

15-1614
TAX TYPE: INCOME TAX
TAX YEAR: 2012 & 2013
DATE SIGNED: 11-1-2016
COMMISSIONERS: M. CRAGUN, R. PERO, R. ROCKWELL
EXCUSED: J. VALENTINE
GUIDING DECISION

BEFORE THE UTAH STATE TAX COMMISSION

PETITIONER-1 & PETITIONER-2, Petitioners, v. AUDITING DIVISION OF THE UTAH STATE TAX COMMISSION, Respondent.	INITIAL HEARING ORDER Appeal No. 15-1614 Account No. ##### Tax Type: Income Tax Tax Year: 2012 and 2013 Judge: Phan
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Presiding:

Jane Phan, Administrative Law Judge

Appearances:

For Petitioner: PETITIONER-1, By Telephone

For Respondent: RESPONDENT, Manager, Income Tax Auditing

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission on August 2, 2016 for an Initial Hearing in accordance with Utah Code §59-1-502.5. Petitioners are appealing Utah Individual Income Tax Audit Deficiencies for tax years 2012 and 2013. The Notices of Deficiency and Estimated Income Tax were issued on September 23, 2015. The amount of tax, penalties and interest for each year are as follows:

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

APPLICABLE LAW

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

Utah Code §59-10-103(1)(q) defines “resident individual” as follows:

(i) “Resident individual” means:

¹ Interest continues to accrue on the unpaid balance.

- (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 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...”

The Commission has been granted the discretion to waive penalties and interest. Utah Code §59-1-401(14) 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 PETITIONER must prove that the commission gave the PETITIONER erroneous information or took inappropriate action that contributed to the error.
- (3) Reasonable Cause for Waiver of Penalty. The following clearly documented circumstances may constitute reasonable cause for a waiver of penalty:
 - (a) Timely Mailing...
 - (b) Wrong Filing Place...
 - (c) Death or Serious Illness...
 - (d) Unavoidable Absence...
 - (e) Disaster Relief...

- (f) Reliance on Erroneous Tax Commission Information...
- (g) Tax Commission Office Visit...
- (h) Unobtainable Records...
- (i) Reliance on Competent Tax Advisor...
- (j) First Time Filer...
- (k) Bank Error...
- (l) Compliance History...
- (m) Employee Embezzlement...
- (n) Recent Tax Law Change...

DISCUSSION

The Division based its audit on the assertion that under provisions set out at Utah Code Sec. 59-10-136, which became effective starting with the 2012 tax year, PETITIONER-1 was a resident of Utah for individual income tax purposes during 2012 and 2013. It was not disputed that PETITIONER-2 had been a Utah resident in 2012 and 2013. In fact, PETITIONER-2 had filed Utah resident returns for 2012 and 2013, with the status of married filing separate on which she claimed income that she had earned. The PETITIONERS had filed federal returns for both years at issue with the status of married filing joint. The PETITIONERS did own a residence in Utah during the tax years at issue which was located in Utah and this is where PETITIONER-2 resided. The PETITIONERS received the primary residential exemption on this residence, which they had purchased in 2010. The issue in this appeal was whether or not PETITIONER-1 was domiciled in Utah during these tax years.

It was PETITIONER-1's position that he was a resident of and domiciled in STATE-1 during 2012 and 2013 and he was not a resident of Utah. He explained that he had lived in STATE-2 from 1984 through 2007. At some point, PETITIONER-1 and PETITIONER-2 were married and lived together in STATE-2. PETITIONER-1 had a STATE-2 Driver License and was registered to vote in that state. In 2007, he and PETITIONER-2 separated and started to live in separate residences. Although they no longer lived together as a couple, they did not "legally separate" as they never filed separation papers in a court of law and have never divorced. PETITIONER-1 moved from STATE-2 to STATE-3 at this time. He indicated that he took his two vehicles and all his personal effects to STATE-3 and resided there for about 1 year. He states that in December 2008 he moved from STATE-3 to STATE-1 and lived in that state through the end of the audit period. During the audit period he was employed in STATE-1. He states that he had all of his mail sent to the address in STATE-1 and maintained his church records in STATE-1. He did not obtain a Driver License or register to vote in STATE-1, as he had retained his STATE-2 Driver License and voter registration. PETITIONER-1 moved back to STATE-2 later

after the audit period and continues to reside there. It was his position that he never lived in Utah during any of this time period.

After they had separated, PETITIONER-2 had moved to Utah to attend UNIVERSITY and the PETITIONERS jointly purchased a residence in COUNTY in 2009 where she resides. The PETITIONERS have a son who was an adult at this time and was also attending UNIVERSITY. PETITIONER-1 states that he does support PETITIONER-2 financially and he is the joint owner of the residence they own in Utah.

It was not until after he was audited by the State of Utah that PETITIONER-1 became aware of the new Utah law provisions at Utah Code Sec. 59-10-136 regarding domicile and specifically subsection 59-10-136(5) regarding when one spouse is domiciled in Utah. At the hearing, now that he understood what the law said, he explained that he felt the law was invalid. He argues that under Utah law, because he had not resided in Utah for 6 contiguous months, the state of Utah had refused to issue him a Utah Driver License or register him to vote in Utah. He also points out that he could not obtain a Utah resident hunting or fishing license. He asserted that he would not have qualified for jury duty in Utah. He notes that he was able to obtain a resident STATE-1 hunting or fishing license and also had been called to jury duty in STATE-1. His point was the inconsistency in Utah laws which would state that he was domiciled and a Utah resident for tax purposes, but not for other purposes.

PETITIONER-1 also raised the point that under federal law he had been considered to be domiciled in STATE-1 during the audit period. He argued if there was a conflict between the state law and federal law, the federal law would take precedence. This was a federal preemption argument. To illustrate the inconsistency between state and federal law, he explained in a letter dated April 23, 2016 the following:

During 2012, 2013 and 2014 I purchased several firearms out of state. Per federal statutes, those firearms could only be transferred to me legally in my state of residence/domicile. I have included two receipts showing background checks and transfer of the two firearms to me. The receipts show my domicile address in another state other than Utah. Had these firearms been shipped to Utah for official transfer I would not have been able to complete the legal transfer of the firearms since I was not a resident of Utah nor Domiciled in Utah. Federal law would not allow the transfer to be completed, nor would Utah law allow the transfer to be complete since I was not a resident or domiciled in Utah.

PETITIONER-1 provided a receipt dated February 21, 2012 that showed he had purchased a firearm from a STATE-1 store and showed that PETITIONER-1's address was in STATE-1 at this time. There were also receipts in 2014 that showed PETITIONER-1 paying the

firearm transfer fee for two different firearms with his address listed in STATE-1. Additionally, there was a receipt for a “CBI Background Check” fee of \$\$\$\$\$.

It was the Division’s position under Utah Code §59-10-136(5), effective beginning in tax year 2012, that PETITIONER-1 was domiciled in Utah because PETITIONER-2 was domiciled in Utah. The Division also points out that they received the primary residential exemption on the property they owned in Utah. During the audit years, 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 Rule² and prior case law.³ Prior to 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 or 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 PETITIONERS did not fall under the exceptions. They were not legally separated or divorced and they filed a joint federal return.

The Division also indicated that under Utah law, they would have given PETITIONER-1 a credit for any taxes that he paid to the State of STATE-1, but that PETITIONER-1 did not pay any taxes to STATE-1 in 2012 or 2013 so there was no credit available. The Division provided copies of a printout from the STATE-1 which showed the data entered from the returns filed by the PETITIONER or PETITIONERS. It is unclear from this printout whether the returns had been filed as joint or separate, as the printout shows both PETITIONERS’ names. Although these returns show \$\$\$\$\$ in “STATE-1 Taxable Income” on Line 14 for 2012 and \$\$\$\$\$ in “STATE-1 Taxable Income” on Line 18 for 2013, they show \$0 “STATE-1 Tax” and indicate that the PETITIONERS were refunded all of the withholding.

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 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.

Regarding the PETITIONERS' federal preemption issue, that if two statutes were inconsistent the federal law would apply, the Division offered no opinion. The Division stated that the Utah State Tax Commission did not have authority to find a statute unconstitutional. The Division cited to *Nebeker v. Utah State Tax Commission*, 2001 UT 74 (Utah 2001) and to the Utah State Tax Commission's decision in *Appeal No. 08-0892* in which the Commission had previously stated, "The Commission is aware, however, that the Courts have consistently held that administrative agencies do not have the authority to determine the constitutionality of legislative enactments."⁴

Upon reviewing the facts in this matter, the Division's interpretation of Utah Code §59-10-136 and specifically Subsection 59-10-136(5) is consistent with a plain reading of these provisions.⁵ Utah Code §59-10-136(5) provides a bright, clear line on domicile, which is a change from prior law and rules. PETITIONER-1 represents that he has never been a Utah resident and under Utah Law would not have been a resident for other purposes including obtaining a Driver License or registering to vote. He maintains that he must have been considered a resident in STATE-1 under STATE-1 law because STATE-1 called him to jury duty and under federal law he could buy a firearm and have ownership transferred to him in that state. Regardless of these factors, under the clear and direct language of Utah Code §59-10-136(5) PETITIONER-1 was domiciled in Utah for Utah individual income tax purposes for 2012 and 2013 because he was married to a Utah resident, they had filed a joint federal return and were not divorced or legally separated.

Penalties and interest were assessed with the audit. The Division's representative did not argue that the penalties be upheld. In this case, PETITIONER-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 PETITIONER-2 had timely filed returns that she thought were proper and PETITIONER-1 was not aware that he should be filing Utah returns as the law had changed and 2012 was the first year that the new law was in effect.

⁴ *Utah State Tax Commission Findings of Fact, Conclusions of Law and Final Decision, Appeal No. 08-0892*, pg. 8 (April 5, 2010). This and other Tax Commission decisions are available for review in a redacted format at tax.utah.gov/commission-office/decisions.

⁵ 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).

There is no basis for waiver of interest. As noted at Utah Administrative Rule R861-1A-42, for interest to be waived the PETITIONER must prove “that the commission gave the PETITIONER 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 §59-10-136 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 new law that became effective in 2012, the tax and interest assessment for tax years 2012 and 2013 should be upheld. There is reasonable cause for waiver of the penalties.

Jane Phan
Administrative Law Judge

DECISION AND ORDER

Based on the foregoing, the Commission sustains the Utah Individual Income Tax Audit Deficiencies as to the tax and interest due and waives the penalties 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

Appeal No. 15-1614

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.