chair

Michael J. Cragun
Commissioner

Robert P. Pero
Commissioner

Rebecca L. Rockwell
Commissioner

Notice of Appeal Rights and 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 assessed. You have twenty (20) days after the date of this order to file a Request for Reconsideration with the Tax Commission Appeals Unit pursuant to Utah Code Ann. §63G-4-302. A Request for Reconsideration must allege newly discovered evidence or a mistake of law or fact. If you do not file a Request for Reconsideration with the Commission, this order constitutes final agency action. You have thirty (30) days after the date of this order to pursue judicial review of this order in accordance with Utah Code Ann. §59-1-601 et seq. and §63G-4-401 et seq.