

16-518
TAX TYPE: INCOME TAX
TAX YEAR: 2013
DATE SIGNED: 5-30-2017
COMMISSIONERS: M. CRAGUN, R. PERO, R. ROCKWELL
EXCUSED: J. VALENTINE
GUIDING DECISION

BEFORE THE UTAH STATE TAX COMMISSION

TAXPAYER-1 & TAXPAYER-2, Petitioners, v. AUDITING DIVISION OF THE UTAH STATE TAX COMMISSION, Respondent.	INITIAL HEARING ORDER Appeal No. 16-518 Account No. ##### Tax Type: Income Tax Tax Year: 2013 Judge: Phan
---	---

Presiding:

Jane Phan, Administrative Law Judge

Appearances:

For Petitioner: REPRESENTATIVE FOR TAXPAYER'S, CPA, By Telephone
TAXPAYER-1, 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 March 28, 2017 for an Initial Hearing in accordance with Utah Code Ann. §59-1-502.5. Petitioners ("Taxpayers") filed an appeal under Utah Code §59-1-501 of a Utah individual income tax audit deficiency for tax year 2013. Respondent ("Division") had originally issued the Notice of Deficiency and Audit Change on March 9, 2016, on the basis that the Taxpayers were non-residents of Utah, but had Utah source income taxable to Utah during 2013. On December 14, 2016, Respondent issued an Amended Notice of Deficiency and Audit Change, based on the position that the Taxpayers were residents of the State of Utah for income tax purposes for all of 2013, and therefore, owed Utah income tax on all income earned in that year. The amount due as of the date of the original Notice of Deficiency and the amended Notice of Deficiency is as follows:

	<u>Tax</u>	<u>Interest¹</u>	<u>Penalties</u>	<u>Total as of Notice Date</u>
Original 2013	\$\$\$\$\$	\$\$\$\$\$	\$0	\$\$\$\$\$
Amended 2013	\$\$\$\$\$	\$\$\$\$\$	\$0	\$\$\$\$\$

APPLICABLE LAW

Utah imposes income tax on individuals who are residents of the state, in Utah Code Subsection 59-10-104(1) 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.

Beginning with the 2012 tax year, a new law was adopted regarding the factors to be considered for determining when someone is domiciled in Utah. This provision is 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 on the unpaid balance until 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.

The applicable statutes generally provide that the taxpayers bear the burden of proof in proceedings before the Tax Commission, however, in some situations the burden does shift to the Division in Utah Code Sec. 59-1-1417(1) as follows:

In a proceeding before the commission, the burden of proof is on the petitioner except for determining the following, in which the burden of proof is on the commission:

...

- (d) whether the petitioner is liable for an increase in a deficiency if the increase is asserted initially after a notice of deficiency is mailed in accordance with Section 59-

1-1405 and a petition under Part 5, Petitions for Redetermination of Deficiencies, is filed, unless the increase in the deficiency is the result of a change or correction of federal taxable income: (i) required to be reported; and (ii) of which the commission has no notice at the time the commission mails the notice of deficiency.

The Commission has been granted the discretion to waive penalties and interest. Utah Code Ann. §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 taxpayer must prove that the commission gave the taxpayer erroneous information or took inappropriate action that contributed to the error.

DISCUSSION

The Division originally based its audit on the assertion that the Taxpayers were non-residents of Utah, but had received Utah source income in the form of severance pay that the Taxpayer, TAXPAYER-1, had received in 2013 relating to employment he had in Utah prior to the tax year 2013. However, after an appeal of the original Notice of Deficiency had been filed, the Division changed its position and issued the Amended Notice of Deficiency on the basis that the Taxpayers had remained domiciled in Utah throughout all of 2013 and, therefore, remained “resident individuals” for the purposes of Utah Code Sec. 59-10-104. 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. It is the Division’s position that the Taxpayers remained domiciled in Utah.

The Taxpayer explained that he had been employed and working in Utah for a number of years and that they had purchased a residence in Utah and had been Utah residents up until the end of 2012. He stated that he was laid off from his Utah employment in November 2012. He found a new job in STATE-1 and started working there in March of 2013. He stated it was always their intent that the entire family would eventually move to STATE-1, but the reality was that it takes time to move everyone. The Taxpayers had a daughter who was still in public high school during 2013 and did not want to move schools mid-year. They had to sell their Utah residence, which the Taxpayer states they listed for sale in 2013 and did not sell until the middle

of 2014. TAXPAYER-1 moved to STATE-1 by March 2013 where he rented an apartment and began his full time employment. It was not disputed that he was living in STATE-1 and working full time in that state. However, he did not obtain a STATE-1 Driver License until 2014. TAXPAYER-2 and their daughter remained in Utah during 2013, they continued to reside in their Utah residence during all of 2013 and the daughter continued to attend public high school in Utah. They continued to receive the primary residential exemption on their Utah residence for property tax purposes.

TAXPAYER-2 and their daughter did move to STATE-1 in 2014 and they continue to reside in STATE-1 as of the date of the hearing. The Taxpayers sold their Utah home in 2014 and purchased a home in STATE-1 in 2014. They both obtained STATE-1 Driver Licenses in 2014. The Taxpayer makes the argument at the hearing that all of their income from employment for 2013 was earned in STATE-1. Their intent was to move to STATE-1 permanently and they did end up in STATE-1 permanently, but the reality is that it takes time to move. It was the Taxpayer's contention that these are the factors that should be considered for deciding domicile, not the ones relied on by the Division. The Taxpayer also states that he was not aware of the provisions of Utah law regarding domicile. He stated he had moved seven times from other states prior to this and there was no other state that had this type of law. He also said that he did not know about the primary residential exemption or that he should have requested it to be removed for 2013. It was his position that this was an oversight on their part and it was not reasonable to expect taxpayers to pull their children out of school mid school year. The Taxpayer argued that the issue was one of law and rules and what actually happens in real life.

It was the Division's position that based on the new law defining domicile that became effective for tax year 2012, both Taxpayers were domiciled in Utah throughout 2013 as a matter of law. The Division points out that the Taxpayers had filed a married filing joint federal return and had claimed their daughter on that return as a personal exemption. The Division points to three specific provisions under Utah Code Sec. 59-10-136, under which the Taxpayers would have been considered domiciled in Utah. Under Utah Code Subsection 59-10-136(1) an individual "is considered to have domicile in this state if: (i) . . . a dependent with respect to whom the individual or the individual's spouse claims a personal exemption . . . is enrolled in a public kindergarten, public elementary school, or public secondary school in this state . . ." There was no dispute as to the facts relating to this provision of law. The Taxpayers claimed their daughter as a personal exemption and she was enrolled in a public secondary school in Utah during 2013.

Secondly, the Division points to Subsection 59-10-136(2) which provides that “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 . . .”² The Taxpayers argue that they were unaware of this provision of the law. The Division points out that beginning in 2012, the Utah 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 Tax Commission has previously considered what factors would rebut the presumption set out at Utah Code Subsection 59-10-136(2)(a) in *Utah State Tax Commission, Findings of Fact, Conclusions of Law and Final Decision, Appeal No. 14-30 (September 21, 2015)*³ and other cases and determined that ignorance of the law is not sufficient basis to rebut this presumption.⁴ The Taxpayer has not provided sufficient information to rebut the presumption under Utah Code Subsection 136(2)(a).

Regardless, the final provision argued by the Division, Utah Code Subsection 59-10-136(5) also confirms the Division’s position that TAXPAYER-1 was domiciled in Utah as a matter of law for all of 2013. Under Subsection 136(5), if an individual is considered to have domicile in this state, the individual’s spouse is considered to have domicile in this state. In the Taxpayers’ situation, although TAXPAYER-1 had moved early in 2013, TAXPAYER-2 had remained domiciled in Utah throughout the year. She did not move to STATE-1 until 2014. Under Subsection 136(5), TAXPAYER-1 is also a Utah domiciliary because TAXPAYER-2 was domiciled in Utah. The only exceptions to this automatic domicile is if they were legally separated or divorced, or if they had claimed a married filing separately filing status on their federal return for tax year 2013.⁵ The Tax Commission has issued decisions in numerous appeals

2 There is also a rebuttable presumption of residence in Utah if the individual or the individual's spouse is registered to vote in Utah under 59-10-136(2)(b).

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

4 See *Utah State Tax Commission Initial Hearing Order Appeal No. 16-787* (April 10, 2017).

5 The Taxpayers argue at the hearing that they are going to amend their federal tax return to change the filing status. However, they had not done so as of the hearing. The Tax Commission does note that other taxpayers have tried to do this because of the provision at Utah Code Sec. 59-10-136(5) and have found that the IRS did not allow a change to the filing status.

in which it applied the provisions of Utah Code Subsection 59-10-136(5). These prior decisions are consistent with the Division's position in this appeal.⁶

Based on the statutory provisions set out at Utah Code Sec. 59-10-136, which the Commission must follow regardless of the Taxpayers' arguments that other factors should be controlling, both Taxpayers were domiciled in Utah for all of 2013 as a matter of law. This means they were Utah resident individuals as it is defined under Utah Code Subsection 59-10-103(1)(q) so the income TAXPAYER-1 earned in STATE-1 is also subject to Utah individual income tax under Utah Code Subsection 59-10-104(1). As there is no state income tax in STATE-1, there is no credit available for income taxes paid to another state and the Division's Amended Notice of Deficiency should be upheld.

No penalties were assessed with the audit. There is no indication that the Taxpayers had acted to intentionally evade the tax, nor is there a basis for a negligence penalty. The Taxpayers state they were 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 amended audit tax deficiency and interest should be upheld for tax year 2013.

Jane Phan
Administrative Law Judge

DECISION AND ORDER

Based on the foregoing, the Commission upholds the amended audit deficiency of Utah individual income tax and interest for tax year 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:

⁶ See Utah State Tax Commission *Initial Hearing Orders in Appeal Nos. 14-1869* (August 17, 2015); *15-1154* (February 1, 2016); *15-1200* (May 23, 2016); and *15-1857* (August 26, 2016).

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.