16-117
TAX TYPE: INCOME TAX
TAX YEAR: 2011, 2012, 2013
DATE SIGNED: 1/18/2017
COMMISSIONERS: M. CRAGUN, R. PERO, R. ROCKWELL
EXCUSED: J. VALENTINE
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. 16-117 Account No. ##### Tax Type: Income Tax Tax Year: 2011, 2012 and 2013 Judge: Phan

Presiding:
Jane Phan, Administrative Law Judge

Appearances:
For Petitioner: TAXPAYER-1
For Respondent: RESPONDENT-1, Manager, Income Tax Auditing
RESPONDENT-2, Senior Auditor

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission on October 3, 2016 for an Initial Hearing in accordance with Utah Code §59-1-502.5. Petitioners ("Taxpayers") had appealed Utah individual income tax audit deficiencies under Utah Code §59-1-501 for tax years 2011, 2012 and 2013. Respondent ("Division") had issued the Notices of Deficiency and Audit Change on December 28, 2015, on the basis that the Taxpayers were full year Utah resident individuals for income tax purposes. It was the Taxpayers' position that they had moved from Utah to STATE-1State in 2010, so were not Utah resident individuals for the years at issue. The amounts due as of the date the Notices of Deficiency were issued are as follows:

	Tax	Interest[1]	Penalties	Total as of Notice Date
2011	$$$$$	$$$$$	$0	$$$$$
2012	$$$$$	$$$$$	$0	$$$$$
2013	$$$$$	$$$$$	$0	$$$$$

APPLICABLE LAW

Utah imposes income tax on individuals who are residents of the state, in Utah Code Subsection 59-10-104(1)[2] as follows:

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

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

> (q)(i) "Resident individual" means:
> (A) an individual who is domiciled in this state for any period of time during the taxable year, but only for the duration of the period during which the individual is domiciled in this state; or
> (B) an individual who is not domiciled in this state but: (I) maintains a place of abode in this state; and (II) spends in the aggregate 183 or more days of the taxable year in this state.

For tax year 2011, whether an individual was domiciled in this state was determined by Utah Administrative Rule R865-9I-2(2011)[3] as follows:

> (1) Domicile.
> a. Domicile is the place where an individual has a permanent home and to which he intends to return after being absent. It is the place at which an individual has voluntarily fixed his habitation, not for a special or temporary purpose, but with the intent of making a permanent home.
> b. For purposes of establishing domicile, an individual's intent will not be determined by the individual's statement, or the occurrence of any one fact or circumstance, but rather on the totality of the facts and circumstances surrounding the situation.
> (i) Tax Commission rule R884-24P-52, Criteria for Determining Primary Residence, provides a non-exhaustive list of factors or objective evidence determinative of domicile.
> (ii) Domicile applies equally to a permanent home within and without the United States.
> c. A domicile, once established, is not lost until there is a concurrence of the following three elements:

[1] Interest continues to accrue on the unpaid balance until paid in full.
[2] For tax years 2011 through 2013 this provision was substantially the same.
[3] Effective for tax year 2012 and following years, the Utah Legislature substantially revised the provisions of the Utah Code regarding domicile, adopting Utah Code 59-10-136. These revisions are significant. The Commission applies the 2011 provisions for that tax year and the new provisions for the 2012 & 2013 tax years.

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

d. An individual who has not severed all ties with the previous place of residence may nonetheless satisfy the requirement of abandoning the previous domicile if the facts and circumstances surrounding the situation, including the actions of the individual, demonstrate that the individual no longer intends the previous domicile to be the individual's permanent home, and place to which he intends to return after being absent.

. . .

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

. . . .

E. Factors or objective evidence determinative of domicile include:

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

h) contained in leases.

14. the exercise of civil or political rights in a given location;

15. any failure to obtain permits and licenses normally required of a resident;

16. the purchase of a burial plot in a particular location;

17. the acquisition of a new residence in a different location.

. . . .

Beginning with the 2012 tax year, a new law was adopted regarding the factors to be considered for determination of domicile at Utah Code §59-10-136, as set forth below:

(1) (a) An individual is considered to have domicile in this state if:

(i) except as provided in Subsection (1)(b), a dependent with respect to whom the individual or the individual's spouse claims a personal exemption on the individual's or individual's spouse's federal individual income tax return is enrolled in a public kindergarten, public elementary school, or public secondary school in this state; or

(ii) the individual or the individual's spouse is a resident student in accordance with Section 53B-8-102 who is enrolled in an institution of higher education described in Section 53B-2-101 in this state.

(b) The determination of whether an individual is considered to have domicile in this state may not be determined in accordance with Subsection (1)(a)(i) if the individual:

(i) is the noncustodial parent of a dependent:

(A) with respect to whom the individual claims a personal exemption on the individual's federal individual income tax return; and

(B) who is enrolled in a public kindergarten, public elementary school, or public secondary school in this state; and

(ii) is divorced from the custodial parent of the dependent described in Subsection (1)(b)(i).

(2) There is a rebuttable presumption that an individual is considered to have domicile in this state if:

(a) the individual or the individual's spouse claims a residential exemption in accordance with Chapter 2, Property Tax Act, for that individual's or individual's spouse's primary residence;

(b) the individual or the individual's spouse is registered to vote in this state in accordance with Title 20A, Chapter 2, Voter Registration; or

(c) the individual or the individual's spouse asserts residency in this state for purposes of filing an individual income tax return under this chapter, including asserting that the individual or the individual's spouse is a part-year resident of this state for the portion of the taxable year for which the individual or the individual's spouse is a resident of this state.

(3) (a) Subject to Subsection (3)(b), if the requirements of Subsection (1) or (2) are not met for an individual to be considered to have domicile in this state, the individual is considered to have domicile in this state if:

(i) the individual or the individual's spouse has a permanent home in this state to which the individual or the individual's spouse intends to return after being absent; and

(ii) the individual or the individual's spouse has voluntarily fixed the individual's or the individual's spouse's habitation in this state, not for a special or temporary purpose, but with the intent of making a permanent home.

(b) The determination of whether an individual is considered to have domicile in this State under Subsection (3)(a) shall be based on the preponderance of the evidence, taking into consideration the totality of the following facts and circumstances:

(i) whether the individual or the individual's spouse has a driver license in this state;

(ii) whether a dependent with respect to whom the individual or the individual's spouse claims a personal exemption on the individual's or individual's spouse's federal individual income tax return is a resident student in accordance with Section 53B-8-102 who is enrolled in an institution of higher education described in Section 53B-2-101 in this state;

(iii) the nature and quality of the living accommodations that the individual or the individual's spouse has in this state as compared to another state;

(iv) the presence in this state of a spouse or dependent with respect to whom the individual or the individual's spouse claims a personal exemption on the individual's or individual's spouse's federal individual income tax return;

(v) the physical location in which earned income as defined in Section 32(c)(2), Internal Revenue Code, is earned by the individual or the individual's spouse;

(vi) the state of registration of a vehicle as defined in Section 59-12-102 owned or leased by the individual or the individual's spouse;

(vii) whether the individual or the individual's spouse is a member of a church, a club, or another similar organization in this state;

(viii) whether the individual or the individual's spouse lists an address in this state on mail, a telephone listing, a listing in an official government publication, other correspondence, or another similar item;

(ix) whether the individual or the individual's spouse lists an address in this state on a state or federal tax return;

(x) whether the individual or the individual's spouse asserts residency in this state on a document, other than an individual income tax return filed under this chapter, filed with or provided to a court or other governmental entity;

(xi) the failure of an individual or the individual's spouse to obtain a permit or license normally required of a resident of the state for which the individual or the individual's spouse asserts to have domicile; or

(xii) whether the individual is an individual described in Subsection (1)(b).

(4) (a) Notwithstanding Subsections (1) through (3) and subject to the other provisions of this Subsection (4), an individual is not considered to have domicile in this state if the individual meets the following qualifications:

(i) except as provided in Subsection (4)(a)(ii)(A), the individual and the individual's spouse are absent from the state for at least 761 consecutive days; and

(ii) during the time period described in Subsection (4)(a)(i), neither the individual nor the individual's spouse:

(A) return to this state for more than 30 days in a calendar year;

(B) claim a personal exemption on the individual's or individual's spouse's federal individual income tax return with respect to a dependent who is enrolled in a public kindergarten, public elementary school, or public secondary school in this state, unless the individual is an individual described in Subsection (1)(b);

(C) are resident students in accordance with Section 53B-8-102 who are enrolled in an institution of higher education described in Section 53B-2-101 in this state;

(D) claim a residential exemption in accordance with Chapter 2, Property Tax Act, for that individual's or individual's spouse's primary residence; or

(E) assert that this state is the individual's or the individual's spouse's tax home for federal individual income tax purposes.

(b) Notwithstanding Subsection (4)(a), an individual that meets the qualifications of Subsection (4)(a) to not be considered to have domicile in this state may elect to be considered to have domicile in this state by filing an individual income tax return in this state as a resident individual.

(c) For purposes of Subsection (4)(a), an absence from the state:

(i) begins on the later of the date:

(A) the individual leaves this state; or

(B) the individual's spouse leaves this state; and

(ii) ends on the date the individual or the individual's spouse returns to this state if the individual or the individual's spouse remains in this state for more than 30 days in a calendar year.

(d) An individual shall file an individual income tax return or amended individual income tax return under this chapter and pay any applicable interest imposed under Section 59-1-402 if:

(i) the individual did not file an individual income tax return or amended individual income tax return under this chapter based on the individual's belief that the individual has met the qualifications of Subsection (4)(a) to not be considered to have domicile in this state; and

(ii) the individual or the individual's spouse fails to meet a qualification of Subsection (4)(a) to not be considered to have domicile in this state.

(e) (i) Except as provided in Subsection (4)(e)(ii), an individual that files an individual income tax return or amended individual income tax return under Subsection (4)(d) shall pay any applicable penalty imposed under Section 59-1-401.

(ii) The commission shall waive the penalties under Subsections 59-1-401(2), (3), and (5) if an individual who is required by Subsection (4)(d) to file an individual income tax return or amended individual income tax return under this chapter:

(A) files the individual income tax return or amended individual income tax return within 105 days after the individual fails to meet a qualification of Subsection (4)(a) to not be considered to have domicile in this state; and

(B) within the 105-day period described in Subsection (4)(e)(ii)(A), pays in full the tax due on the return, any

interest imposed under Section 59-1-402, and any applicable penalty imposed under Section 59-1-401, except for a penalty under Subsection 59-1-401(2), (3), or (5).

(5) (a) If an individual is considered to have domicile in this state in accordance with this section, the individual's spouse is considered to have domicile in this state.

(b) For purposes of this section, an individual is not considered to have a spouse if:

(i) the individual is legally separated or divorced from the spouse; or

(ii) the individual and the individual's spouse claim married filing separately filing status for purposes of filing a federal individual income tax return for the taxable year.

(c) Except as provided in Subsection (5)(b)(ii), for purposes of this section, an individual's filing status on a federal individual income tax return or a return filed under this chapter may not be considered in determining whether an individual has a spouse.

(6) For purposes of this section, whether or not an individual or the individual's spouse claims a property tax residential exemption under Chapter 2, Property Tax Act, for the residential property that is the primary residence of a tenant of the individual or the individual's spouse may not be considered in determining domicile in this state.

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

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

DISCUSSION

The Division based its audit on the assertion that the Taxpayers were Utah resident individuals for income tax purposes. The Taxpayers had filed Utah returns as nonresident individuals with some Utah source income.

The issue in this appeal is whether the Taxpayers were "resident individuals" in the state of Utah for the purposes of Utah Code Sec. 59-10-104, in 2011, 2012 and 2013. Under Utah Code Sec. 59-10-103, a resident individual is one who is "domiciled" in Utah, or if not "domiciled" in Utah, is one who maintains a place of abode in this state and spends in the aggregate 183 days or more per year in Utah. The Division argues that the Taxpayers were domiciled in Utah during the audit years. There were substantial revisions to the law defining domicile that became effective for the 2012 tax year. Therefore, in resolving this question, the Commission must look at 2011 independently from 2012 and 2013, and apply the law in effect for each year.

Under the law in effect up through 2011, whether someone was a "resident individual" for state tax purposes has been addressed by the appellate courts in Utah.[4] As discussed by the courts, the fact finder may determine intent "based on the 'totality of the facts and circumstances surrounding the situation,' and the taxpayer's statement of intent is only one factor of many to be considered. 'In determining whether a party has established a Utah domicile, the fact finder may accord the party's activities greater weight than his or her declaration of intent.'" *Benjamin v. Utah State Tax Comm'n*, 250 P.3d 39, 2011 UT 14, ¶ 22 (Utah 2011) (Citations Omitted).

In this case, the Taxpayers acknowledge being Utah residents prior to the audit period. The Taxpayer explained that they were Utah residents since he retired from military service in 1984 up through 2010. They had purchased a home in Utah, registered to vote, registered their vehicles, opened bank accounts all in this state. For the 2011 tax year, once domicile had been established in Utah three things needed to be shown to establish a new domicile: 1) a specific intent to abandon the former domicile; 2) the actual physical presence in a new domicile; and 3) the intent to remain in the new domicile permanently. See Utah Admin. Rule R865-9I-2. Although Utah Admin. Rule R865-9I-2 lists an "intent to remain in a new domicile permanently," the courts have noted, "Even though a person may not intend to remain in the state for all time, domicile will be found where there is a residence coupled with an intent to remain for an indefinite period." *Clements v. State Tax Comm'n*, 893 P.2d 1078, 1081 (Utah App. 1995). See also, *O'Rourke v. State Tax Comm'n*, 830 P.2d 230 (Utah 1992).

In 2010 TAXPAYER-2 was working part-time for UNIVERSITY teaching an on-line course, which she could teach from anywhere. TAXPAYER-1 had a small business in Utah which he operated out of their Utah residence. They had adult children residing in Utah in 2010 and no minor children. TAXPAYER-1 stated that in 2010 they started transitioning their residency to STATE-1. They had purchased a residence in STATE-1 in 2002 as a second home and had gradually begun to spend more time there. He explained that the weather there was more moderate than in Utah, with the summers being cooler and the winters warmer with little snow. The facts presented at the hearing did show that the Taxpayers had established a physical presence in STATE-1 and they did take steps indicative of an intent to remain in the new domicile permanently. In 2010 they obtained STATE-1 Driver Licenses, registered to vote in

[4] The issue of domicile based on the law in effect up through 2011 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).

STATE-1, registered vehicles in STATE-1 and began to spend more time at their STATE-1 residence. The property that they owned in STATE-1 was a substantial single family residence and its value exceeded the value of their Utah residence. They had fully furnished the STATE-1 residence. TAXPAYER-1 was not able at this hearing to state how many days specifically they spent in STATE-1 and how many days in Utah, but that they were in STATE-1 more than half of the year. He did state that at the time they thought they would make the move to STATE-1 a permanent move, although later they had decided it was not practical to live that far away from their children and grandchildren.

The Taxpayers retained many ties with Utah in 2011 through 2013. They never sold their Utah residence and continued to maintain it as a residence where they would stay when they were in Utah. They returned to Utah several times during the audit years. The residence was not leased out to tenants. The Taxpayer stated at the hearing that they did not think the residence was in a sellable condition at the time. The Taxpayers paid utilities, insurance and other expenses to maintain the residence. They received the primary residential exemption for the residence during the audit period. Additionally, they used the address of their Utah residence as their mailing address for tax returns, banking and other important financial information. The Taxpayer explained that they had tried forwarding mail through the U.S. Postal Service at first, but it had gotten lost. They found it easier not to change their addresses on banking and other items and just continue to have all mail sent to their residence in Utah because they traveled back and forth between Utah and STATE-1 several times a year. They had their mail sent to Utah because they had adult children in Utah who would check their mail for them when they were not in Utah and forward mail that needed to be forwarded.

One of their children who was 31-33 during the audit years resided at the Taxpayers' Utah residence and the residence was his primary residence. He did not pay rent or utilities, but he was supposed to maintain the residence while the Taxpayers were away. They did claim this son as a dependent for two of the audit years. He was not attending a Utah public college or university.

TAXPAYER-1 continued to operate his small BUSINESS out of the Utah residence, but stated that when he was away his children would handle the orders. He was the registered agent for this business at the Utah address. The Taxpayers had filed Utah nonresident returns on which they had claimed TAXPAYER-1 business income and TAXPAYER-2's income from her UNIVERSITY employment as Utah source income. Their income, however, was primarily retirement income and social security which they had claimed as non-taxable to Utah on their returns.

As the Taxpayers maintained the two residences during 2011 it is helpful for that year to consider the factors set out at Admin. Rule R884-24P-52(5). The Taxpayers were registered to vote in STATE-1, not Utah. They had owned the STATE-1 residence since 2002 and the Utah residence since 1984. Their home in STATE-1 had a higher market value than their residence in Utah. Their adult children and grandchildren were in Utah, while the Taxpayers resided together whether in Utah or STATE-1. TAXPAYER-1 business was in Utah, however this was a small business and not a full time endeavor. His primary source of income was retirement and social security. TAXPAYER-2's employment was from a Utah employer, but was performed over the internet from any location. The Taxpayers registered the vehicles that they used in STATE-1. Some vehicles registered in Utah were used by their children in Utah. They used the Utah address on state and federal returns and for most other items. They had driver licenses and were registered to vote in STATE-1. They did not attend, nor did they have dependents who attended public schools in any state. STATE-1 does not have a state income tax and they filed their Utah return as a nonresident, consistent with their position. They declared STATE-1 as their residence for purposes such as driver licenses and voter registration, there was no evidence of any declarations during 2011 that indicated Utah as their residence. Whether they had burial plots and, if so, in which state was unknown. They had purchased a residence in STATE-1 and as noted above, it had a higher value than the residence they had owned in Utah. Although their Utah residence was receiving the primary residential exemption in 2011, it was the primary residence for their adult son and could have qualified for that exemption on that basis in 2011. They spent more of their time in STATE-1 than Utah. After weighing all these factors, they do weigh more heavily to STATE-1 and so for the 2011 tax year, the Taxpayers had established a domicile in STATE-1.

There was a different statutory definition of domicile that must be applied for tax years 2012 and 2013. Utah Code Subsection 59-10-136(2) provides, "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 the individual's or individual's spouse's primary residence . . ." In 2012 and 2013 the Individual Income Tax TC-40 Forms & Instructions were revised to reflect this change and the Form TC-40 revised to add a provision, Part 7, where a property owner was to check if they were no longer eligible to claim the residential exemption on their property. If the Taxpayers no longer considered their Utah residence to be their primary residence, they had the affirmative requirement to notify the county that they no longer qualified pursuant to Utah Code Subsection 59-2-103.5(5). The Taxpayer stated at the hearing that he was not aware of this change. He did

indicate that he was willing to now go back and pay the County the amount of property tax that had been exempt for these years.

Under Utah Code Subsection 59-10-136(2)(a) the Taxpayers are presumed domiciled in Utah because they received the primary residential exemption on their Utah residence for the 2012 and 2013 tax years. It is a rebuttable presumption and the Tax Commission has previously considered what factors would rebut this presumption in *Utah State Tax Commission, Findings of Fact, Conclusions of Law and Final Decision, Appeal No. 14-30 (September 21, 2015)*.[5] In that case the Commission concluded at page 9:

> Utah Code Subsection 59-10-136(2)(a) indicates that although a presumption of domicile, it is a rebuttable one, but does not provide guidance on what factors should be considered to rebut this presumption. Utah Code Subsection 59-10-136(3) provides a list of common domicile factors based on the preponderance of the evidence, including things like where the taxpayer has his or her driver license, registers vehicles and the address used for tax returns among other factors. However, Subsection 136(3)(a) specifically makes it clear these factors are applied only if the requirements of Subsections 136(1) or (2) are not met. In this appeal Subsection 59-10-136(2) has been met because the Taxpayers received the primary residential exemption on their Utah residence. Upon review of Subsections 136(2) and 136(3) it does not follow that the legislature intended that the way to rebut the presumption of Utah domicile set out in Subsection 59-10-136(2)(a) was by showing a preponderance of the factors listed in Subsection 136(3), because it would make Utah Code Subsection 59-10-136(2)(a) as its own separate factor irrelevant. In regards to statutory interpretation the court noted in *Ivory Homes, Ltd, v. Utah State Tax Comm'n*, 2011 UT 54, ¶ 21, '"We presume that the legislature used each word advisedly and read each term according to its ordinary and accepted meaning." However, "our plain language analysis is not so limited that we only inquire into individual words and subsections in isolation; our interpretation of a statute requires that each part of a section be construed in connection with every other part of section so as to produce a *harmonious whole*."' (Emphasis in Original, Internal Citations Omitted.)
>
> Therefore, having made the fact that a taxpayer receives a primary residential exemption on a Utah residence a rebuttable presumption separate from Subsection 59-10-136(3) indicates the intent was something more stringent than a preponderance of the evidence of the common domicile factors listed in Subsection 136(3). It follows that to rebut the presumption set out at Subsection 136(2)(a) a taxpayer would have to show something other than a preponderance of the domicile factors, for example that the taxpayer had taken the proper steps to notify the County that they no longer qualified for the exemption and the County then in error continued to leave the property in that status, or that there was a tenant in the property and the tenant used it as his or her primary residence, which would allow the property to qualify based on the tenant's use.

[5] This and other Tax Commission decisions are available for review in a redacted format at: tax.utah.gov/commission-office/decisions.

An exception to the residential exemption factor is specifically provided under Utah Code Subsection 59-10-136(6) if the property is leased to a tenant and it is the tenant's primary residence. The Commission has considered what is meant by "tenant" for this subsection in a *Utah State Tax Commission Initial Hearing Order, Appeal No. 15-1063* (August 26, 2016). The facts in *Appeal No. 15-1063* are different from those in the subject case. In *Appeal No. 15-1063* the property owners were away from their Utah property for a period of about three years, did not return to Utah or stay in their Utah property during that entire period and relinquished their rights to possess their Utah property to another family for that period of time in exchange for the other family paying the utilities, maintaining the property and to protect the property from theft or vandalism. The Commission concluded in *Appeal No. 15-1063* that the other family constituted tenants. In the subject appeal, the Taxpayers' son was not a tenant as the Taxpayers themselves still had the right to use and reside at the property whenever they wanted and they did so periodically. The son did not pay rent, utilities or the expenses of maintaining the property. The Taxpayers have not provided information to rebut the presumption that they were domiciled in Utah based on the fact that they had received the residential exemption for their Utah property.

No penalties were assessed with the audit. There is no indication that the Taxpayers had acted to intentionally evade the tax, or basis for a negligence penalty. The Taxpayer stated he was not aware of the law change and the Division did not refute that assertion. However, ignorance of the law is not a basis to abate tax or to waive interest. As noted at Utah Administrative Rule R861-1A-42, for interest to be waived the taxpayer must prove "that the commission gave the taxpayer erroneous information or took inappropriate action that contributed to the error." There was no showing of error on the part of the Tax Commission. The 2011 audit should be abated on the basis that the Taxpayers were nonresident individuals for that year. The audit tax deficiency and interest should be upheld for tax years 2012 and 2013.

Jane Phan
Administrative Law Judge

DECISION AND ORDER

Based on the foregoing, the Commission orders the Division to adjust its audit for tax year 2011 as indicated above. The audit deficiency of tax and interest is upheld for 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 _____, 2017.

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.